

DOL's Joint Employer Plan Highlights New Regulatory Agenda

By Braden Campbell

Law360 (October 17, 2018, 7:24 PM EDT) -- The U.S. Department of Labor is readying a rule to clarify when two businesses are joint employers under federal wage law, according to a Wednesday update to the Trump administration's regulatory road map that also includes delays to rules on overtime and workplace wellness programs.

The DOL said in its portion of the fall 2018 regulatory agenda that it will put out a draft rule on businesses' joint employer liability under the Fair Labor Standards Act in December and issue its long-awaited proposal to update the so-called white collar overtime exemption in March. The regulatory agenda is a biannual summary of federal agencies' planned and pending rulemaking.

Elsewhere, the U.S. Equal Employment Opportunity Commission pushed back to June its target for replacing rules outlining how businesses can implement workplace wellness programs without violating the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act. A Washington, D.C., federal judge said the prior rules were illegal in August 2017 but temporarily left them in place while the EEOC works on alternatives.

The DOL's planned joint employer rule will come as welcome news to employers worried about being blamed for violations they say they didn't commit. It also deals a blow to workers' advocates, who say businesses have increasingly outsourced liability for labor abuses to staffing companies and franchisees.

Businesses can be held mutually liable for violating the rights of shared workers if found to be joint employers. The DOL's current regulations say businesses jointly employ a given worker whose work for one employer is not "completely disassociated" from his or her work for another employer. The regulations give a few examples of joint employer relationships, including those in which "an arrangement between the employers to share the employee's services" exists or "one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee."

The joint employer agenda item calls these regulations outdated but does not specify how the DOL will update them, except to say the rule will "provide clarity to the regulated community and thereby enhance compliance" and "help to provide more uniform standards nationwide."

Susan Harthill, a former senior attorney in the DOL's Office of the Solicitor who recently joined management-side law firm Morgan Lewis & Bockius LLP, said the rule will clear up employers' questions about whether their relationships to other businesses make them joint employers.

“Modern workforces have many different forms and so employers obviously want to know what their rights, their responsibilities and obligations are,” Harthill said.

The National Labor Relations Board is also working on joint employer rulemaking, which was the only item the agency listed on Wednesday’s agenda. Stakeholders have until next month to comment on the board’s September proposal, which would make businesses joint employers under the National Labor Relations Act only when one has “direct control” of the other’s workers.

The agenda also shows the DOL is inching closer to updating its overtime rule, which sets the salary level under which businesses must pay workers overtime under the FLSA.

The FLSA generally requires businesses to pay employees extra when they work more than 40 hours a week, but exempts several classes of workers, including those in “bona fide executive, administrative and professional” jobs. The DOL uses a two-part test for exempt status that considers workers’ duties and their pay.

The Obama administration issued a rule in 2016 requiring businesses to pay overtime to workers making less than \$47,476 even if they otherwise qualify for the exemption, but a Texas federal judge said the rule went further than the FLSA allowed and struck it days before it would have taken effect. That decision restored a 2004 rule setting the salary level at \$23,660.

The DOL said little Wednesday about its plans for the proposal, saying only that it will be informed by input stakeholders provided last year when it issued a request for information on the Obama rule. The DOL pegged the proposal for a January release in the last regulatory agenda.

Other notable additions in Wednesday’s agenda include proposals to modernize the H-2A and H-2B immigrant work programs’ recruitment requirements and make it easier for businesses to offer multiemployer retirement plans and health reimbursement accounts, which reimburse workers for medical costs. All four proposals are due out this month.

Businesses looking for clarity on how they can encourage workers to take part in workplace wellness programs without violating the ADA and GINA will be flying blind for the first half of next year, according to the EEOC’s portion of the regulatory agenda.

This is because the EEOC now says it won’t have new rules ready until June, months after the Jan. 1 date U.S. District Judge John Bates set for their Obama-era counterparts to lose effect.

Those rules, which the EEOC adopted to bring its interpretations of GINA and the ADA in line with an Affordable Care Act provision encouraging businesses to offer wellness programs, said businesses could entice workers to take part by raising or lowering their insurance premiums by as much as 30 percent based on their participation. But these lofty penalties all but forced workers to give up private medical information protected by GINA and the ADA, Judge Bates said, directing the EEOC to come up with new, “voluntary” rules.

Wednesday’s agenda says the regulations will be “based on the court’s order” and the ACA, but does not hint at the mechanics the EEOC has in mind.

“I’m sure the agency is exploring all options in addressing wellness incentives,” said Littler Mendelson

PC's James Paretti, who was acting EEOC chair Victoria Lipnic's chief of staff. "That said, I think it's highly unlikely we will see new rules before there's a Republican majority on the commission."

He added it's "highly likely" the Senate confirms outstanding EEOC chair nominee Janet Dhillon and commissioner nominee Daniel Gade by June.

--Additional reporting by Vin Gurrieri. Editing by Kelly Duncan.