U.S. CHAMBER OF COMMERCE
Employment Policy

Key Labor and Employment Regulatory Initiatives

The following is a summary of key regulatory actions, completed, underway, or anticipated, in which the Chamber has been, or plans on being, actively engaged.

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Labor and Employment Related Regulatory Activity

Executive Actions

Executive Order 13897 on Improving Federal Contractor Operations by Revoking Executive Order 13495

On November 5, 2019, President Trump signed Executive Order 13897, entitled "Executive Order on Improving Federal Contractor Operations by Revoking Executive Order 13495." E.O. No. 13897 revokes Executive Order 13945, which provided a right of first refusal for continued employment to qualified service workers when a government contract was replaced with a new contract and successor contract at the same location. The Executive Order does not affect contractor obligations with respect to compliance with Executive Order 13495.

E.O. 13897 requires the Secretary of Labor, the FAR Council, and heads of executive departments and agencies to "promptly move to rescind any orders, rules, regulations, guidelines, programs, or policies implementing or enforcing Executive Order 13495." Significantly, the Order terminates immediately any existing investigations or compliance actions based on E.O. 13495.

Completed Rulemakings

OSHA Injury and Illness Reporting Regulation

On November 8, 2013, OSHA published a proposed rule to amend its current recordkeeping regulations to add requirements for the electronic submission of illness and injury records employers are required to keep under Part 1904. On August 14, 2014, OSHA published a supplemental notice of proposed rulemaking to explore adding provisions that will make it a violation for an employer to discourage employee reporting. The supplemental would upend the statutory whistleblower protection provisions of Section 11(c) by giving OSHA the ability to issue citations against employers without an employee complaint, i.e. no whistleblower.

On May 12, 2016, OSHA published the final regulations. Employers with 250 or more employees (includes part-time, seasonal, and/or temporary workers) in each establishment must submit electronically their 300, 301, and 300A, forms to OSHA on an annual basis (instead of quarterly as originally proposed). Employers with more than 20 but less than 250 employees in certain identified industries must submit only their 300A form annually.

OSHA announced that they would post the data from employer submissions on a publicly accessible website – and vowed not to include any information that could be used to identify individual employees. Employers are also required to have a "reasonable" policy in place for employees to report injuries or hazards. A "reasonable" policy is one where a "reasonable employee would not be deterred." OSHA then elaborated in the preamble that some of the employer actions that might trigger citations under the anti-retaliation provision would include

drug testing seen as punitive or deterring an employee from reporting an injury, or safety incentive programs that rely on a rate of injury, or absence of injuries, for rewarding employees.

OSHA delayed the enforcement date for the anti-retaliation provisions from August 1, 2016, to December 1, 2016, due to ongoing litigation. The initial filing deadline for employers with 250 or more employees to submit their form 300As was December 15, 2017.

On July 8, 2016, the National Association of Manufacturers and other business groups filed a lawsuit against OSHA targeting the impact on drug testing and safety incentive programs under the anti-retaliation provision. On January 4, 2017, the Chamber, in conjunction with other business groups such as the National Association of Home Builders, filed a lawsuit in the U. S. District Court for the Western District of Oklahoma to invalidate the reporting requirements and the anti-retaliation provisions. The NAM suit was dismissed and the NAHB/Chamber suit was stayed pending OSHA's rulemaking to revise the regulation.

On April 30, 2018, OSHA clarified that employers in state-based plans where the state has not yet issued a companion regulation are still required to meet the federal requirements.

On July 30, 2018, OSHA published their proposed rulemaking to revise the electronic injury and illness reporting regulation. The Chamber expressed strong opposition to that original regulation, including filing comments on the first proposal, and then the supplemental proposal that set up the anti-retaliation provisions.

The proposed revision does only two things:

- Locks in place the change in reporting requirements dropping the 300 and 301 forms and leaving only the annual summary 300A forms for establishments with 250 or more employees and employers with 20-249 employees in designated industries.
- Adds a requirement for these establishments to include the Employer Identification Number (EIN) to their submissions.

OSHA bases the reduced filing requirement on their concerns for protecting employee identifiable information (EII) and the "non-trivial" risk that this information could be subject to a successful FOIA request. The agency also cites the merely speculative value of collecting such information and thus believes the costs outweigh the benefits. OSHA does not acknowledge the confidential business information included in 300As in the form of hours worked and number of employees. Furthermore, their reference to FOIA in the context of EII is ironic since OSHA is currently opposing a FOIA request for access to the 300A forms.

Unfortunately, the proposed regulation does not address any of the problems associated with the anti-retaliation provision such as: the extraordinarily vague requirement for employers to post a "reasonable" policy on how employees are to report their injuries and safety violations; OSHA's preamble commentary that certain drug testing and safety incentive programs would be considered "unreasonable" as in conflict with the whistleblower protections in the statute; OSHA's intention to enforce this provision through citations rather than through the

whistleblower process as spelled out in the statute; or the wholly inadequate rulemaking process that led to this provision.

