



# U.S. CHAMBER OF COMMERCE

## Employment Policy

### Key Labor and Employment Regulatory Initiatives in the Obama and Trump Administrations

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**

## **Completed Rulemakings**

### **FAR Regulation: Ending Trafficking in Persons**

On September 26, 2013, the Department of Defense, General Services Administration and the National Aeronautics and Space Administration published a proposed rule in the *Federal Register* to amend the Federal Acquisition Regulation (“FAR”) to among other things, prohibit federal contractors, contractor employees, subcontractors and subcontractor employees from engaging in any activities related to human trafficking, such as forced labor and prostitution. For contracts that are not solely for commercially off-the-shelf items and where a portion of the contract will be performed overseas, the contractor or successful offeror will be required to develop a compliance plan and issue a certification of compliance at the time the contract is awarded and annually thereafter. The requirements of a compliance plan and certification apply to all subcontracts where the value of the services provided and/or supplies acquired outside the United States exceeds \$500,000.

The proposed rule mandates that the contractor compliance plans include “procedures to prevent agents and subcontractors at any tier from engaging in trafficking in persons, and to monitor, detect, and terminate any agents, subcontractors, or subcontractor employees that have engaged in such activities.”

On December 20, 2013, the Chamber filed joint comments with the Aerospace Industries Association, the American Council of Engineering Companies, the National Defense Industrial Association, the Professional Services Council, and TechAmerica.

On January 29, 2015, the FAR Council issued the final rule, which became effective March 2, 2015. The final rule sought comment on a recommendation by the Senior Policy Operating Group for the FAR Council to consider a new definition of the term, “recruitment fees” to supplement the regulation. On March 18, 2015, the Chamber submitted comments, which may be accessed here: <https://www.uschamber.com/comment/comments-gsa-draft-definition-recruitment-fees-supplement-far-case-2013-001>

On May 11, 2016, the FAR Council promulgated a proposed rule, requesting comments regarding the definition of the term, “recruitment fees.” On July 11, 2016, the Chamber submitted comments, which are available here:  
<https://www.uschamber.com/comment/comments-gsa-combating-trafficking-persons-definition-recruitment-fees>

The Chamber is active in promoting best practices to avoid human trafficking and is working to root out both the cause and effects of human trafficking. However, the Chamber is concerned about the creation of potential contractor and subcontractor liability without regard to the realities of global supply chains and various other provisions that complicate employer recruitment processes without a tangible relationship to reducing human trafficking.

The Fall 2018 regulatory agenda published October 17, 2018, indicates that the final regulation was anticipated, October, 2018.

**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 revisions to the rulemaking.

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 promulgated 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\\_oshaproposal\\_to\\_revise\\_reporting\\_reg-final.pdf](https://www.uschamber.com/sites/default/files/cws_comments_on_oshaproposal_to_revise_reporting_reg-final.pdf)

On January 25, 2019, OSHA [published in the \*Federal Register\*](#) the final regulation modifying the Obama 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. Collection of Calendar Year 2018 information from the OSHA Form 300A began on January 2, 2019. The deadline for electronic submissions is March 2, 2019.

The Chamber vigorously opposed the original Obama OSHA regulation. 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 is the one that 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 2018 regulatory agenda published October 17, 2018, indicates that the revised regulations are expected, June, 2019.

#### 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-eooc-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 memo as in violation of the Administrative Procedure Act and reinstated Component 2.

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

On May 3, 2019, the U.S. Department of Justice appealed this ruling.

### **Rulemakings Underway**

#### *Updating and Modernizing Overtime Regulations*

On May 23, 2016, the U.S. Department of Labor, published the final regulations that set the salary threshold at \$47,476; increased the highly compensated salary level to \$134,000; “automatically updated the salary level every three years based on the 40<sup>th</sup> 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. In addition, the final regulations did not make any changes to the duties test.

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, filed a notice to appeal 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 July 26, 2017, the Department of Labor issued a request for information (RFI) to make changes to the overtime regulations.

