FEDERAL Employment Law Insider

An update on new federal law and regulation affecting your workplace

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EMPLOYMENT LAW

Supreme Court may play critical role in future of LGBT rights

by Sara Nasseri
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With another new justice on the U.S. Supreme Court, all eyes are on how the Court will decide some of the pressing issues of our day, including LGBT rights under Title VII of the Civil Rights Act of 1964. Supreme Court watchers are keeping a close eye on a trio of cases involving the issue of whether Title VII's prohibition on sex discrimination applies to LGBT workers. The cases the Court may consider are *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, from the U.S. 6th Circuit Court of Appeals; *Altitude Express, Inc. v. Zarda*, from the 2nd Circuit; and *Bostock v. Clayton County, Georgia*, from the 11th Circuit.

The Court initially rescheduled its consideration of each petition from November to early December. When the December date rolled around, the Court postponed the cases yet again but didn't provide a new date. That has many people wondering why the Court keeps delaying its decision on whether to hear any of the cases and if it's any indication of the justices' interest or posture.

While observers are speculating about the Court's reasoning, it's undeniable that the issue is gaining significance in the LGBT community and around the country at large. Two of the cases address sexual orientation *(Zarda* and *Bostock)*, and the third addresses gender identity *(Harris Funeral Homes)*. In *Zarda*, skydiving company Altitude Express petitioned the Court to review the 2nd Circuit's ruling that instructor Donald Zarda could allege that the company fired him because of his sexual orientation. The 2nd Circuit held that Title VII prohibits discrimination on the basis of sexual orientation and Zarda was unlawfully fired from his job for being gay. The employer subsequently petitioned the Court to decide whether Title VII encompasses sexual orientation discrimination. Altitude Express maintains it does not.

The *Bostock* case involves an employee who was denied the right to sue his employer under Title VII for discrimination based on his sexual orientation. Gerald Bostock claims he was fired from his job as a child welfare services coordinator for a Georgia county's juvenile court system when his employer found out he is gay. The 11th Circuit ruled that Bostock cannot sue Clayton County under Title VII because the law doesn't bar discrimination based on sexual orientation. Bostock's attorneys asked the Supreme Court to review the case, arguing the 11th Circuit erred and citing *Zarda*'s holding that Title VII prohibits discrimination against employees on the basis of sexual orientation.

Finally, the *Harris Funeral Homes* case asks a related question: whether Title VII protects transgender workers. A Michigan funeral home fired Aimee Stephens, a

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transgender woman, after she began her transition from male to female. The 6th Circuit ruled that Stephens' employer unlawfully fired her because of her sex. The funeral home filed a petition for review by the Supreme Court, arguing, among other things, that the statutory construction of Title VII cannot be read to infer that Congress meant "gender identity" as opposed to "sex" when it enacted the law's prohibitions on discrimination. The employer claims the 6th Circuit's decision "threatens to drive out sex-specific policies" in employment and public education.

Earlier this year, the Supreme Court ruled in favor of a Colorado baker who refused, based on his Christian beliefs, to bake a wedding cake for a same-sex couple. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,* the majority concluded in an opinion written by Justice Anthony Kennedy that the baker didn't get a fair hearing on his complaint during the state proceedings because the Colorado Civil Rights Commission exhibited improper bias against him. While it seemed at first glance that the Court had ruled against LGBT rights, the opinion didn't include any guidance on whether religious beliefs exempt businesses from a state's requirement to treat LGBT people equally. Thus, the issue remains to be open for debate.

If the Supreme Court reviews the appellate court cases and ultimately decides whether sexual orientation and transgender status are protected under Title VII's ban on discrimination "because of sex," its ruling will affect all employers subject to the federal antidiscrimination law. Collectively, the Court's determinations will have major consequences, one way or another, for generations to come.

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INSIDE THE EEOC

Checking in on the status of EEOC nominees

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As the 115th Congress came to a close, it looked like the Senate might have reached a deal to confirm nominees for positions at the U.S. Department of Labor (DOL), the Equal Employment Opportunity Commission (EEOC), and the National Labor Relations Board (NLRB). However, as the deal to avoid a government shutdown collapsed, it was announced that Daniel Gade, a twice-wounded veteran nominated to serve as an EEOC commissioner, had withdrawn his name from consideration, ending the possibility of an end-of-session deal.