On September 28, 2018, the U.S. Chamber, as part of the Coalition for Workplace Safety, submitted comments raising the concerns indicated above, which may be accessed here: https://www.uschamber.com/sites/default/files/cws_comments_on_osha_proposal_to_revise_reporting_reg-final.pdf

On January 25, 2019, OSHA published in the *Federal Register* the final regulation modifying OSHA's regulation requiring certain employers to submit their forms 300, 301 and 300A annual summaries. As expected, there were no changes from the proposed regulation. It eliminates the obligation for employers of 250 or more employees to submit their forms 300 and 301, but retains the requirement for them to submit their 300A annual summary, as well as for employers with 20 or more employees but less than 250 in certain designated hazardous industries to submit 300As. In addition, it adds a requirement for covered employers to electronically submit their Employer Identification Number with their information from Form 300A.

OSHA bases its action in final regulations on the concerns about sensitive employee information being in the agency's possession and the risk that such information could be released. Unfortunately, no such concern is expressed for the employer sensitive information contained in the 300A forms that will still have to be submitted (number of employees and hours worked) and will now be subject to Freedom of Information Act requests.

OSHA's entire response to concerns about this information being made public is to reiterate that the agency does not support granting FOIA requests for these forms. However, a suit from Public Citizen has already been filed seeking to overcome OSHA's position on FOIA and the judge has given an initial ruling suggesting OSHA's FOIA position may not prevail. Even if OSHA's FOIA position is upheld, the agency says that these forms will be made available after four years.

This new regulation also leaves in place the entire "anti-retaliation" provision untouched. That provision requires employers to have a "reasonable" program in place for employees to report injuries and safety violations, leaving open to interpretation what "reasonable" means. OSHA originally claimed, in commentary, that certain drug testing and safety incentive programs would be "unreasonable". However, OSHA reversed that determination thereby demonstrating that "reasonable" has no inherent meaning. OSHA dismissed any questions regarding the anti-retaliation provision by saying that those concerns were outside the scope of this rulemaking.

The Chamber, in conjunction with the National Association of Home Builders and others, filed a case against the Obama regulation challenging both the reporting requirements and the anti-retaliation provisions. The case was put on hold pending the outcome of this rulemaking. The Chamber and its litigation partners are now reviving this lawsuit as it pertains to the anti-retaliation provision.

Workplace Wellness Programs and Employment Discrimination

On April 20, 2015, the EEOC released proposed regulations that describe how Title I of the Americans with Disabilities Act applies to workplace wellness programs that are part of group health plans and that include questions about employees' health (such as questions on health risk assessments) or medical examinations (such as screening for high cholesterol, high blood pressure, or blood glucose levels) for employee-only coverage.

On October 30, 2015, the EEOC issued proposed regulations that amend the regulations implementing Title II of the Genetic Information Nondiscrimination Act of 2008 as they relate to workplace wellness programs and address the extent to which an employer may offer an employee inducements for the employee's spouse who is also a participant in the employer's health plan to provide information about the spouse's current or past health status as part of a health risk assessment administered in connection with the employer's offer of health services as part of an workplace wellness program.

On May 17, 2016, the EEOC promulgated the final ADA and GINA regulations, consistent with the proposals.

On October 24, 2016, AARP sued the EEOC, arguing for an injunction to stop the rules from taking effect. On November 22, 2016, the Chamber submitted an *amicus* brief, defending the EEOC's position that wellness programs that offer incentives are not coercive, but rather voluntary in nature.

In December 2016, the District Court denied AARP's motion for a preliminary injunction. On August 22, 2017, the District Court remanded the regulations back to the EEOC to begin a new rulemaking process.

On January 18, 2018, the District Court reconsidered its judgment and vacated the portion of its order that required the EEOC to issue proposed regulations on the Court's timeline. On March 30, 2018, the EEOC filed a status report with the court, stating that a "number of policy choices" are available. On December 20, 2018, the EEOC announced that the agency is vacating the final rule, effective January 1, 2019.

The Fall 2019 regulatory agenda published November 20, 2019, indicates that the revised proposed regulations are expected, January, 2020.

EEOC's Changes to the EEO-1 Form

On February 1, 2016, the EEOC announced that it was seeking a three-year Paperwork Reduction Act (PRA) approval of a revised Employer Information Report (EEO-1) data collection. The revisions include two components: Component 1, which collects the same data

that is gathered by the currently approved EEO-1 (e.g., ethnicity, race, and sex, by job category) and Component 2, which includes data on employees' W-2 earnings and hours worked.

On April 1, 2016, the Chamber submitted comments, criticizing the proposal as unnecessary, overly burdensome, lacking utility, and lacking confidentiality/privacy protections.

