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Labor & Employment Legislation, Regulation To Watch In 2015

By **Ben James**

Law360, New York (January 02, 2015, 3:12 PM ET) -- The U.S. Department of Labor's ongoing push to narrow overtime exemptions under the Fair Labor Standards Act tops the list of regulations and legislation employment attorneys say they'll be watching in 2015, with partisan gridlock making any meaningful changes to labor and employment statutes a long shot.

The National Labor Relations Board's controversial union election rule is already on the books, and Republicans will have control of the Senate but will remain 13 seats shy of the 67-member bloc needed to override a veto from President Barack Obama. So the DOL will be in the spotlight.

“It's hard to imagine the president and Congress agreeing on labor matters,” University of Virginia School of Law Professor Rip Verkerke said.

Agencies like the DOL and NLRB don't need majority votes in Congress to forge ahead, but lawyers say they expect to see lawmakers using the “power of the purse” and calling agency brass to Capitol Hill for grillings by congressional committees.

Ogletree Deakins Nash Smoak & Stewart PC's Hal Coxson said he expected the 114th Congress to be active and make moves including “aggressive oversight and appropriations riders to counteract the regulatory agenda, which has gotten out of control.”

Exactly how much success legislators may have in blocking the executive branch on labor and employment matters, and what bills they may send to the president's desk, remains to be seen. But here are five regulatory and legislative measures lawyers say they'll be keeping an eye on in 2015.

FLSA Overtime Exemption Revamp

This rule, titled “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” has its roots in a memorandum Obama signed in March directing the secretary of labor to “modernize and streamline” the existing FLSA overtime regulations.

Because those regulations were “outdated,” millions of workers lacked overtime protections and “even the right to minimum wage,” the memorandum said.

A notice of proposed rule making is slated for release in February. The rule won't likely be finalized in

2015, said Crowell & Moring LLP's Tom Gies, and in the meantime, employers that want to voice concerns about the proposal will have a chance to chime in during public comment period.

“It would certainly generate another flood of lawsuits, and I think it's a big deal,” Gies said of the overtime rule-making push.

Though the proposal has yet to be unveiled, lawyers are anticipating a hike in the salary threshold — currently $455 a week — that must be met in order for workers to be overtime-exempt. The standard under which an employee's “primary duty” must be managerial work in order for him or her to qualify as exempt could also be changed to require that a set numerical percentage of a worker's time be spent on overtime-exempt tasks, lawyers said.

The overtime regulations are the “blockbuster” on the DOL's agenda and will likely have an impact on many businesses, said Littler Mendelson PC's Michael Lotito.

“In particular, retailers and restaurateurs are very, very worried, and the potential reclassification that could come as a result of the rule is something that I don't think employers have been focusing on,” he said. The San Francisco-based Lotito added that the new rule could make national wage-and-hour requirements similar to those in the notoriously plaintiff-friendly California, which “should be enough to frighten anyone.”

But while the management side may see those changes as controversial, Outten & Golden LLP partner Justin Swartz, who represents employees, said they could benefit businesses as well as workers.

“That would be a good move for employees and employers,” Swartz said. “More employees would be entitled to overtime without having to litigate over their duties, and it would draw a bright line for employers, so they would know they either have to raise peoples' salaries or pay them overtime.”

Revamping the overtime regulations will likely be so time-consuming and controversial that it'll preclude the DOL from getting much else done on the rule-making front in 2015, said Jackson Lewis PC's Paul DeCamp, a former head of the DOL's Wage and Hour Division.

“There's only so much bandwidth that the agency has,” DeCamp pointed out. “That rule making is going to be extremely controversial. They know that, and that's going to take up all the air in the room.”

“Blacklisting” Executive Order for Federal Contractors

The “Fair Pay and Safe Workplaces” executive order, signed by Obama at the end of July, applies only to federal contractors and isn't expected to be implemented until 2016. But management-side employment lawyers, who have dubbed it the “blacklisting” order, are already up in arms about it and say they'll be keeping a close eye on any developments related to it in 2015.

Coxson, who chairs Ogletree's governmental affairs group, said the controversial executive order would likely result in rule making from the DOL, and perhaps from theFederal Acquisition Regulatory Council, in 2015.

“The executive order is contingent on some regulation being issued,” added Ogletree's Al Robinson, another former Wage and Hour Division chief. “The administration announced it would go into effect in 2016, but the FAR Council could propose something in 2015.”

A flood of employers would likely comment on proposed regulations, which "will be very contentious," Robinson said.

The executive order calls for would-be contractors to disclose labor law violations going back three years and would make sure the “worst actors” don't get contracts, according to the White House fact sheet.

The order might have the effect of dissuading companies from settling labor disputes to avoid looking bad, said Gies, pointing out that litigation is expensive.

“Perversely, you might end up litigating more cases, and that's typically not thought of as a good thing,” he said.

Something similar was implemented late in the Clinton administration but quickly nixed when George W. Bush took over, Gies noted.

The current incarnation of the order is “even worse than it was then,” Coxson said.

In addition to disclosing labor-related violations, the executive order would stop companies pursuing federal contracts of $1 million or more from requiring workers to enter predispute arbitration agreements for things like Title VII claims or torts related to sexual harassment, and require that workers be given information about hours, overtime hours, pay and addition or deductions from pay, said the White House.

