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WAGE AND HOUR

Joint Employment, Compliance and Overtime: A Wage-and-Hour Update

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Special to the Legal

As Secretary Alexander Acosta has settled into his position at the U.S. Department of Labor (DOL), employers are seeing several new compliance initiatives. From the creation of the Office of Compliance Initiatives, to the six-month extension of the payroll audit independent determination pilot program, to the issuance of multiple new opinion letters and field assistance bulletins, the DOL and its Wage and Hour Division (WHD) have been busy at work. Also on the horizon over the next several months, and of significant interest to employers, are proposed regulations regarding joint employment, the regular rate of pay and the salary threshold for the Fair Labor Standards Act's (FLSA) "white-collar" exemptions.

NEW OFFICE OF COMPLIANCE INITIATIVES

In August, Acosta announced the creation of the DOL's new "Office of Compliance Initiatives." As part of this initiative, the DOL has launched worker.gov and employer.gov, two websites that provide compliance assistance to both the regulated community and workers. In its press release, the DOL announced that it "expects more effective compliance assistance will help the department target enforcement resources on repeat and willful violators to level the playing field for America's job creators who abide by the law."


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PAID PROGRAM

Earlier this year the WHD also announced a six-month pilot of its "PAID" program, which stands for payroll audit independent determination. The PAID program is a self-reporting program where FLSA-covered employers, after an audit, can voluntarily report their FLSA violations. After an employer voluntarily self-reports, it is required to work with the DOL to take corrective action and attempt to settle employee claims for unpaid minimum wage or overtime. Settlements reached through the PAID program cannot include liquidated damages. Therefore, employer FLSA liability is limited to any unpaid minimum wage or overtime. Earlier this month, the DOL announced that it would extend PAID for another six months.

Whether employers seriously should consider participating in the PAID program is hotly contested. At first blush, PAID seems like it could be a good way for employers to address wage-and-hour mistakes while obtaining the DOL stamp of approval. There certainly are potential risks to participating in PAID, however. For starters, the PAID program is entirely voluntary, for both employers and employees. Some employees may choose not to participate in any settlement reached through the PAID program process and instead decide to pursue private litigation, where they of course could be awarded unpaid minimum wages or overtime, plus liquidated damages and attorney fees. Moreover, while the PAID program could extinguish FLSA liability that may be cold comfort to employers operating in jurisdictions where state law is more protective than federal law. After an employer participates in the PAID program, a state department of labor or a private attorney certainly could pursue an employer for state wage-and-hour violations.

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OPINION LETTERS

It was welcome news to employers when the DOL announced last year that it would begin issuing opinion letters again. During the Obama administration, the WHD stopped issuing opinion letters, and instead released broader administrator's interpretations. In January, the DOL reissued 17 opinion letters that had been withdrawn in 2009 and has issued eight new FLSA and Family and Medical Leave Act (FMLA) opinion letters so far this year. In contrast to the administrator interpretations, these opinion letters are focused on specific facts presented by a particular employer. For example, in Opinion Letter 2018-19, the DOL addressed whether frequent rest breaks, necessary to accommodate an employee's serious health condition under the FMLA, were compensable. The DOL determined that those FMLA-protected breaks were noncompensable because they "predominantly benefit the employee."

WHAT'S ON THE HORIZON?

Recently the DOL issued its fall 2018 regulatory agenda and wage-and-hour issues are at the forefront. Employers eagerly are awaiting multiple proposed regulations listed in the agenda which are anticipated late this year or early next year.

The DOL announced that in December it anticipates issuing proposed regulations regarding "joint employer" status, 29 C.F.R. Part 791, an area that has been the source of significant challenge for employers. Reasoning that the "majority" of the joint employer regulations were "promulgated 60 years ago," the DOL "believes that changes in the 21st century workplace are not reflected in its current regulatory framework." The proposed regulations "are intended to provide clarity to the regulated community and thereby enhance compliance" and create "uniform standards nationwide."

Of course the DOL is not the only federal agency that has joint employment on its mind. The National Labor Relations Board (NLRB) already has proposed its new rule defining what it means to be a "joint employer." Under the proposed NLRB rule, employers would only be considered joint employers if "the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine." It remains to be seen whether the DOL's proposal will track the NLRB's proposed rule.

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The DOL also anticipates issuing proposed regulations in December related to the regular rate of pay, stating in its agenda that the regular rate of pay regulations "have not addressed the changes in compensation practices and relevant laws." Calculating the regular rate of pay can be exceptionally complicated; the DOL "believes that the proposed changes will facilitate compliance with the FLSA and lessen litigation regarding the regular rate."

Also of significance, over the summer the DOL issued a request for information to gather public input on the appropriate salary threshold for employees who are employed in a "bona fide executive, administrative or professional capacity." Last month the WHD held public "listening sessions" to continue to gather information. The regulatory agenda indicates that proposed regulations are anticipated in March 2019. This is in the wake of the 2016 regulations that were blocked by nationwide injunction just days before they were scheduled to go into effect on Dec. 1, 2016. The anticipated regulations likely will propose a salary threshold significantly lower than the $913 per week ($47,476 per year) contained in the now defunct 2016 regulations.

Pennsylvania employers are of course keeping their eye on the Pennsylvania Department of Labor and Industry's proposed rulemaking to update its executive, administrative and professional (EAP) regulations under the Pennsylvania Minimum Wage Act. The proposal includes, among other proposed changes, an increase in the salary thresholds to qualify for the EAP exemptions. The proposed weekly salary thresholds would rise over three years (from $610 to $766 to $921 per week). The comment period for the proposed regulations ended in late August.

This is a dynamic time in the wage-and-hour arena, with likely significant regulatory change on the horizon at the federal level. Meanwhile, states and localities have continued to act on overtime, the minimum wage, and sick leave, among other areas. Employers should continue to monitor the shifting horizon and determine what if any modifications to make to existing policies and practices. •