The comments may be accessed here: https://www.uschamber.com/comment/comments-eeoc-proposed-revisions-the-employer-information-report

On September 29, 2016, the EEOC released the final form with reporting instructions, which were identical to the proposal submitted to OMB on August 15, 2016. Employers would have been required to report the new information beginning in March 2018.

On February 27, 2017, the Chamber sent a letter to the Office of Management and Budget, requesting that OMB stay the effectiveness of, or otherwise rescind, EEOC's changes to the EEO-1 Form.

On August 29, 2017, the Administrator, Office of Information and Regulatory Affairs, issued a memo to the Acting Chair of the Equal Employment Opportunity Commission, instructing the EEOC to "initiate a review and immediate stay of the effectiveness of those aspects of the EEO-1 form that were revised as of September 29, 2016." The memo clarifies that the EEOC "may continue to use the previously approved EEO-1 form to collect data on race/ethnicity and gender during the review and stay."

Based on a challenge brought by the National Women's Law Center, on March 4, 2019, a federal judge invalidated OIRA's stay as in violation of the Administrative Procedure Act and reinstated Component 2.

On May 2, 2019, the EEOC announced that filers should submit Component 2 data for calendar year 2017, in addition to data for calendar year 2018, by September 30, 2019.

On July 11, 2019, the EEOC launched a portal for the collection of the 2017 and 2018 data, which may be accessed here: https://eeoccomp2.norc.org/

On May 3, 2019, the U.S. Department of Justice appealed this ruling. On August 19, 2019, the Department of Justice filed a brief in the U.S. Court of Appeals for the D.C. Circuit seeking to overturn the district court's decision from March that reinstated the EEOC's revised EEO-1 Component 2 form. DOJ made a strong case that the plaintiffs (primarily the National Women's Law Center) did not have standing and that the lower court's decision in their favor should be reversed. The DOJ also argued that even if the plaintiffs had standing, the remedy ordered by the court (very specific instructions to EEOC on how and when the data is to be collected) was unauthorized and excessive and should be reversed.

The U.S. Chamber submitted an *amici brief* that explains to the court the problems employers have with the new EEO-1 form. This narrative was not included in the parties' briefs. Our brief is co-signed by 13 other associations and was filed on August 26, 2019.

On September 12, 2019, the EEOC published a notice of information collection that stated that it will collect information on Component 1 over the next three years and will no longer collect Component 2 data, based on an underreporting of burden estimate on employers.

On November 12, 2019, the Chamber joined comments co-signed by other employer representatives that can be accessed here: https://www.uschamber.com/sites/default/files/coalition_comments_eeoc_eeo1_information_collection.pdf

Updating and Modernizing Overtime Regulations (WHD)

On May 23, 2016, the U.S. Department of Labor published final regulations that set the salary threshold for determining overtime eligibility at $47,476; increased the highly compensated salary level to $134,000; "automatically updated the salary level every three years based on the 40th percentile of earnings for full-time salaried workers in the lowest-wage Census Region, currently the South"; and permitted employers to use nondiscretionary bonuses and incentive payment to satisfy up to 10 percent of the salary level for employees under the standard exemption. The final regulations did not make any changes to the duties test. The new salary threshold was to take effect December 1, 2016.

On September 20, 2016, the U.S. Chamber in conjunction with other business trade associations and local Chambers of Commerce filed a lawsuit challenging the overtime regulations in the Eastern District of Texas (Sherman Division), arguing that the salary threshold is too high, and DOL violated the FLSA since the agency lacks the statutory authority to index the threshold to inflation. At the same time, a coalition of 21 states filed a similar (but not identical) challenge in the same court. On November 22, 2016, the judge in the Eastern District of Texas case issued a nationwide preliminary injunction blocking the new salary threshold from taking effect. On August 31, 2017, the judge in the Eastern District of Texas case ruled in favor of the Chamber in the motion for summary judgment, ruling that the overtime regulation violated the FLSA by setting a salary threshold that supplanted the duties test, which is considered the better criteria for determining exemption.

On October 30, 2017, the Department of Justice, on behalf of the Department of Labor, appealed this decision to the U.S. Court of Appeals for the Fifth Circuit. The appeal is being held in abeyance pending the DOL's rulemaking.

On March 22, 2019, the U.S. Department of Labor, published proposed regulations that set the salary threshold at $35,308 per year, and permits employers to use nondiscretionary bonuses and incentive payment to satisfy up to 10 percent of the salary level for employees under the standard exemption. In addition, the rulemaking:

- Reverts to the methodology used in the 2004 rule that focused on the 20th percentile of full time wage earners in the lowest income region of the company (identified as the South) as well as the retail industry.
- Makes no changes to the duties tests. Another point stressed by the Chamber.