“It's got a lot of things in it in addition to the blacklisting initiative,” said Robinson.

The DOL estimates 24,000 business have federal contracts, employing about 28 million workers.

EEOC Wellness Program Regulations

The U.S. Equal Opportunity Commission made headlines and drew criticism last year after launching its first direct legal challenges to employer wellness programs under the Americans with Disabilities Act.

Critics have complained that employers face the prospect of being targeted in an EEOC suit even though the agency hasn't provided guidance on how to administer the programs — which are promoted under the Affordable Care Act — while steering clear of liability under disability and genetic information discrimination laws.

"The uncertainty that has been created by the EEOC litigation over wellness programs is huge in terms of doing benefit planning for employers, and those are regulations that are desperately needed," said Epstein Becker & Green PC's Frank Morris.

But the EEOC is poised to shed some light on what employers can do to encourage participating in wellness programs without painting a target on their backs, with proposals to amend and clarify existing regulations under the ADA and the Genetic Information Nondiscrimination Act slated for release in February.

“We don't know what they're going to say, but certainly I think that's something to be on the lookout for, for 2015,” Littler Mendelson PC's Russell Chapman said of the regulations.

The expected proposed rules should be on the radar for companies considering wellness programs as well as those with programs already in place, he said.

“I believe employers really need to pay attention, particularly if they have wellness programs currently, because these regulations may indicate that they need to make changes quickly,” Chapman said. “Certainly employers who are considering wellness programs will want to pay careful attention to these regulations when they come out. They're intended to directly address the operation of these wellness programs.”

"Persuader" Regulations

The DOL's persuader regulations have ranked among the most frequently criticized and controversial regulatory initiatives to have been floated in recent years.

The Labor-Management Reporting and Disclosure Act requires employers and legal consultants to report any arrangement to persuade employees directly or indirectly regarding the right to organize or bargain collectively, but it carves out an exception for advice, saying no employer or consultant has to file a report covering the services of a consultant if that consultant just gives advice to the employer.

A proposal to narrow that carveout has drawn fire from the American Bar Association and others who say it raises serious concerns about attorney-client privilege. The DOL's proposed regulations would limit the definition of "advice" to oral or written recommendations, which would subject more types of arrangements to the law's disclosure requirements.

A notice of proposed rule making was issued in back in June 2011, and the DOL's fall 2014 regulatory agenda says a final rule narrowing the “advice exemption” under the LMRDA will come out in July 2015.

But Gies said the persuader regulations were “dead,” adding that the ABA's opposition played an important role in discouraging the labor department from moving forward with it.

Other management-side lawyers shared the same or similar assessments but noted that the regulations might see an eleventh-hour push at or near the end of Obama's time in the White House in 2016. Just because the rule isn't expected to come to fruition doesn't mean it's off attorneys' radar.

“One of the things that I like to say is no bad idea ever goes away in Washington,” said Coxson. “This is a bad idea.”

Bills to Rein in the NLRB

Incoming Senate Majority Leader Mitch McConnell, R-Ky., and Sen. Lamar Alexander, R-Tenn., who is expected to chair the Senate Health, Education, Labor and Pensions Committee in 2015, introduced a bill called the NLRB Reform Act in September, a move they said aimed to rein in partisan advocacy at the labor board.

The once-obscure NLRB has emerged as a political lightning rod in recent years, making headlines and drawing fire over a case against The Boeing Co., unconstitutional recess appointees and a recently finalized rule-making push to streamline the union election process.

Among other things, the NLRB Reform Act would add a sixth member to the five-seat NLRB to help ensure consensus across party lines. The bill would be vetoed if it made it to the president's desk, said George Washington University Law School Professor Charles Craver.

“I strongly think the board should remain with five members, whether Democratic or Republican, to enable them to continue to resolve key issues, which could then be subject to court of appeal review,” Craver said.

But with powerful backers and a Republican majority in both houses of Congress, movement on the NLRB Reform Act is not a stretch, and neither is the introduction of legislation countering specific NLRB rulings that may be issued on controversial topics like joint employer status and student-athlete unionization.

“The NLRB does not have a whole lot of friends in the majority of the House and Senate, and if they keep pushing what is seen as a radical agenda, that's going to be problem for the board,” Lotito said.

“Employers should be on their toes, because the 2016 election began on Nov. 5,” Coxson said, referring to the recent midterm elections.

State and Local Measures

While the federal government hasn't been active recently in enacting new labor and employment laws, and likely won't be in 2015, many individual states and cities have the freedom to tackle employment issues like paid sick leave, minimum wage and workplace accommodations for pregnant employees.

In November, for example, Massachusetts voters gave a green light to a ballot initiative requiring private employers to provide paid sick time to workers. With the approval of that new law, which takes effect in July, Massachusetts became the third state to require paid sick leave, joining California and Connecticut.

New Jersey may not be far behind, with lawmakers moving a paid sick time bill through the state Assembly Budget Committee on Dec. 15

While new state and local employment laws may not have a nationwide impact, they're certainly significant for employers in the affected jurisdictions, DeCamp said, adding that the proliferation of such laws isn't likely to abate in the near future.

“I think these types of laws will continue to gain some measure of traction at the state and local level,” he said.

--Editing by Kat Laskowski and Emily Kokoll.