The failure to seat the nominees will especially affect the EEOC because Chai Feldblum's term, which officially ended July 31, 2018, actually ended when the 115th Congress recessed. With Gade's withdrawal and the failure to confirm Janet Dhillon as chair and reconfirm Feldblum, the EEOC will begin January 2019 with only two commissioners: Republican Victoria Lipnic, who is the acting chair, and Democrat Charlotte Burrows. Under U.S. Supreme Court precedent, the EEOC will be unable to act until another commissioner is confirmed. In addition, Dhillon and Sharon Fast Gustafson, who is under consideration to be the EEOC's general counsel, will have to be renominated in 2019.

EEOC's new approach to data

Meanwhile, Lipnic decided to completely rethink the way the EEOC gathers and uses data. The new approach was rolled out in a series of "data dialogues" held during the week of December 10, 2018. The data dialogues were meant to introduce stakeholders to the agency's new Office of Enterprise Data and Analytics (OEDA). Advocacy groups, employer representatives, academics, and researchers from nonprofit groups and other organizations attended meetings at EEOC headquarters in Washington, D.C., interacting with OEDA's leadership and hearing about the new structure within the agency.

The EEOC made significant updates over the past year to develop a 21st century data analytics office. The process began in November 2017 with the hiring of the EEOC's first-ever chief data officer, Dr. Chris Haffer, and was followed by the reorganization and rebranding of the agency's 21-year-old Office of Research, Information and Planning (ORIP). OEDA was created in May 2018 to develop an enterprisewide data analytics system that uses state-of-the-art data and information science tools to enhance mission effectiveness and make the EEOC's data readily available to both internal and external users.

"It was clear to me the agency had to make some dramatic change to bring our capacity into the 21st century," said Lipnic. "We also had to address important issues about data protection, access, and internal data governance. The new OEDA allowed us to do all of that. Equally important, the EEOC sits on a treasure trove of data. We will now be able to make better use of that data, with consistency, to better serve our customers and the mission of the agency in a more efficient and effective manner."

At the data meetings, stakeholders discussed employer and industry coding of EEOC charge data, the potential for bias in "big data," and the need for useful data and information products that can help identify trends in employment opportunities. Among the most important disclosures was information about the EEOC's new "Data Enclave," which is currently in development to allow researchers secure access to EEOC data.

Haffer said, "The information exchanged this week with stakeholders was an essential step in the development of the EEOC's data analytics strategies. Going forward, the information exchanged during these sessions will help us in our goal of expanding the use of data and technology to support agency programs and improve customer service."

Large settlements announced

The EEOC continued its focus on systemic disability discrimination with two large settlements in December. On December 6, the agency announced a $1.75 million settlement of allegations that Family HealthCare Network implemented rigid leave policies and practices that denied reasonable accommodations to disabled and pregnant employees. On December 10, Cato Corporation agreed to settle allegations of systemic disability discrimination for $3.5 million. According to the EEOC, Cato failed to provide reasonable accommodations to pregnant employees, required employees to take unpaid leave, and terminated employees because of their disabilities.

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INSIDE THE NLRB

NLRB has fallen, and it can't get up

by Burton J. Fishman
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In hindsight, we can appreciate the success of the National Labor Relations Board (NLRB) and Richard Griffin, its controversial General Counsel (GC) during the Obama administration. Through a series of targeted decisions and GC memoranda, the NLRB sought to aid union organizing and expand the requirements and limitations of the National Labor Relations Act (NLRA), the law that regulates labor-management issues, to cover nonunion workplaces.

For example, the NLRB's decision in *Browning-Ferris Industries* (the "joint-employment" case) altered the working relationships—and expectations—of millions of employees and employers and exposed them to unforeseen opportunities, obligations, and liabilities. By requiring employers to open their e-mail systems to organizing activity in *Purple Communications, Inc.*, the Board forced employers to become unwilling enablers of the very unions they oppose. In *Specialty Healthcare,* the Board assisted unionizing efforts by permitting "microunits," or small groups of employees, to establish unions within a nonunion workforce.