- Does **not** implement an automatic update feature. This was a key point emphasized by the Chamber. However, the regulation does seek comments on conducting regularly scheduled rulemakings to update the salary threshold consistent with the methodology used in this proposal.
- Increases the total annual compensation requirement for "highly compensated employees" (HCE) from the current level of $100,000 to $147,414 per year, which is higher than the Obama DOL reg's threshold of $134,004. The DOL maintained the methodology used by the Obama administration for this salary level which resulted in the higher threshold.

On May 21, 2019, the Chamber submitted comments, which may be accessed here: https://www.uschamber.com/sites/default/files/uscc_comments_on_proposed_overtime_rule_2019.pdf

On September 27, 2019, the U.S. Department of Labor promulgated final regulations with the following provisions:

- Salary threshold for administrative, executive, and professional employees (the "white collar" exemptions) **will now be $684/week, or $35,568/year.** This will replace the current threshold, in place since 2004, of $455/week or $23,660/year.
- The Highly Compensated Employee threshold will go from $100,000 (in place since 2004) to $107,432. The proposed level was $147,414 and the Chamber criticized this as too high.
- There are **NO** changes to any of the duties tests as the Chamber urged.
- There are **NO** automatic updates included as the Chamber urged.
- Employers may use nondiscretionary bonuses and incentive payments (including commissions) that are paid at least annually to satisfy up to 10 percent of the standard salary level, in recognition of evolving pay practices. Any shortages will have to be made up in the following pay period. The Chamber recommended a higher threshold than 10%, and a longer window for an employer to make catch-up payments.
- The final regulation will be effective January 1, 2020. This will give employers slightly more than 3 months, but because the salary threshold adjustment is more modest than what the Obama administration issued, the amount of employee reclassifications and other disruptions should hopefully not be overly burdensome.

Rulemakings Underway

Tip Regulations Under the Fair Labor Standards Act (Wage and Hour Division)

On December 5, 2017, the U.S. Department of Labor Wage and Hour Division issued a notice of proposed rulemaking to rescind the current restrictions on tip pooling by employers that pay tipped employees the full minimum wage directly. Comments were due by February 3, 2018.

Included in the "Consolidated Appropriations Act, 2018," is a fix that would address concerns about the Department of Labor's "tip-pooling" regulation. The Act makes it clear that employers are not allowed to access the tips collected for employees "for any purposes, including allowing managers or supervisors to keep any portion of employees' tips regardless of whether or not the employer takes a tip credit."

The provision includes liquidated damages and civil money penalties for violations of this provision, and the right for employees to bring actions against the employer. The legislation effectively supplants the Department's rulemaking, meaning that the Wage and Hour Division will not move forward in issuing these regulations and instead issue new regulations that conform to Congress' specifications.

On October 8, 2019, the Department of Labor reissued the proposed rule to conform to Congress' specifications. Specifically, the proposed rule clarifies that an employer may take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage (currently $2.13 per hour) and the federal minimum wage. Establishments utilizing a tip credit may only have a tip pool among traditionally tipped employees.

Additionally, the proposed rule reflects the Department's guidance that an employer may take a tip credit for any amount of time an employee in a tipped occupation performs related non-tipped duties with tipped duties. For the employer to use the tip credit, the employee must perform non-tipped duties contemporaneous with, or within a reasonable time immediately before or after, performing the tipped duties. The proposed regulation also addresses which non-tipped duties are related to a tip-producing occupation.

Comments are due by December 8, 2019.

Regular Rate of Pay Under the Fair Labor Standards Act (Wage and Hour Division)

On March 29, 2019, the Wage and Hour Division promulgated a proposed rule to modernize the regular rate requirements. Many employers are providing generous benefits to attract employees. Unfortunately, litigation has emerged around whether some of these benefits should be included in the calculation of the "regular rate of compensation" that is the foundation for calculating overtime compensation which is 1.5 times the regular rate of compensation.

Under the proposed regulation the following items and benefits may be excluded from regular rate calculation: the cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services; payments for unused paid leave, including paid sick leave; reimbursed expenses need not be incurred "solely" for the employer's benefit for the reimbursements to be excludable from an employee's regular rate; reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System regulations and meet other regulatory requirements; employers do not need a prior formal contract or agreement with the employee(s) to exclude certain overtime premiums described in sections 7(e)(5) and (6) of the FLSA; and pay for time that would not otherwise qualify as "hours worked," including bona fide meal periods unless an agreement or established practice indicates that the parties have treated the time as hours worked.

On June 12, 2019, the Chamber submitted comments, which may be accessed here: https://www.uschamber.com/sites/default/files/uscc_comments_on_2019_whd_regular_rate_nprm.pdf

The Fall 2019 regulatory agenda published November 20, 2019, indicates that the final regulations are anticipated, November, 2019.

