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Joint Employer, OT Rules Headline Packed Regulatory Queue

By **Vin Gurrieri**

Law360 (August 30, 2019, 6:32 PM EDT) -- As 2019 enters the home stretch, ambitious regulatory agendas laid out by the U.S. Department of Labor and National Labor Relations Board have set the stage for an active autumn that could include eagerly anticipated final versions of rules on overtime pay and joint employment.

As outlined in the Trump administration's spring unified agenda, acting Labor Secretary Patrick Pizzella and NLRB Chairman John Ring have a jam-packed regulatory slate in front of them, with some rules in their early stages and others on the precipice of being finalized.

But with next year's presidential election looming, attorneys say agencies are in a race against the clock. They'll want to move through the rulemaking process quickly to ensure regulations are finalized and take effect before a potential new administration can shift course or a newly constituted Congress can stymie the rules under the Congressional Review Act, which allows lawmakers to overturn regulations within 60 legislative days of when they are issued.

"If I were at an agency now, I'd be keeping a close eye to make sure everything gets finalized before May so that there is no chance of it being disapproved if Congress and the White House turns over in the 2020 election," said Susan Harthill, a Morgan Lewis & Bockius LLP partner who was the DOL's deputy solicitor of labor for national operations until late 2018. "You just want to make sure that there is plenty time for the rule to be promulgated, finalized and to be effective so that it can't be disapproved under the CRA."

Alfred Robinson of Ogletree Deakins Nash Smoak & Stewart PC, a former acting administrator of the DOL's Wage and Hour Division, similarly said that while the DOL likely has until around May or June to finalize items on its agenda, the "window is definitely closing as you get into the primary season."

Robinson said that Pizzella, along with DOL Wage and Hour Division Administrator Cheryl Stanton and the rest of his team, "will definitely try to finish as many of these regulatory initiatives as they possibly can because I don't think he wants to leave anything to chance."

Here, Law360 looks at five regulatory actions labor and employment attorneys should be on the lookout for.

New Overtime Rule Is Near

The centerpiece of the DOL's regulatory to-do list since President Donald Trump assumed office has been a revision of the Obama administration's since-enjoined 2016 rule updating the Fair Labor Standards Act's "white collar" overtime exemptions.

The DOL earlier this year unveiled a proposed version of the rule, which updates the FLSA's overtime exemptions for executive, administrative and professional, or EAP, workers. It subsequently drew over 100,000 comments during a notice-and-comment period that expired in May.

As proposed, the rule would hike the salary threshold for workers to qualify for the EAP exemptions to $35,308 per year, or $679 per week — up from the current $23,660 annual salary that was last updated in 2004 but lower than the Obama administration's proposed $47,476 cutoff.

The White House's Office of Management and Budget received the final rule from the DOL for review in early August, the last step in the rulemaking process before it is publicly released.

"The overtime regulations and what it's gone through since 2016 will be the most important of the wage-and-hour regulatory initiatives," Robinson said, adding that he believes "what's previewed in the [notice of proposed rulemaking] will be comparable to the final salary and total annual compensation levels."

Robinson noted, however, that there's a chance the salary levels could be finalized slightly higher than in the proposed version since the DOL would have had access to more current data than when it issued the proposed rule.

While Harthill cautioned that it's "pure speculation" to say exactly what the final rule might look like, she said it will likely hew closely to the proposed version given the relatively short time frame between when the comment period ended and when the rule was submitted to OMB.

"There are some [rules] that are clearly moving quickly, and overtime is one of them," she said. "With overtime, that was a very quick turnaround in the agency — three months after the comments close to issue a final rule."

2 Joint Employer Rules on Horizon

Besides overtime, employment observers are also paying close attention to the issue of joint employment — when two or more affiliated businesses are found responsible for the same workers — with the DOL and NLRB each having recently proposed regulations to revamp their standards.

The NLRB, taking a rare foray into rulemaking, proposed a rule last year to clarify its joint employer test under the National Labor Relations Act by undoing a 2015 standard set in a case involving waste company Browning-Ferris Industries. The NLRB's rule, if finalized, would reinstitute a pre-BFI test under which a business is only a joint employer if it has "direct and immediate control" of another's workers.

Although the NLRB didn't offer an estimate in the spring unified agenda for when the final rule may issue, the comment period on the board's proposed rule ran out in January and management-side advocates have long said it is a high priority for the agency.

