

DOL Looks To Beat Congress' Review Clock With 3 New Rules

By **Vin Gurrieri**

Law360 (May 26, 2020, 8:07 PM EDT) -- The U.S. Department of Labor finalized regulations last week covering pay and overtime issues and the labor secretary's power to review administrative decisions, looking to lock in key rules before they become fair game for the next Congress to rescind.

Putting a significant dent in its regulatory backlog, the DOL finalized three notable rules that expand how certain employers can qualify as "retail" businesses to fall under an exemption to the Fair Labor Standards Act, let employers offer bonuses and hazard pay to workers with "fluctuating workweeks," and expand the secretary of labor's authority to review rulings by two legal panels that hear administrative appeals.

Those rules come just months ahead of an election in which the presidency and control of Congress will be up for grabs, leaving agencies like the DOL racing to finalize new rules so that they take effect before a potential new administration can shift course or a newly constituted Congress can step in. Under the Congressional Review Act, lawmakers can overturn regulations within 60 legislative days of when they are issued.

Morgan Lewis & Bockius LLP partner Susan Harthill, who until late 2018 was the DOL's deputy solicitor for national operations, one of the highest career positions within the agency's Office of the Solicitor, said the exact CRA deadline can be difficult to predict but is still something that federal agencies must keep in mind when there's a possibility of change in Congress and the White House.

"The administration is presumably keeping a very close eye on the potential for a CRA issue if the Democrats take the House, the Senate and the White House," Harthill said. "The CRA deadline is very hard to pin down because it's based on legislative days. It's really a moving target; it could've already passed, actually. So, the push was probably on to get the rules out by May 20 to avoid any CRA problems."

Harthill added that since congressional Republicans "used the CRA a great deal" during the early days of the Trump administration to invalidate rules that were issued late in President Barack Obama's term, it's "probably a safe assumption that Democrats might do the same thing" should the election fall their way.

Here, Law360 looks at the rules' potential impact on businesses and workers.

Path Cleared for 'Retail' Exemption

In a final rule unveiled May 18, the DOL adjusted the regulatory framework surrounding Section 7(i) of the FLSA, which allows certain employees of "retail or service establishments" who get paid mostly on commission to be deemed overtime-exempt.

The new rule withdrew from the DOL's existing regulations a partial list of industries that the agency presumed to have "no retail concept," a designation that left them unable to claim the 7(i) exemption. It also pulled a second, nonexhaustive list of businesses that "may be recognized as retail" for purposes of the exemption.

By eliminating the two half-century-old lists from the 7(i) equation, the DOL said it was promoting a more consistent approach to figuring out whether the exemption applies, noting that the lists have led to inconsistent court rulings. Moreover, businesses on the nonretail list can now potentially avail themselves of the 7(i) exemption if they meet the DOL's other criteria for applying it, the agency said.

Harthill said she believes that businesses "will take a fresh look at whether their establishments and businesses meet the exemption" in light of the new rule.

"The courts were free to not defer to the lists anyway, and now the lists don't exist, so the courts will be in a position to take a fresh look at some of the establishments that were previously listed and just apply the criteria that exist in the regulation," she said.

But Patricia Smith, who was solicitor of labor during the Obama administration and is now senior counsel with worker advocacy group the National Employment Law Project, said the rule makes it easier for employers to claim the 7(i) exemption and, like the agency's fluctuating workweek rule, tilt the deck against workers.

"The Department of Labor these days seems to think it's the Department of Commerce," Smith said. "The Department of Labor's mission statement is to protect workers, but right now what it's been doing is making it easier for employers to pay workers less."

Door Opened for More 'Fluctuating Workweek' Usage

The DOL on May 20 put out its final rule updating the agency's regulatory framework for how overtime is calculated under the FLSA for salaried workers with "fluctuating workweeks" who aren't exempt from overtime.

The rule expressly allows employers to give those workers incentive-based payments like bonuses, hazard pay and commissions on top of the fixed weekly salaries those workers already receive, with the DOL saying that such payments "are compatible" with the fluctuating workweek overtime calculation method. It also says that employers must include those added payments in the calculation of a worker's so-called regular rate of pay as required by the FLSA.

The fluctuating workweek formula lets businesses pay overtime hours at diminishing rates to workers whose hours fluctuate from week to week as long as the workers are paid a fixed salary as straight-time compensation for all the hours they work. The method makes employers pay out overtime hours at half of a worker's "regular rate," the base wages that employers use to compute overtime.

