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Department of Labor Moves to Roll Back Obama Regulations

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The Trump administration's Department of Labor announced on June 7th and June 8th that it will start the process of rolling back two controversial DOL regulations promulgated by the Obama DOL: the overtime pay regulation and the "persuader" regulation.

Overtime Regulation

The 2016 overtime regulation was scheduled to take effect on December 1, 2016. Its principal effect would have been to increase the salary threshold for overtime exemption from \$23,660.00 to \$47,476.00. In November 2016, however, a federal district court issued a nationwide injunction blocking the regulation from taking effect. An appeal of that injunction is pending, and the Department of Justice has a June 30th deadline for filing a brief.

In his March 22, 2017 confirmation hearing, Alex Acosta, who was later confirmed as Secretary of Labor, stated his views that an increase of the salary threshold to \$33,000.00 would be appropriate based on inflation since the last increase in 2004 and that the proposed increase to \$47,476.00 would impose "stress on the system" and raised questions about whether the DOL even had the "power to enact" an increase of that size "in the first place."

On June 7, 2017, Secretary Acosta announced that to a congressional committee that, in the next several weeks, the DOL would issue a request for information asking for public information and public comment about the overtime regulation. A request for information would be the first step in the process of proposing a new overtime regulation.

Secretary Acosta's remarks indicate that the Obama overtime regulation will be revised with a lower salary threshold. The process of revising that regulation and issuing a new regulation, however, is likely to take an extended period of time, which could

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exceed a year.

For employers, the good news is that it is extremely unlikely that the Obama overtime regulation, which would have doubled the salary threshold to \$47,476.00, will ever take effect.

“Persuader” Regulation

Among the Obama administration’s numerous efforts to help labor unions organize more workers, the Obama DOL implemented a regulation that would have expanded reporting to the federal government for both employers that use labor consultants and lawyers to oppose a union organizing campaign and those labor consultants and lawyers.

The Obama DOL’s “persuader” regulation abandoned the DOL’s interpretation of those reporting duties that had been in effect since 1962. A key effect of the 2016 “persuader” regulation would have been to require employers and consultants to report not only about agreements under which “a consultant directly contacts employees, but also where a consultant engages in activities ‘behind the scenes,’ where an object is to persuade employees concerning their rights to organize and bargain collectively.”

In June 2016, however, a federal district court issued a nationwide preliminary injunction against enforcement of that regulation, and in November 2016, that court converted the preliminary injunction to a permanent one. As a consequence of these injunctions, the expanded reporting obligations imposed by the 2016 “persuader” regulation never took effect.

On June 8, 2017, the DOL issued a Notice of Proposed Rulemaking that “proposes to rescind” the “persuader” regulation. It stated several reasons for its action, including the following:

- To engage in “further statutory analysis” of the reporting requirements, so that if the DOL “elects to change the scope of reportable activity beyond what has been in place since 1962, it can provide as thorough an explanation of its statutory interpretation as possible.”
- To engage in “more detailed consideration of attorneys’ activities.” There was concern about the “interaction between the new categories of ‘indirect’ persuasion” that the 2016 regulation created and the “role of attorneys in advising their clients.” Employers and attorneys had expressed concerns that the 2016 regulation would “have a ‘chilling effect’ on clients’ abilities to obtain representation by attorneys.” The Trump DOL wants to have a “more detailed and specific analysis of how each of” the new “indirect” persuasion activities “would, as a practical and factual matter, affect the behavior of the regulated community, with regard to furnishing and receiving legal services.”

The issue of revising the interpretation of “persuader” activities is not a new one. The Clinton administration proposed a revision similar to the 2016 regulation, but the Bush administration rescinded that proposed regulation before it took effect. Now the Trump administration is moving toward the rescission of the Obama administration’s “persuader” regulation, which, in any event, is permanently enjoined at this time.

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For non-union employers, labor consultants, and labor attorneys who represent employers, the DOL's proposal to rescind the 2016 "persuader" regulation is good news. A rescission will relieve them of the onerous, expanded reporting obligations contemplated by the Obama DOL's 2016 regulation, but not implemented as a result of the injunctions.

These two actions by the DOL are further indications that the Trump administration will reverse the anti-employer regulatory efforts of the Obama administration.

If you have any questions about these regulations, please contact the author of this Client Alert, your Butzel Long attorney, or any member of the Labor and Employment Law Group.