Moreover, by issuing its "quickie election" rule in late 2014, the NLRB hoped to inspire a renaissance of successful union organizing. Finally, by expanding, in a number of decisions, the interpretation of "concerted activity" to cover just about any comment about the workplace made anywhere or anytime to anyone or no one, the Board became the arbiter of workplace conduct everywhere and the editor-in-chief of all employee handbooks.

In other words, the NLRB under Barack Obama did what it always hopes to do—find ways of putting the president's policies into action. And it was anticipated that the Board would continue that pattern under Donald Trump. During 2017, that is exactly what happened.

A Republican majority was quickly achieved, and the NLRB, under the short-lived chairmanship of Philip Miscimarra, demonstrated that the Republicans could run an effective agency. After a year of focused adjudications, crafted to overturn some of the most controversial decisions of the Obama Board, the new Board showed its work. In a period of days, the NLRB issued four decisions that reflected its shift toward management:

- In *Hy-Brand Industrial Contractors, Ltd.,* it reversed the *Browning-Ferris* joint-employment standard.
- In *The Boeing Co.,* it returned to the established law on facially neutral rules of conduct.
- It voted 3-2 to reverse its decisions on employers' obligation to bargain over changes to past practices in *E.I. du Pont de Nemours* and on the propriety of microunits in *Specialty Healthcare.*

Those rulings were the culmination of Miscimarra's impressive leadership. And then he resigned.

In the same emphatic way, new GC Peter Robb issued a sweeping memorandum on December 1, 2017, that promised to slow the controversial policy initiatives undertaken by his predecessor and identified a number of critical areas for reexamination, including the quickie election rule, union access to employers' e-mail systems, and graduate students' right to organize. GC Robb also rescinded a number of memoranda, making it clear that the Trump NLRB intended to undo the decidedly prounion agenda that had been in place. Perhaps most significant, the efforts of the previous Board to expand the decisions and authority of the NLRA into nonunionized workplaces were going to stop.

But that isn't what stopped; the NLRB did. Maybe it was new leadership, or maybe it was better organized opposition—from staffers to senators—but as 2018 dawned, something changed. The Board appeared to lose its momentum, and it certainly lost its ability to shape its own agenda.

Perhaps everything started to shift with the "ethics" bomb hurled at Board member William Emanuel

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FEDERAL CONTRACTOR CORNER

What employers can expect from OFCCP for 2019

by H. Juanita M. Beecher
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In calendar year 2018, the Office of Federal Contract Compliance Programs (OFCCP) had two directors, issued nine directives, recovered $10 million less than it did in fiscal year (FY) 2017, and completed less than 1,000 audits. After nearly two years under the Trump administration, the agency finally began to make some of the changes federal contractors have been hoping to see since the end of the Obama administration.

Based on what happened in 2018, here are some of our predictions for the OFCCP in 2019:

- **An increased number of audits in calendar year 2019.** In his testimony before the Commission on Civil Rights on November 2, 2018, Acting Director Craig Leen said he plans to increase the number of audits conducted by the OFCCP in FY 2019 to 3,500. In FY 2018, the OFCCP completed less than 1,000 audits. It's questionable whether the number set by the acting director will be reached, but there is clearly an intent to perform more audits.
- **New and different types of audits.** One way the OFCCP can conduct more audits is by changing how audits are conducted. In addition to full audits, the agency will perform "no-certify" audits and compliance checks based on the System for Award Management (SAM) database, preaward audits, complaint investigations, and construction audits, all designed to be resolved more quickly. At least 500 of the scheduled audits will be focused reviews under one of the three laws enforced by the OFCCP: Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA).
- **More efficient and effective audits.** The OFCCP's new directive on compliance audit procedures, DIR 2019-01, rescinds Active Case Enforcement (ACE) and outlines a more streamlined audit process. The commitment to greater transparency under DIR 2018-08 will aid federal contractors in better understanding and managing their compliance audits.
- **Continuation of compensation as the big issue for OFCCP.** Although Leen rescinded Directive 307 with Directive 2018-05, the new compensation directive keeps many of the worst features of Directive 307, including pooled regressions, OFCCP-created pay analysis groups (PAGs), and the analysis of multiple years of compensation data. An increased percentage of the OFCCP's FY 2018 settlements were based on compensation. Contractors will see that trend continue in 2019.
- **New early resolution procedures.** Although some aspects of the new Early Resolution Procedures (ERP) set forth in DIR 2019-02 are very helpful, contractors need to carefully consider the ramifications before entering into the new Early Resolution Conciliation Agreement with Corporate-Wide Corrective Action (ERCA), especially if they're facing material violations alleging discrimination. The proposal to resolve audits that uncover nonmaterial violations with just a closure letter is a welcome return to earlier approaches. However, the material violation discrimination resolution procedures will subject all of a federal contractor's establishments to OFCCP reporting and may not provide the best resolution terms for the contractor. As a result, we predict that few contractors will elect to enter into ERCAs.
- **New opinion letters and help desk.** The OFCCP's new directive on opinion letters and an enhanced help desk (DIR 2019-03) is an attempt to provide more useful compliance assistance to contractors. While the OFCCP seems to be mirroring the U.S. Department of Labor's (DOL) Wage and Hour Division's (WHD) opinion letters, it is unclear whether contractors will be able to rely on the OFCCP's opinion letters in the way employers can rely on the WHD's opinion letters. As a result, it remains to be seen whether contractors will avail themselves of this opportunity.

