



Labor Department Will Tackle Joint Employment And Overtime Issues...But When?

Insights

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Right after the clock struck midnight this morning, the U.S. Department of Labor unveiled its new regulatory agenda for Fall 2018 and announced its intention to soon tackle two of the hottest topics in the labor and employment world: joint employment and overtime pay. But employers can be forgiven if they approach this announcement with some degree of skepticism, as the USDOL has missed previous target dates—at least when it comes to the long-delayed overtime rule. What does this latest development mean for employers, and when can you expect to see some tangible results?

Unified Agenda Unveiled

The agency's "Fall 2018 Unified Agenda of Regulatory and Deregulatory Actions" was rolled out at 12:01 a.m. this morning, and, in the words of the USDOL, "reports on the actions that administrative agencies plan to issue in the near and long term." These kinds of reports are generally issued several times a year, and include the agency's forecast for what it expects to undertake in the next six-month period.

Of course, priorities may change over time, and the actual action items that are accomplished in the wake of the report often change from when first released. Nevertheless, this report provides a good insight on the agency's immediate priorities, and you can be sure that the USDOL will devote resources to moving these items forward.

Joint Employment Topic Now Targeted By Two Agencies

About a month ago, the National Labor Relations Board (NLRB) got the jump on the joint employment issue when it rolled out a proposed rule that would make it more difficult for businesses to be held legally responsible for alleged labor and employment law violations by staffing companies, franchisees, and other related organizations. The rule, if eventually adopted, would also limit the ability of employees from affiliated companies to join together to form unions. (You can read a complete summary of this activity here.) Now, it's the USDOL's turn to weigh in.

In this morning's announcement, the USDOL announced plans to unveil a joint employment rule of its own. While the regulatory agenda is short on specifics—simply stating that the agency will "propose an update to its regulations concerning joint employment, i.e., those situations in which a worker is considered an employee of two or more employers jointly"—you can assume that the proposals will somewhat mirror the NLRB plan and aim to return the standards to a pre-Obama administration formula.

If such a scenario comes to pass, two companies would only be considered “joint employers”—equally liable for certain labor and employment matters under the USDOL’s purview, such as wage and hour enforcement—if they share or co-determine those matters governing the essential terms and conditions of employment, and actually exercise a right to control. This kind of proposal would almost certainly mean that fewer businesses would be found to be a joint employer by a court or agency.

The agency plans to unveil a fully fleshed-out proposal as soon as December 2018, so keep your eyes peeled for action on this matter in the very near future.

Overtime Rule Delayed Once Again

The future of the overtime rule, however, might be hazier. This morning’s announcement indicated that the agency expects to roll out a new overtime pay requirement by March 2019. This once again pushes the timeline back by several months and further throws into doubt the date we’ll actually see the revised rule.

By way of quick recap, employers had originally been bracing for a sea change in the way in which they compensated workers after the USDOL unveiled a package of regulations to fundamentally alter who could be treated as exempt from the federal Fair Labor Standards Act’s (FLSA’s) overtime and minimum-wage requirements under the “white collar” exemptions. The two changes that would have had the broadest impact: the minimum salary threshold you would have had to pay in order to characterize an employee as exempt would have increased from \$455 to \$913 per week, which annualizes to \$47,476 (up from \$23,660 per year); and this amount would have been “updated” every three years (meaning that it would have likely increased with each update).

But right before they were to take effect on December 1, 2016, a federal court blocked the rules from being put into place. With the subsequent change in administrations, the USDOL changed course. Once Alexander Acosta was installed as the new Secretary of Labor, he announced plans to develop a new overtime rule that, employers hoped, would more seriously take into account employers’ legitimate concerns about a potential massive increase. The comment period for what that new overtime rule should look like closed in September 2017, and some hoped to see a quick resolution and a new rule soon thereafter. But that was not to be.

In late 2017, the USDOL’s regulatory status report indicated that no proposal would be forthcoming for at least 10 months, with a preliminary projection for a revised rule by October 2018. Then, in mid-2018, the projection was revised to reflect an expected January 2019 reveal. There seemed to be some progress and momentum, too, as the USDOL just wrapped up a series of “listening sessions” to gather views from employers, employees, and interested parties about what the new overtime rule should look like.

But with this morning’s announcement of an expected March 2019 unveiling, the timeframe is once again delayed and thrown into doubt. Employers can take solace that the USDOL will almost certainly roll out a rule that will be more moderate in nature than the significant increase sought

certainly roll out a rule that will be more moderate in nature than the significant increase sought under the Obama administration, but should not hold their breath while waiting for the proposed rule to be released.

Conclusion

If you have questions about the expected joint employer or overtime rule proposals and how they might impact your business, contact your Fisher Phillips attorney or any attorney in our [Staffing and Contingent Workers](#) or [Wage and Hour Law](#) Practice Groups.

This Legal Alert provides an overview of proposed rulemaking. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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