On September 25, 2017, the Chamber submitted comments, which may be accessed here:  
[https://www.uschamber.com/sites/default/files/u\\_s\\_chamber\\_-\\_comments\\_-\\_2017\\_rfi\\_on\\_overtime\\_final-comments\\_only.pdf](https://www.uschamber.com/sites/default/files/u_s_chamber_-_comments_-_2017_rfi_on_overtime_final-comments_only.pdf)

In September and October 2018, the Wage and Hour Division held five public listening sessions throughout the nation for affected parties to provide input regarding potential changes to the salary level test. An additional session was held in Washington, D.C., at the U.S. Department of Labor, and the U.S. Chamber directly participated in this session.

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 20<sup>th</sup> percentile of full time wage earners in the lowest income region of the company (identified as the South) as well as the retail industry. This is a point that the Chamber stressed during DOL's listening sessions and comments submitted to a Request for Information.
- 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.

Comments are due May 21, 2019.

#### *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 issue new regulations that conform to Congress’ specifications.

The October 2018 regulatory agenda indicates that the proposed regulation was anticipated, October, 2018.

*Request for Information on 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>

*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\\_rule\\_making.pdf](https://www.uschamber.com/sites/default/files/uscc_comments_to_nlrb_on_joint_employer_rule_making.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>

*Decertification of Representatives (National Mediation Board)*

On January 31, 2019, the National Mediation Board issued a proposed regulation to eliminate the "strawman" requirement for a decertification of a bargaining representative under the Railway Labor Relations Act. Comments were due by April 1, 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.<sup>28</sup> 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 meets 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.

Comments are due June 12, 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.

Comments are due June 25, 2019.

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

On April 12, 2019, the Office of Federal Contract Compliance Programs (OFCCP) published a notice proposing 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’ EO 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.

Comments are due June 11, 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 was anticipated December, 2018.

The Department of Labor’s OLMS also proposes 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. A proposed rule was anticipated in December 2018.

### **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 House Division released an opinion letter that stated workers who are connected to jobs via an unnamed app don't meet the legal definition of an employee under the Fair Labor Standards Act.

#### *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 be able to use the voluntary audit process to resolve claims already under investigation by the Department of Labor or subject to ongoing court fights.

After the six-month pilot is complete, the Labor Department plans to evaluate the effectiveness of the program before determining its next steps.

On October 4, 2018, DOL announced that they are extending the PAID program until April 4, 2019.

*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.

*Field Assistance Bulletin No. 2018-4 (WHD)*

On July 13, 2018, the Wage and Hour Division issued Field Assistance Bulletin, No. 2018-4, “Determining whether nurse or caregiver registries are employers of the caregiver.” The Field Assistance Bulletin provides guidance concerning the Wage and Hour Division’s interpretation of independent contractor status with respect to determining whether home care, nurse, or caregiving registries are employers under the Fair Labor Standards Act.

*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 effectively 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.

*National Labor Relations Board*

*NLRB General Counsel Memorandum GC 19-02 (NLRB)*

On December 7, 2018, the NLRB's general counsel issued Memorandum GC 19-02, "Reducing Case Processing Time." Memorandum GC 19-02 directs the board's regional offices to put in place new protocols that will reduce the time between receiving a charge and disposing of a case by 5 percent in each of the next four years and scraps older "Impact Analysis" system that prioritized cases deemed to have the most significant impact, while allowing longer deadlines for less urgent disputes.

*NLRB General Counsel Memorandum OM 19-05 (NLRB)*

On March 13, 2019, the NLRB's general counsel issued Memorandum OM 19-05, "Noting Respondents Failure to Cooperate with ULP Investigations in Subsequently-Issued Complaints." The memo limits regional directors' use of subpoenas to get information from companies and unions not cooperating with the agency's investigations of alleged unfair labor practices against them.

*NLRB General Counsel Memorandum GC 19-06 (NLRB)*

On April 29, 2019, the NLRB's general counsel issued Memorandum OM 19-06, "*Beck Case Handling and Chargeability Issues in Light of United Nurses & Allied Professionals (Kent Hospital.)*" This memo changes agency policy by announcing that workers who object to paying for particular union expenditures do not have to explain why they haven't been charged and give the agency evidence or investigative leads to support their allegations.