It will be interesting to see how many of our predictions come true in calendar year 2019.

OFCCP issues three new directives

On November 30, the OFCCP announced three new directives. DIR 2019-02, which establishes the ERP, offers five years of respite from audits to contractors that settle bias claims with the OFCCP in exchange for an agreement to report hiring, pay, and other employment data to the agency. The ERP provides the mechanism by which OFCCP staff may resolve violations and work with contractors to develop corporatewide corrective actions.

Under DIR 2019-03, the OFCCP will begin issuing opinion letters and will enhance its current help desk capabilities. The directive indicates that the agency may consider whether a contractor's actions are consistent with an opinion letter, FAQs, or help desk advice when considering whether to cite the contractor for a violation.

Finally, the agency issued DIR 2019-01, which sets out Compliance Evaluation Procedures and rescinds ACE (established under DIR 2011-01). Because its recent directives have embedded the most effective parts of ACE and Active Case Management (ACM) into its standard operating policies and procedures, the agency considers the ACE directive no longer necessary.

Bottom line. While the recent directives provide welcome new ways to resolve issues with the OFCCP, the question will be whether the "new" OFCCP will be any more reasonable in resolving those issues than the "old" OFCCP. How the directives will be implemented remains to be seen.

Bloomberg Law claims OFCCP fielded substantially more LGBT complaints

According to a November 28 article on Bloomberg Law, the OFCCP handled 65 complaints of sexual orientation discrimination and 20 complaints of discrimination based on transgender status in FY 2018, up from 14 and nine in FY 2017. The article stated those numbers mirror an overall increase in complaints to the OFCCP, from 686 in FY 2017 to 1,417 in FY 2018. LGBT activists are concerned that the OFCCP's religious exemption rule, which was expected in December 2018 but has not yet been issued, could have an impact on the agency's protection of LGBT individuals.

Coastal International to pay $400K over hiring discrimination claims

Coastal International Security Inc. has agreed to pay $409,947 to settle allegations of systemic hiring discrimination. The OFCCP alleged that from January 1, 2013, through December 31, 2014, the company discriminated against 180 female applicants for professional security officer positions. While not admitting liability, the company has agreed to make 16 job offers to female applicants as positions become available, in addition to the four applicants it has already hired. The company has also agreed to pay for additional certification training for at least three class members to enhance their employment opportunities in the security industry.

Oldcastle to pay nearly $400K to settle hiring discrimination claims

Oldcastle BuildingEnvelope Inc. will pay $395,000 to resolve allegations of hiring discrimination at its facility in Denver, Colorado. A routine compliance evaluation by the OFCCP alleged that from January 21, 2013, to January 20, 2015, the company discriminated against white, black, and female applicants who applied for 8A loader and unloader positions in favor of Hispanic and male applicants. In its conciliation agreement with the OFCCP, the company also agreed to provide job opportunities to 38 affected white male, black male, and female applicants as positions become available.