“What we’re seeing generally at the board is they have moved more slowly on the rulemaking than I think they would have hoped,” Ballard Spahr LLP partner Steven Suflas said. “The management community has been waiting for the joint employer rule for quite some time, and we hope they get to [it]. … It’s one of the more important ones for the Ring board to address if indeed it’s going to be a guidepost for other administrative agencies on the issue.”

A few months after the comment period on the NLRB’s regulation closed, the DOL waded into the joint employer debate when it proposed an update to its 60-year-old framework for analyzing joint employment under the FLSA. The DOL’s proposed rule said any analysis of joint employment should focus on whether a franchisor or contractor’s actions actually affect the terms and conditions of workers’ employment.

If two businesses are deemed joint employers under the FLSA, they share responsibility for wages and liability for any pay violations. If deemed to be joint employers under the NLRA, they share liability for labor law violations and share collective bargaining obligations.

The DOL hasn’t given an estimate for when its rule might issue, but the comment period on it expired around the same time as it did for the overtime rule and another rule that changes how employers calculate a worker’s “regular rate,” the level employers use to calculate overtime.

Suflas also pointed out that while the DOL’s version of the joint employer rule “is going to have a broader application,” the NLRB’s view on the subject from Browning-Ferris “has been cited in other contexts” that make it broadly applicable in its own right.

“The DOL has a bigger footprint, but I think with the way Browning-Ferris [has been cited] more generally, that means the NLRB’s view is still going to remain important,” he said.

Tip Reg Proposal Getting Final Clearance

OMB is also in the process of giving a last look at the Labor Department’s draft proposal to revise its standards for tipped workers, a rule aimed at aligning the DOL’s regulations with a 2018 legislative rider. That congressional provision amended the FLSA to stop employers from keeping "tips received by [their] employees for any purposes," including to share them with managers or supervisors, but rolled back the parts of a 2011 DOL rule excluding nontipped workers from tip pools.

Congress’ amendment to the FLSA scaled back a prior version of the DOL’s tip pool rule — which became the subject of controversy over missteps the DOL reportedly took prior to its issuance — that would have let businesses redistribute workers' tips as they please as long as the workers are paid at least minimum wage.

The amendment blocks business owners or their management staff from dipping into workers' tips and gives workers and the DOL the power to sue businesses that violate that bar.

As part of its tipped regulation, the DOL said in the spring regulatory agenda that it will also look to revise its existing “dual jobs” regulation that lets employers pay workers who perform tipped and nontipped duties at a lower tipped minimum wage for service work as long as they pay at least the full minimum wage for nontipped tasks.

Several federal courts have recently shunned the DOL's November opinion letter that rescinded the department's "80-20 rule," a 30-year-old interpretation of FLSA tipping regulations that barred employers from paying tipped workers at a lower wage if they spent more than 20% of their time on nontipped "side work," like cleaning tables and folding napkins.

While acknowledging that the DOL rules pertaining to tips are "complicated" and don't apply to many businesses, Ogletree Deakins' Robinson said the forthcoming tip regulations "are important."

"It doesn't apply to everybody. It's sort of a narrow issue, but I think it's something that there's been a lack of clarity and consistency [on], and I think it would be good for employers if we could have clearer and more consistent guidance," Robinson said.

Drug Tests for Jobless Benefits

The DOL's Employment and Training Administration, a subagency that regulates unemployment, is close to getting OMB's approval for a final rule that would let states deny unemployment benefits to some claimants if they fail drug tests.

The rule, if finalized as proposed, would replace an Obama-era regulation that was wiped out early in the Trump administration under the Congressional Review Act.

The DOL's proposal interprets a portion of the Middle Class Tax Relief and Job Creation Act of 2012 letting states drug test unemployment applicants whose only "suitable work" is in an "occupation that regularly conducts drug testing" and deny workers benefits if they test positive for the use of controlled substances. The law leaves it up to the states to define suitable work and the DOL to compile the list of jobs that regularly drug test.

The comment period on the proposed rule expired in January, and the DOL submitted a final version to OMB for approval in early August.

Harthill pointed out that if a rule is rejected under the CRA, agencies are blocked from later issuing a "substantially similar" rule. As such, the drug testing rule is the first to come out of the DOL where the issue of whether it is different enough from a prior regulation will come into play, she said.

"The question on this rule is: 'Is it substantially dissimilar to the prior rule?'" Harthill said. "I think there'll be folks closely watching that."

--Editing by Aaron Pelc and Jack Karp.

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