Changes to the Joint Employer Standard (Wage and Hour Division)

On April 9, 2019, the U.S. Department of Labor's Wage and Hour Division issued a proposed rule to clarify the contours of the joint employment relationship. In the scenario where an employee works one set of hours in the workweek for his or her employer, and that work simultaneously benefits another entity, the Department proposes a clear, four-factor test—based on well-established precedent—that would consider whether the potential joint employer actually exercises the power to:

- hire or fire the employee;
- supervise and control the employee's work schedules or conditions of employment;
- determine the employee's rate and method of payment; and
- maintain the employee's employment records.

The proposal also provides guidance on how to apply this multi-factor test; explains what additional factors should and should not be considered; and clarifies that a particular business model, certain business practices, and certain contractual agreements do not make joint employer status more or less likely.

On June 25, 2019, the Chamber submitted comments, which may be accessed here: https://www.uschamber.com/sites/default/files/uscc_comments_on_dol_flsa_joint_employer_proposal.pdf

The Fall 2019 regulatory agenda published November 20, 2019, indicates that the final regulations are anticipated, December, 2019.

Fluctuating Workweeks Under the Fair Labor Standards Act (Wage and Hour Division)

On November 5, 2019, the Wage and Hour Division promulgated proposed regulations that amend Part 778.114 of title 29 Code of Federal Regulations. Part 778.114 of title 29 Code of Federal Regulations provides an alternative method for calculating overtime pay under the Fair Labor Standard Act for employees whose work hours fluctuate from week to week. Currently, this method is not available to employers who compensate their employees with bonuses or other incentive-based pay. The proposed regulations add language to § 778.114(a) clarifying that bonuses, premium payments, and other additional pay of any kind are compatible with the use of the fluctuating workweek method of compensation. The Department also proposed to add examples to § 778.114(b) that illustrate the fluctuating workweek method of calculating overtime where an employee is paid (1) a nightshift differential and (2) a productivity bonus in addition to a fixed salary. Comments are due December 4, 2019.

NLRB's "Quickie Election" Regulation

On December 13, 2017, the NLRB issued a request for information asking for public input whether the Board should revise or repeal the "quickie election" rule.

On April 18, 2018, the Chamber submitted comments supporting rescission of the rule, which may be accessed here: https://www.uschamber.com/comment/us-chamber-comments-the-national-labor-relations-boards-ambush-elections-rule

On August 12, 2019, the National Labor Relations Board (NLRB) proposed amendments to Part 103 of its Rules and Regulations with respect to blocking charges, voluntary recognition, and Section (9) (a) recognition in the construction industry. Under the proposal, the NLRB is proposing to replace the current blocking charge policy with a vote-and impound procedure. The blocking charge policy would establish a system to impound ballots and hold an election in cases where employees request a decertification vote for the union.

The election bar policy would address the timing of when a union decertification election may take place. In circumstances where an employer agrees to voluntary recognition, workers would have a 45-day window to file a decertification vote. The construction policy would require unions to provide evidence that they have support from a majority of workers before entering into a full bargaining relationship with an employer and prevent representation based on contract language alone. Comments are due by December 10, 2019, and reply comments are due by December 24, 2019.

Joint-Employer Rulemaking (National Labor Relations Board)

On September 14, 2018, the National Labor Relations Board proposed a regulation establishing the standard for determining whether two employers are a joint employer. The proposed rule states that for an employer to be regarded as a joint employer, the two employers must share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, and direction. The proposed rule also reverses the *Browning Ferris* decision by indicating that "an employer must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another employer's employees in a manner that is not limited and routine."

On January 28, 2019, the Chamber submitted comments, which may be accessed here: https://www.uschamber.com/sites/default/files/uscc_comments_to_nlrb_on_joint_employer_rulemaking.pdf

On February 11, 2019, the Chamber submitted reply comments, which may be accessed here: https://www.uschamber.com/comment/reply-comments-the-national-labor-relations-boards-proposed-rulemaking-the-standard

To date, the NLRB has not issued a final rule.

The Fall 2019 regulatory agenda published November 20, 2019, indicates that the final regulations are expected, December, 2019.

Student/Employee Status (NLRB)

On September 23, 2019, the NLRB published proposed rules, which establish the standard for determining whether students who perform services at a private college or university in connection with their studies are "employees" within the meaning of Section 2(3) of the National Labor Relations Act (29 U.S.C. 153(3)). Comments are due by December 16, 2019.

Changes to Revised Scheduling Letters, Focused Reviews, and Compliance Reviews (OFCCP)

On April 12, 2019, the Office of Federal Contract Compliance Programs (OFCCP) proposed changes to the revised scheduling letters for Section 503 and VEVRAA Focused Reviews, Compliance Checks, and compliance reviews.