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after *Hy-Brand* was decided. Proponents of the *Browning-Ferris* standard challenged Emanuel's "right" to vote in *Hy-Brand* because his 1,000-lawyer firm represented one of the parties in the case, Leadpoint Business Services. Although Emanuel insisted that he had nothing to do with his firm's representation of Leadpoint, an unprecedented inspector general (IG) report found that he should have recused himself. In the face of the IG report, a truncated NLRB rescinded the *Hy-Brand* decision, and the Board has been in turmoil ever since. The recusal issue not only haunts *Hy-Brand*, but it also is the chief barrier to Board approval of a settlement in the overdue *McDonald's* case, which also involves the joint-employer issue. Similar ethics challenges are certain to arise.

It remains to be seen whether any Board member can withstand a recusal demand if "issue recusal" rather than the more common "specific matter recusal" is the new standard. All NLRB members have had long careers in which they identified with either labor or management, and all are associated with prounion or promanagement positions. In the past, that hasn't been a basis for recusal, a drastic remedy reserved for situations in which a member had direct involvement in a matter before the Board. "Weaponizing" recusal is a new facet of life as a Board member and may very well undermine the agency.

In any event, the NLRB has been hobbled. Chairman John Ring promises an internal ethics review in the vain hope of establishing a process that satisfies everyone. In the meantime, the Republican majority is treading lightly. Recently, the Board approved a microunit on the grounds that the members were traditional craft workers—an exception that revivifies *Specialty Hardware.* Similar hair-splitting led the Board to approve a union of postdoctoral researchers at Columbia University, muddying what was thought to be an opportunity to reset the rules for unionizing in higher education. There is now concern that the Board will find a way to "split the baby" on employees' use of e-mail, a decision that is expected in the new year.

Finding a middle road appears to be the course for addressing the joint-employer issue. Chairman Ring announced that he is seeking a regulation rather than a Board ruling to settle the matter, a process fraught with delays and hurdles, including the NLRB's inexperience in drafting regulations that can survive judicial scrutiny. But cracks are already beginning to show even in the Republican facade. GC Robb recently voiced his dissent to the current draft, asserting that it leaves too many ambiguities, echoing concerns previously expressed by the business community. Ring has responded mainly by repeatedly extending the comment period. And the fate of a new rule on quickie elections has moved to some unknown future.

Past Boards have been faced with difficult decisions in politically divided times. Few Boards have been so irresolute. It is tempting to attribute the current stasis to the turmoil of the Trump administration in general, but the hallmark of the NLRB is its independence and its ability to pick its cases and make its decisions. Those characteristics are not now apparent. But perhaps in this, too, we are in new political territory.

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WAGE AND HOUR LAW

Year-end roundup on happenings at DOL, WHD

by Sean D. Lee
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Last year was significant for the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD), the subagency responsible for regulating and enforcing federal minimum wage and overtime under the Fair Labor Standards Act (FLSA), employee leave rights under the Family and Medical Leave Act (FMLA), and other employment standards and worker protections. In this article, we take a walk down memory lane, reviewing some of the key wage and hour developments over the past year and looking ahead to 2019.

Leadership

Two years into Donald Trump's presidency, the WHD remains without a permanent leader. Cheryl Stanton, who, at the time, was the executive director of the South Carolina Department of Employment and Workforce, was nominated to be the WHD administrator on September 1, 2017. After a confirmation hearing, the Senate Health, Education, Labor and Pensions (HELP) Committee advanced her nomination to the full Senate, but her appointment wasn't approved before Congress adjourned for the year.

In January 2018, Stanton was renominated and approved once more by the HELP Committee, but she wasn't confirmed by the Senate over the ensuing year. Accordingly, she will need to be renominated and approved once more if her nomination is to proceed in 2019.

Opinion letters

Opinion letters were reinstated in the summer of 2017 by DOL Secretary Alexander Acosta, who reintroduced them after an eight-year hiatus. Employers and employees can seek opinion letters in which the WHD provides guidance on how certain laws—particularly the FLSA and the FMLA—apply under specific factual circumstances. Under the Obama administration, opinion letters were abandoned in favor of broader "administrator interpretations," which made general pronouncements about the application of labor laws rather than addressing specific scenarios.

