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Employment Legislation And Regulation To Watch In 2016

By **Aaron Vehling**

Law360, New York (December 24, 2015, 8:38 PM ET) -- The U.S. Department of Labor's push to expand overtime eligibility and the union "persuader" rule top the list of regulations and legislation employment attorneys will be watching in 2016, with lawyers saying the biggest action will come from agencies.

Under the magnifying glass of employers and their counsel is the DOL's rule changing the overtime exemption — which is set to be finalized in 2016 and could require employers to reclassify workers as non-exempt from overtime — depending on their salary and even the frequency and character of their duties.

Legislation is less likely, because in 2016 there will be 34 Senate seats, 435 House seats and a presidency all up for election at a time when Democrats and Republicans aren't keen to work together.

"There is legislation to overturn the NLRB's joint-employer standard that will probably come up again," Ogletree Deakins Nash Smoak & Stewart PC's Hal Coxson says, "but I really think that the focus once again as has been recently and will be on regulatory actions."

Here are five regulatory and legislative measures lawyers say they'll be keeping an eye on in 2016:

U.S. Department of Labor's Proposed OT Rule

Attorneys are closely monitoring the DOL's proposed rule to raise the minimum salary threshold required to qualify for the Fair Labor Standards Act's "white collar" exemption to equal the 40th percentile of weekly earnings for full-time, salaried workers, or about $50,440 per year.

That is more than double the current threshold under the FLSA exemption for executive, administrative, professional, outside sales and computer employees.

Introduced in February and expected to be finalized in 2016, the proposal garnered nearly 300,000 comments in 2015 as attorneys anticipate the fallout from the final version of the rule.

Although employers and their attorneys have accepted the threshold bump as a given, the uncertainty surrounding the duties test has them nervous, according to Tom Gies, a management-side partner at Crowell & Moring LLP.

"A lot of us are worried about changes to the job duties test," Gies said.

In its proposal, the DOL asked for input on whether changes should be made to the duties test applicable to the white collar exemptions, asking if it should eye for inspiration the California model — a worker has to spend at least 50 percent of his or her time on exempt duties to qualify for an exemption.

It's not set in stone how the DOL will reconcile that question, but Littler Mendelson PC's Tammy McCutchen, a former head of the DOL's Wage and Hour Division, says she's already advising clients to plan for the DOL to adopt a change to the duties test.

"I think the issue is important for [DOL Secretary Thomas] Perez — I don't think he'll let it go easily," McCutchen said. "I'm telling lawyers to prepare for that."

In 2016 employers should consider reclassifying salaried employees who spend more than 50 percent of their time on nonexempt work, "and if not 50 percent, I'm pretty confident we will see at least some restriction on the amount of time exempt employees can perform nonexempt work," she says.

The California rule, or something like it, could run into some serious conflict with certain management positions, such as retail store manager, that in recent years have been exempted from overtime eligibility, Gies says. In that setting, managers often have to do nonexempt work if there's a staff shortage, he says, a dynamic that could lead to a lack of clarity under the duties test.

This rule, which has its roots in a memorandum President Barack Obama signed in March 2014, is expected to be finalized in July 2016, according to the DOL's fall 2015 unified agenda.

The rule is Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, rule number 1235-AA11.

DOL's 'Persuader' Rule

The DOL's "persuader" regulation designed ostensibly to make more transparent the union-related communications responsibilities between employers and their attorneys largely disappeared from the limelight after its 2011 introduction.

However, the rule came entered the spotlight again after showing up on the DOL's fall 2014 regulatory agenda. A planned 2015 rollout didn't happen, but in December 2015 the department sent the regulations to the Office of Management and Budget, a final step toward finalizing the proposed rule in March 2016.

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.

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. The proposal has drawn fire from the American Bar Association and others who say it raises serious concerns about attorney-client privilege.

Michael Lotito, co-chair of Littler Mendelson PC's Workplace Policy Institute, says that the rule could

erode the attorney-client relationship in general.

“Attorneys will be put in the position of having to decide if they’re going to violate the persuader statute and [incur] criminal penalties or violate their ethical responsibilities under state and ABA rules, which is obviously a horrible position to be in,” Lotito said.

The proposal’s treatment of “advice” could also mean that law firms have to expose the amount of money they billed the employer in their role as a consultant, which Gies says could push firms to leave the business of advising employers on union-organizing campaigns. Most law firms won’t want to reveal that kind of sensitive information, he said.

Overall, Lotito says, “this is going to have huge impacts and people need to start studying.”

The rule is Employer and Labor Relations Consultant Reporting Under the LMRDA, rule number 1245-AA03.

The 'Blacklisting Rule'

The “Fair Play and Safe Workplaces” executive order, which Obama signed in July 2014 and is expected to be implemented in 2016, requires government contractors to report labor law violations — those under federal labor and employment laws such as Title VII or the NLRA. The number of violations and their nature is to be considered when determining if the company can bid on government contracts.

