What to Expect in 2020

Legal Changes Affecting Employers

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Since January 2017, the Trump administration has attempted to dismantle former President Barack Obama's labor and employment regulatory legacy.

The Department of Labor (DOL) reversed course on an overtime rule that would have doubled the salary requirement to exempt employees from overtime. The DOL and the National Labor Relations Board (NLRB) proposed rules to roll back Obama-era decisions that made it easier to establish a joint employer relationship for purposes of wage law liability and collective bargaining.

With an election on the horizon, below is an overview of significant changes on these two issues in 2020.

Overtime

In September 2019, the DOL published its final overtime rule. The new rule sets the salary threshold for administrative, executive and professional employees at $35,568 per year. This number is roughly in between the current threshold of $23,660 (unchanged since 2004) and the $47,476 threshold set by the Obama administration in 2016.

The rule also increases the highly compensated employee threshold from $100,000 to $107,432 annually. Importantly, the final overtime rule makes no changes to the duties test, nor does it contain any automatic increase mechanism. Employers must comply with the overtime rule effective January 1, 2020.

In 2016, employer-aligned interests brought suit to challenge the final overtime rule issued during the last year of the Obama administration. They succeeded, and the 2016 final rule was invalidated and never went into effect. It is difficult to predict whether employee advocates will mount a similar legal challenge to the 2019 final rule. Nearly all employee advocates argue the $35,568 annual threshold is insufficient, and this is destined to be a lightning rod during the 2020 campaign.

What are the implications for employers? The DOL estimates 1.3 million workers will become newly entitled to overtime protection because of the increase in the salary level. Indiana employers should evaluate whether salaried exempt positions below the $35,568 annual threshold should receive a salary increase or be reclassified.

Joint employer

Joint employment has been one of the hottest political and policy issues over the last several years, spanning multiple administrations and Congresses. Which entities can be considered a joint employer is significant in understanding who is potentially liable in wage lawsuits against franchisors, contractors, staffing agencies and professional employer organizations. In addition, joint employment dictates who needs to be at the table for collective bargaining. With the 2020 elections looming, the DOL and NLRB face a race to promulgate final joint employer rules.

In April 2019, the DOL announced it would publish a final rule to amend existing regulations regarding joint employment under federal wage law. The proposed rule sets forth clear, bright line rules regarding the circumstances in which an employer may be deemed a joint employer. This is the first meaningful revision to the Fair Labor Standards Acts's joint-employer regulation since it was originally promulgated in 1958. The DOL's proposal follows the NLRB's proposed rule to re-establish its traditional "direct and immediate" standard following the Obama NLRB's controversial decision to consider both reserved and indirect control.

The DOL proposes a four-part test that would assess whether the potential joint employer: (1) hires or fires

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Apply Now for 2020 HR Award

Nominations and applications are open for the 2020 Ogletree Deakins Human Resources Professional of the Year award. The winner will be announced at the Indiana Chamber's 56th Annual Human Resources Conference on May 7.

The award is open to all full-time human resources practitioners in Indiana. Individuals who have made significant contributions to their company/organization over the past year through implementation of best practices, organization design and effectiveness, and alignment and accomplishment of the strategic direction of their company are encouraged to submit a nomination. The deadline to apply is February 14, 2020.

Previous winners include:

- 2019: Kania D. Lotte, JD, MBA, SHRM-SCP, SPHR, FHLBank Indianapolis
- 2018: Amanda Bates, IU Health Physicians
- 2017: Cari Kline, SPHR, Grundfos Americas Corporation; Kendra Vanzo, Old National Bancorp
- 2016: Lisa Price, JD, KAR Auction Services, Inc.
- 2015: Anita Bunten, Indiana Farm Bureau Insurance Company; LaVonne Cate, Federal Home Loan Bank of Indianapolis
- 2014: Charles Young, hhgregg
- 2013: Jill Lehman, SPHR, Ontario Systems
- 2012: Melissa Greenwell, The Finish Line
- 2011: Todd Richardson, Exact Target
- 2010: Donna Wilkinson, Pacers Sports and Entertainment Corp.
- 2009: Anthony Casablanca, Batesville Casket Co.
- 2008: Steve Kotz, SPHR, KAR Holdings, Inc.
- 2007: John Dickey, Hillenbrand Industries, Inc.
- 2006: Michael Murdock, Kroger Co.

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the employee; (2) supervises and controls the employee's work schedule or conditions of employment; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records.

The proposed rule makes clear that "[o]nly actions taken with respect to the employee's terms and conditions of employment, rather than the theoretical ability to do so under a contract, are relevant to joint employer status under the Act." Further, the proposal details that certain business models (e.g., franchises), certain business practices (e.g., allowing an employer to operate a facility on premises) and certain business agreements (e.g., requiring vendors to institute sexual harassment policies) do not make a finding of joint-employer status more or less likely. The issuance of the DOL's final joint employer rule will certainly be welcome news for the employer community.

With other issues preoccupying Washington D.C., it remains unclear when the DOL or NLRB will publish their final rules. When those final rules are issued, employers will want to pay attention to any material differences between the two rules. Employers should also be aware of any legal challenge or legislative response to the final joint employer rules.

For example, the 9th Circuit recently confirmed that McDonald's Corporation did not exercise sufficient control over a franchisee's workforce to be considered liable for alleged violations of California wage law. The 9th Circuit held that the exercise of quality control over product offerings was not sufficient to create a joint employer relationship and was instead "central to modern franchising and to the company's ability to maintain brand standards." Employers can expect similar legal challenges once the final rules are implemented.