In 2018, the DOL issued 29 opinion letters—17 of which were reinstated from the last days of the George W. Bush administration after they were withdrawn in March 2009 for "further consideration." The remaining 12 letters were issued across April, August, November, and December. While many of the opinion letters address whether particular jobs can be considered exempt from overtime under the FLSA's "white-collar" exemptions for executive, administrative, and professional employees, others address a wide array of topics, including the compensability of travel time, volunteers, tipping, and FMLA leave for organ donors.

Internships

In January 2018, the WHD released guidance on the perennially difficult issue of when interns are considered employees under the FLSA, and therefore entitled to minimum wage and overtime. In Field Assistance Bulletin No. 2018-2, "Determining Whether Interns at For-Profit Employers Are Employees Under the FLSA," the DOL announced that it will now use the "primary beneficiary test" adopted by several federal appeals courts.

The primary beneficiary test, which replaces a test implemented in 2010, takes into account seven factors, including the extent to which the intern and the employer clearly understand that there is no expectation of compensation, the extent to which the internship provides training that would be similar to training provided in an educational environment, and the extent to which the internship corresponds to the intern's academic calendar.

PAID program

In March 2018, the WHD announced a return to its historical practice of supervising settlements. A year-long pilot program lasting until April 2019, the Payroll Audit Independent Determination (PAID) program, invites eligible employers to voluntarily self-audit for overtime and minimum wage violations under the FLSA. Employers can then self-report any violations to the WHD, which will work with the employer to provide back wages to the affected employees—all without the burdens of engaging in litigation or paying liquidated damages and attorneys' fees to employees' lawyers.

According to the DOL, the PAID program's primary objectives are to resolve claims "expeditiously and without litigation, to improve employers' compliance with overtime and minimum wage obligations, and to ensure that more employees receive the back wages they are owed—faster." Nevertheless, the program has been criticized by attorneys general from 10 states and the District of Columbia for not requiring employers to pay liquidated damages, interest, or penalties as well as not necessarily informing workers of additional remedies that may exist under state law. In April, the state of New York filed a request under the Freedom of Information Act (FOIA) seeking information about how the PAID program was developed. When it didn't receive a satisfactory response, the state filed a lawsuit, and a judge ordered the DOL to turn over the requested information by the end of December.

While some employers might welcome the opportunity to bolster their compliance and nip FLSA claims in the bud, the PAID program has been viewed with some caution by employers' counsel.

Tipping issues

A number of significant developments related to tipping and the FLSA—particularly tip sharing and the employer tip credit—occurred in 2018.

Under a typical tip-sharing or tip-pooling arrangement, tipped workers (such as servers and bartenders) share their tips with nontipped "back-of-the-house" staff (such as cooks and dishwashers). In 2017, the DOL announced that it intended to rescind 2011 regulations prohibiting tip-sharing arrangements that include back-of-the-house employees. The ensuing proposed rule was widely criticized because it didn't prohibit employers from sharing in tip pools and because the DOL withheld an unfavorable internal analysis showing that workers could lose billions of dollars in tips under the regulation. According to Bloomberg Law, which broke the original story, senior DOL officials ordered staff to revise their methodology to lessen the expected impact of the proposed rule. The DOL's Office of the Inspector General initiated an audit of the rulemaking process, which remains ongoing after nine months.

In light of that controversy, the FLSA provisions addressing tip pooling were amended through provisions in the 2019 federal budget in two key ways in March 2018. First, the FLSA now explicitly states that all tips belong to the employee, not the employer. Second, the 2011 rule prohibiting tip pooling with back-of-the-house employees will have "no further force or effect" until it is addressed further by the WHD. Following those amendments, the WHD issued Field Assistance Bulletin No. 2018-3, which explains that "employers who pay the full FLSA minimum wage are no longer prohibited from allowing employees who are not customarily and regularly tipped—such as cooks and dishwashers—to participate in tip pools." The anticipated new regulations to address the changes in the tip-pooling statutory provisions have not yet been published.

The previous year also brought changes to the tip credit. Under the FLSA, employers are permitted to pay tipped employees $2.13 per hour—substantially less than the federal minimum wage of $7.25 per hour—and count tips toward the difference. Under guidance issued by the DOL in 2011, tipped employees were entitled to the full minimum wage when they spent more than 20 percent of their working time on nontipped work incidental to their main job (e.g., rolling silverware, cleaning tables, or refilling condiments). On November 7, the DOL issued Opinion Letter 2018-27, which eliminates the so-called 80/20 rule for tipped employees.