It’s a regulation that even those who don’t do government contracts are watching, with management-side attorneys calling it a “blacklisting rule” for its potential to cost businesses significant revenue if they’re found in violation — even if the stacks of violations are nebulous.

Big companies find themselves hit with unfair labor practices quite often, and not all are resolved with the company found in violation.

“It’s a fact of life that if you’re a big company, you’ll have claims against you,” said David Goldstein, co-chair of Littler Mendelson’s government contractors industry group.

The Fair Play rule goes beyond what Congress intended with discrimination, workplace safety, labor and employment laws, changing remedies and putting issues before federal workers to decide and not the courts, according to Gies, who said it will change how companies approach claims.

“Why risk getting a black mark and losing government business,” Gies said. “Companies will be much more inclined to settle.”

Minor labor rows that are now more likely to instill fear in a company because it’s up to an agency official’s view as to whether a company is a good citizen or not, Goldstein says.

In addition to labor violation disclosures, the executive order would also bar companies pursuing federal contracts of $1 million or more from requiring workers to enter predispute arbitration agreements for things like bias or sexual harassment claims, and require that workers be given information about hours, overtime hours, pay and addition or deductions from pay, according to the White House.

Although Congress in December denied the president’s request for funding to set up an Office of Labor

Compliance to administer the rule, the rule is still expected to be finalized in April 2016, according to the OMB.

OFCCP's Compensation Reporting Rule

The DOL's Office of Federal Contract Compliance Programs' proposed rule requiring contractors to collect and report employee compensation data is another regulation that draws ire among attorneys on the management bar.

"It would be extremely burdensome to comply with, [and] there's absolutely no reason to believe the information being requested, in the form being requested, will be of any meaningful use to the government," Goldstein said.

The rule, which implements an April 2014 memo from Obama and is slated for a May 2016 finalization, would require federal contractors and subcontractors to submit to the DOL summary data on the compensation paid to their employees, including data by sex and race, according to the White House.

The White House said in 2014 that the rule would have an impact on roughly 24,000 businesses with federal contracts, employing about 28 million workers, and is designed to hold accountable companies contracts worth $500,000 that discriminate against employees because of race or gender or who stiff their workers on overtime, among other things.

One of the concerns for employers is that it creates a burden for companies already required to file similar reports with the EEOC around the same time the new rule's reports would be due, Goldstein said.

But a supreme concern for employers is that the compensation information could get out, benefiting competitors who would be quite keen on learning about rivals' pay and growth plans, Goldstein says. Although the OFCCP would ostensibly keep the data confidential, he said the OFCCP isn't held to as high of a standard as the EEOC, which faces criminal penalties if it leaks private information in reports.

"More than once a year an OFCCP communication will disclose [to me] information that relates to an employer I'm not representing," Goldstein said.

The rule is Requirement to Report Summary Data on Employee Compensation (Compensation Data Collection), rule number 1250-AA03.

Legislation to Undo NLRB's Browning-Ferris Decision

Since the NLRB majority decided in its August ruling in Browning-Ferris to expand its view of what constitutes a joint-employer relationship under the National Labor Relations Act — subjecting companies to liabilities, such as collective bargaining agreements, that previously may have only applied to third parties like vendors, staffing agencies or franchisees — opponents have eyed its rollback.

A high-profile challenge to the decision is the Protecting Local Business Opportunity Act, introduced in October by House Education and the Workforce Committee Chairman John Kline, R-Minnesota. Although killed as a rider in the proposed $1.1 trillion omnibus spending bill released in December, Kline said in a statement to Law360 that he will keep the bill in play in 2016 to protect small-business owners from being upended by the new standard's effects.

“We are going to continue this fight and do whatever we can to protect these small business owners and the working families they support," Kline said.

The majority’s decision in Browning-Ferris Industries of California Inc. v. Sanitary Truck Drivers and Helpers Local 350 meant that a company and its contractor could potentially be seen as a single joint employer — even if the company hasn't exerted overt control over workers' terms and conditions. This, proponents say, is to bring to the bargaining table the employer with the actual power in the dynamic.

The act, co-introduced by Senate Health Employment Labor and Pensions Subcommittee Chairman Phil Roe, R-Tennessee, would toss out BFI and return joint-employer considerations to whether a company has actual, direct and immediate control over employees.

Although the board has said the ruling is narrow and won’t mean the death knell of franchises, the GOP has said the decision could do just that.

“If a franchisor is responsible for the employment decisions of its franchisees, the franchisor will have no choice but to exert greater control over the franchise small business,” the committee said in a statement in October 2015. “That is precisely the scenario franchise small business owners warn would cause them to lose their independence.”

The likelihood of it getting anywhere, though, is limited, because the president isn’t going to sign off on it, according to Thomas Y. Mandler of Hinshaw & Culbertson LLP.

“This era is marked by a greater polarization of the parties and their philosophies, which leads to the current gridlock on many issues,” he said.

The bill is the Protecting Local Business Opportunity Act, H. R. 3459.

--Additional reporting by Ben James. Editing by Jeremy Barker and Rebecca Flanagan.