For example, if approved, the establishment compliance evaluation scheduling letter will require contractors to provide additional information not included in the current version of the letter. Key among these are: (1) a list of their three largest subcontractors based on contract value; (2) job group analyses that account for specific racial groups (as opposed to simply identifying and grouping together "minorities"); (3) more detailed information about promotions, specifically the pool of candidates from which promotions were selected; and (4) "[r]esults of the most recent analysis of the" contractor's "compensation system(s)."

OFCCP has announced that they are bringing back "compliance checks" – limited reviews aimed at quickly determining if the selected contractor is meeting basic compliance requirements. The letter proposed for these evaluations seeks contractors' E.O. 11246, Section 503, and VEVRAA Affirmative Action Programs, as well as detailed information concerning reasonable accommodations (i.e., the requests made and whether they were granted or denied), and examples of job advertisements.

Finally, OFCCP has proposed to revise its Section 503 focus review letter, and seeks approval for a VEVRAA focus review letter. Contractors would have to submit employee-level compensation data that is currently required for regular compliance evaluations, and detailed applicant and employee level information for veterans and individuals with disabilities.

On July 11, 2019, the Chamber submitted comments criticizing these changes, which may be accessed here:
https://www.uschamber.com/sites/default/files/uscc_comments_to_ofccp_information_collection_renewals.pdf

Labor Organization Annual Financial Reports for Trusts in Which a Labor Organization is Interested, Form T-1 (Office of Labor Management and Standards)

On May 30, 2019, the Department of Labor's OLMS proposed to re-establish a Form T-1 to capture financial information pertinent to trusts in which a labor organization is "interested" (LMRDA section 3(l) "trusts"), information that historically has largely gone unreported.

Comments were due July 29, 2019.

Anticipated Rulemakings

Labor Organization Annual Financial Reports (Office of Labor Management and Standards)

The Office of Labor-Management and Standards (OLMS) proposes to return to its 2003 interpretation that intermediate bodies that are subordinate to a national or international labor organization that includes a labor organization are covered by the Labor-Management Reporting and Disclosure Act (LMRDA). A proposed rule is anticipated November, 2019.

Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures to Resolve Potential Employment Discrimination (Office of Labor Management and Standards)

The Department of Labor is planning to promulgate a Notice of Proposed Rulemaking (NPRM), November, 2019, that would revise regulations at 41 CFR parts 60-1, 60-300, and 60-741, which implement the nondiscrimination and affirmative action provisions of Executive Order 11246 (as amended), section 503 of the Rehabilitation Act (as amended), and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (as amended), respectively, to codify certain procedures and documents OFCCP uses to resolve potential violations of these laws by federal contractors and subcontractors.

RFI: Family and Medical Leave Act (Wage and Hour Division)

The Wage and Hour Division is planning to solicit comments through a request on information regarding ways to improve its regulations under the Family and Medical Leave Act to: (a) better protect and suit the needs of workers; and (b) reduce administrative and compliance burdens on employers. Request for information anticipated November, 2019.

Drug Testing Program and Safety Incentive Rule (OSHA)

OSHA recently clarified, through a memorandum to the field, the agency's position that 29 CFR 1904.35(b)(1)(iv) does not prohibit post-incident drug testing or safety incentive programs. OSHA is planning a Notice of Proposed Rulemaking, August, 2020, memorializing OSHA's position on these issues through changes to 29 CFR 1904.35(b)(1)(iv) related to implementation of post-incident drug testing and safety incentive programs.

Access Rule (NLRB)

The National Labor Relations Board plans to engage in rulemaking to establish the standards under the National Labor Relations Act for access to an employer's private property. A notice of proposed rulemaking is anticipated, February, 2020.

Revisions of Representation Case Rules (NLRB)

The National Labor Relations Board plans to engage in rulemaking to revise the "quickie election" regulations with a specific focus on amendments relating to procedures for the conduct of representation elections. A notice of proposed rulemaking is anticipated, January, 2020.

FAR Regulations; FAR Case 2019-017, Training to Prevent Human Trafficking For Certain Air Carriers (FAR Council)

The FAR Council plans to engage in rulemaking to amend the FAR to implement Section 111 of the Frederick Douglas Trafficking Victims Prevention and Protection Reauthorization Act of 2018, which spells out the requirements for domestic air carriers that is performing on a government contract for air transportation to include statistical information in the company's annual report regarding human trafficking awareness training. A notice of proposed rulemaking is anticipated, February, 2020.

Joint Employer Status (EEOC)

The Equal Employment Opportunity Commission (EEOC) is planning to promulgate a Notice of Proposed Rulemaking (NPRM), December, 2019, that would explain the EEOC's interpretation of when a business is considered a "joint employer" under equal opportunity laws.

Significant Non-Regulatory Activities

U.S. Department of Labor

Opinion Letters (WHD)

On June 27, 2017, the Department of Labor announced that they will reinstate the issuance of Wage and Hour Division opinion letters.