With the 80/20 rule gone, regularly assigned nontipped duties related to tipped services are considered part of a tipped employee's job. Thus, the amount of time an employee spends performing those activities will not prevent his employer from claiming the tip credit.

New overtime regulation and other rulemaking

Based on the DOL's regulatory calendar, we can expect a number of new rules from the WHD—perhaps, most notably, a long-awaited update to the overtime regulation.

As you will recall, the Obama era overtime rule would have doubled the salary threshold for the so-called white-collar exemptions to the FLSA—that is, the executive, administrative, professional, and computer employee exemptions—from $23,660 a year to $47,476. The WHD under the Trump administration vowed to recraft the rule and issued a Request for Information in July 2017 seeking input from employers and employees. By the close of the comment period, the DOL had received nearly 215,000 comments. The WHD then embarked on "listening sessions" across the country in an effort to give members of the public an opportunity to express their views on the overtime rule.

According to the DOL's regulatory calendar, the next step will be the issuance in March 2019 of a new Notice of Proposed Rulemaking (NPRM) setting out the Trump administration's version of an updated salary test for exemption status. Based on DOL Secretary Acosta's public statements, it is anticipated that the NPRM will propose a salary threshold somewhere between $32,000 and $37,000, and the new rule may include a mechanism to automatically increase the threshold each year to account for inflation.

On another overtime issue, the WHD was slated to release a proposed rule in December to "clarify, update, and define regular rate requirements." Under the FLSA, an employer must use an employee's "regular rate" of pay to determine the proper value of her overtime compensation. The regular rate includes more than just the employee's hourly rate of pay; it also accounts for the value of bonuses, commissions, and other forms of compensation. In its proposed rule, the WHD intends to clarify Section 207(e)(2) of the FLSA, which provides guidance on the types of payments that are excluded from the regular rate. At this time, no proposed rule has been issued.

The DOL's regulatory calendar also listed a forthcoming rule in December clarifying joint employment under the FLSA—the scenario in which businesses share legal responsibility and liability for minimum wage and overtime violations. The DOL's guidance will be particularly significant for franchises, staffing agencies, and workers in other contractual arrangements, although no proposed rule has been issued yet.

Finally, the WHD seeks to release a rule that would permit 16- and 17-year-olds to operate power-driven patient lifts in healthcare settings. While the FLSA prohibits 16- and 17-year-olds from performing certain hazardous jobs outside of agricultural work, it provides limited exemptions for apprentices and student learners who are working under certain conditions. The WHD states that its proposed rule will consider whether the DOL "should amend Hazardous Occupations Order No. 7 (occupations involved in the operation of power-driven hoisting apparatus) to reflect current economic and work environments and allow for safe and meaningful employment opportunities for youth in healthcare." The comment period ended on November 26, 2018.

Bottom line

After a busy 2018, the WHD is poised to have another active year. In addition to the long-awaited overtime rule, it will issue several new rulemakings and continue to focus on assisting employers with their compliance efforts.

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INSIDE OSHA

Drones in the workplace? OSHA says maybe

by Sara Nasseri
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As if on-site inspections by the Occupational Safety and Health Administration (OSHA) weren't worrisome enough, the U.S. Department of Labor (DOL) released a memorandum last May authorizing certain OSHA inspectors to use drones to collect evidence during some workplace inspections. However, before employers worry too much too soon, the memorandum issued on May 18 makes clear that OSHA is to "obtain express consent from the employer prior to using [the drone] on any inspection." Additionally, on-site personnel must be notified of the aerial inspection before the drone's launch.

This news certainly raises a number of issues and an endless amount of questions: What happens if an employer denies consent? How long will the drone operate over the worksite? What will the DOL do with the footage it obtains?

For now, employers can assume that there will be no unexpected drone sightings without their express knowledge and breathe a sigh of relief. However, employers should certainly be aware that the authority to use drones exists. Employers should also be thinking of ways to incorporate the possibility of a drone inspection into their OSHA inspection procedures.

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