On January 5, 2018, the Wage and Hour Division reissued 17 opinion letters that had been issued during the last days of the Bush administration and withdrawn by the Obama administration.

On November 8, 2018, the Wage and Hour Division issued an opinion letter, rescinding the 20% rule, which purported to segregate the duties of tipped employees between allegedly tip-generating duties and related non-tipped duties.

On March 14, 2019, the Wage and Hour Division issued three opinion letters. The first letter clarified that its regulations permit employers to provide employees with a written "designation notice" within five business days that the paid leave benefit they take will count toward the 12 weeks' unpaid job-protected leave that the employer is required to provide under the FMLA. The letter also stated that employers may not designate as FMLA-protected a more-generous paid leave policy, since the law covers only 12 weeks' maximum leave.

The second letter states that live-in apartment building managers or janitors must be paid at least minimum wage, and must receive overtime, even if state law exempts those employees.

The third letter explains that an employer is not required to compensate employees for hours spent working on volunteer activities for an optional community service program, as long as employees are not pressured to participate.

On April 29, 2019, the Wage and Hour Division released an opinion letter that stated workers who are connected to jobs via an unnamed app do not meet the legal definition of an employee under the Fair Labor Standards Act.

On July 1, 2019, the Wage and Hour Division released three opinion letters on calculating overtime pay for non-discretionary bonuses paid on a quarterly and annual basis; whether paralegals should be classified as “highly compensated” employees exempt from federal minimum wage and overtime requirements; and rounding practices for calculating the hours employees have worked.

On July 22, 2019, the Wage and Hour Division released an opinion letter clarifying that truck driver owners don’t need to pay truck drivers for the time they spend sleeping.

On September 11, 2019, the Wage and Hour Division released three opinion letters related to overtime pay, family and medical leave, and employer contributions to pre-tax health savings accounts.

Payroll Audit Independent Determination (PAID - WHD)

On March 6, 2018, the Wage and Hour Division announced a nationwide, 6-month pilot program aimed at encouraging employers to audit their books to look for potential violations of the Fair Labor Standards Act. If such violations are found, businesses will have to pay workers' wages they are owed but won't be subject to fines and could avoid litigation.

Under the pilot, the Wage and Hour Division plans to assess the amount of wages due and supervise payment to employees. The pilot would not require payment of additional damages or civil monetary penalties when employers proactively resolve the compensation practices that led to such infractions.

According to a description of the pilot, employers would offer employees the option of taking back wages. If an employee accepts the payment of back wages, they would then release their right to sue their employer for the specific violation identified. It would be the employee's choice whether or not to accept the payment. If workers accepted the terms set out by the employer, they would be paid shortly after violations are discovered, and not have to wait for the outcome of Department of Labor investigations or lawsuits.

Companies would not able to use the voluntary audit process to resolve claims already under investigation by the Department of Labor or subject to ongoing court fights.

On October 4, 2018, DOL announced the extension of the PAID program.

Field Assistance Bulletin No. 2018-3 (WHD)

On April 6, 2018, the Wage and Hour Division issued Field Assistance Bulletin, No. 2018-3, "Amendment to FLSA Section 3(m) Included in the Consolidations Appropriations Act, 2018." The Field Assistance Bulletin provides guidance concerning the Wage and Hour Division's (WHD) enforcement of tip credit rules under the Fair Labor Standards Act (FLSA) after Congress amended the FLSA in the Consolidated Appropriations Act, 2018.

Standard Interpretations – Clarifications of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 C.F.R. §1904.35(b)(1)(iv) (OSHA)

On October 11, 2018, OSHA sent a memo to regional administrators and state designees, clarifying the agency's position that 29 C.F.R. § 1904.35(b)(1)(iv) does not prohibit workplace safety incentive programs or post-incident drug testing. This interpretation supersedes a memorandum OSHA sent to regional administrators in 2012 that outlines four scenarios that OSHA believes would constitute violations of the whistleblower protections under Section 11(c). Among the scenarios is one where employers implement an incentive program that rewards employees for low injury rates or remaining injury free for a period of time. Incentive programs are not mentioned anywhere else in the statute or regulations.

This memo rescinds OSHA's final regulations preamble commentary that certain drug testing and safety incentive programs could constitute "unreasonable" policies and deter employee reporting of injuries and safety violations.

Directive 2018-5 (OFCCP)

On August 24, 2018, OFCCP issued Directive 2018-5, "Analysis of Contractor Compensation Practices During a Compliance Evaluation," rescinding Directive 307. Directive 2018-5 sets out the agency's approach and commitment to transparency with respect to pay equity analyses. The Directive outlines "standard procedures for reviewing contractor compensation practices during a compliance evaluation." The Directive explains the agency's methodology for creating Pay Analysis Groups, details its statistical methodology and modeling, and includes a listing of the variables it will control for in its regression models. The Directive also sets out OFCCP's process for providing contractors with information regarding its conclusions.

Directive 2019-01 (OFCCP)

On November 30, 2018, OFCCP issued Directive 2019-1, "Compliance Review Procedures." Directive 2019-01 rescinds Directive 2011-01, Active Case Enforcement Procedures and spells out the procedures OFCCP will use in conducting compliance reviews.

Directive 2019-02 (OFCCP)

On November 30, 2018, OFCCP issued Directive 2019-02, "Early Resolution Procedures." Directive 2019-02 establishes OFCCP's early resolution procedures and implementation guidelines.

Directive 2013-1, Revision 2 and Functional Affirmative Action Programs (FAAP) FAQs (OFCCP)

On June 20, 2019, OFCCP issued Directive 2013-1, Revision 2, "Functional Affirmative Action Programs." Revision 2 clarifies that OFCCP will no longer consider compliance history when reviewing a request for a new FAAP agreement or termination; the agreement term is extended to five years, up from three years; there is a minimum of 36 months between compliance evaluations for a single functional unit; complete FAAP applications will be determined within 60 days, and OFCCP no longer requires that FAAP contractors undergo at least one compliance evaluation during the term of the FAAP agreement.

On July 31, 2019, OFCCP issued FAQs to provide clarity on definitions related to FAAPs, as well as the application and maintenance of FAAP agreements.

Opinion Letter on Pay Analysis Groupings (OFCCP)

On July 22, 2019, OFCCP released an opinion letter, announcing that the federal government encourages businesses to submit their own Pay Analysis Groups for review by and to receive feedback from the agency, which would be taken into account in future compliance evaluations. However, OFCCP states that it does not provide any guarantees with regards to such future evaluations due to the possibility of material changes to the factors considered by the OFCCP in its initial evaluation.

Frequently Asked Questions (OFCCP)

On July 23, 2019, OFCCP issued Frequently Asked Questions regarding the validation of employee selection procedures. In particular, these FAQs clarify that artificial-intelligence based tools must be validated like other selection tools if they disparately impact workers, freelance workers shouldn't be included in a company's affirmative action plan, and that the agency will take practical significance into account when reviewing a contractor location for potential compliance violations, as well as "statistical significance and all other evidence gathered in the course of investigation."

On July 23, 2019, OFFCP issued "Practical Significance in EEO Analysis FAQs." According to the FAQs, "practical significance is a conceptual framework for evaluating discrimination cases developed primarily on statistical evidence." The FAQs elaborate on definitions and measures of practical significance.

On July 23, 2019, OFFCP released FAQs, "Project-Based or Freelance Workers and the Affirmative Action Program," which states that generally speaking, OFCCP regards workers performing on a project or freelance basis are typically classified as independent contractors who are not included in an AAP.

National Labor Relations Board

Mandatory use of NLRB E-Filing System

On October 21, 2019, the NLRB's general counsel issued Memorandum GC 20-01 directing the agency's regional offices not to accept certain documents unless they are filed electronically. Section 102.5(c) of the NLRB's Rules and Regulations mandates the use of its E-filing system for the submission of affidavits, correspondence, position statements, documentary or other evidence in connection with unfair labor practice or representation cases processed in Regional offices. The memorandum stipulates that there will be a 90-day grace period during which these documents will continue to be accepted when filed through means other than the E-filing system, including e-mail, fax or hand delivery. Section 102.5(c) does not apply to the filing of unfair labor practice charges or petitions in representation proceedings. Parties are encouraged to use the agency's E-Filing system to file charges and petitions, but may continue to use regular mail, personal delivery, and/or facsimile to file and serve the documents in accordance with Sections 102.11 and 102.12.

Seeking Submission of W-2s to the Regional Director

On November 12, 2019, the NLRB's general counsel issued Memorandum GC 20-02, directing Regional Offices to require that employers submit to the Regional Director a copy of the W-2 reflecting backpay in cases involving backpay, In *Don Chavas LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Board announced that it would routinely require respondents to compensate employees for the adverse tax consequences of receiving lump-sum backpay awards covering periods longer than one year. It further required respondents to file a report with the Social Security Administration (SSA) allocating backpay awards to the appropriate calendar quarters.

The NLRB was notified by the Social Security Administration (SSA) that the backpay awards in many situations could not be applied to the appropriate calendar year(s) because the information contained on the Backpay Report did not match the W-2 submitted by the employer or the employer failed to submit a W-2 for the individual in question. As a result, backpay is not being credited to the proper year in which it would have been earned in the absence of a violation of the NLRA, which could result in lower Social Security benefits or a failure to meet the requirements for benefits. The object of the memorandum is to obtain a copy of the W-2, which will allow the Region to ensure the accuracy of the information on the Backpay Report.