Paul DeCamp, a former DOL Wage and Hour Division administrator who now co-heads Epstein Becker Green's wage practice, said the rule offers "a clear statement that bonuses and other types of nonsalary compensation are just fine with regard to the fluctuating workweek."

"I think that as a result of this new final rule, we will see some employers adopt the fluctuating workweek where they have not used it before," DeCamp said. "But the greater effect will be seeing employees who are already on a fluctuating workweek now finding themselves receiving bonuses and other types of compensation. I think that will affect more workers than having people newly added to the fluctuating workweek."

The DOL said the final regulation would provide "flexibility" for businesses as they take measures to jumpstart operations safely amid the COVID-19 pandemic, including the flexibility to have employees work staggered shifts.

But despite the DOL's apparent support for employers' use of the fluctuating workweek, the overtime calculation method has garnered pushback from some state governments that have rejected its use, as well as plaintiffs lawyers and worker advocates who contend that the formula shortchanges workers on overtime pay. Those concerns were raised in feedback the DOL received when the rule was in the public comments phase, which prompted the agency to spend a large portion of its final rule addressing the criticisms.

Regarding criticism that any potential increase in the use of the fluctuating workweek method could result in workers receiving less pay than if they remained hourly workers who are paid time-and-a-half for overtime, the DOL said it "does not believe this scenario is likely to be widespread" if it happens at all. Instead, it insisted that "overall earnings are likely to increase" and said that businesses could in theory realize the same cost savings by cutting those workers' hourly pay as opposed to switching them to a fluctuating workweek.

"As such, the ability to switch an employee to the fluctuating workweek method should not make the employer more able or willing to reduce the employee's earnings," the DOL said in its rule. "Such an employee would be agnostic as to the method behind an earning reduction: Having the hourly wage reduced or being switched to the fluctuating workweek method with an equivalently low salary would both make the employee equally dissatisfied because the negative effect on earnings is the same."

Smith, however, told Law360 that the rule makes it easier for employers to use the fluctuating workweek, which "generally results in workers — especially low-income workers — getting less money." Employers that shift to fluctuating workweeks can save on labor costs in a less obvious way than simply doing a pay cut, she said.

"It's true that employers can cut people's salary at any time. That has a negative reaction for employees' morale," Smith said. "But if you switch to the fluctuating workweek, you're not necessarily obviously cutting [workers'] salary, and it takes a while to figure out that you're getting less money."

Labor Chief Allowed to Dip Into Review Panels' Work

The DOL finalized a rule May 19 that gives Labor Secretary Eugene Scalia and subsequent DOL secretaries "discretionary secretarial review" over decisions issued by the Board of Alien Labor Certification Appeals and the Administrative Review Board.

It was issued on the heels of a so-called secretary's order that Scalia put out in February that gave him the authority to review and potentially upend decisions by the ARB, a legal panel that hears appeals of decisions by DOL administrative law judges related to whistleblowers, immigration, child labor, workplace bias and more. BALCA hears appeals of decisions by the DOL's Employment and Training Administration regarding foreign labor certification applications.

During a virtual seminar Tuesday hosted by the Competitive Enterprise Institute, a free-market think tank, Scalia said the rule is intended to "promote accountability" to taxpayers by ensuring that the executive branch has oversight of the agency and that the labor secretary can oversee rulings made in the secretary's name.

Harthill said it isn't clear from the regulation how the labor secretary will use the newfound power, saying that time will tell how often and in what types of matters it will come into play. The labor secretary could choose to look at only cases involving novel or high-profile issues or large monetary damages, she said, or exercise the new discretionary power in all those circumstances.

"It's hard to predict what his criteria will be and how often he'll exercise his discretion," Harthill said. But she added that she doesn't expect the power to be used often, given the wide variety of other responsibilities that come with the position of labor secretary.

While L.J. D'Arrigo, co-leader of the immigration law practice at Harris Beach PLLC, similarly said that it remains to be seen how the labor secretary's newfound discretionary power will be asserted, he said he is "concerned and admittedly skeptical" about the rule in the BALCA context.

The entire immigration system has been "turned upside down" over the past four years without any changes to statutes or regulations, he said, and the DOL's rule regarding BALCA could be indicative of a broader effort to curtail immigration.

"In my more than 20 years of practice, I've witnessed more drastic changes in my employment-based immigration practice in the past few years than in my entire career," he said. "My concern is that this development provides yet another example of one-man rule to achieve an overarching policy goal of limiting immigration by investing seemingly unfettered discretion to disrupt years and years of [BALCA] precedent that employers have relied on."

D'Arrigo noted that BALCA was created in the mid-1980s to create uniformity in administrative law judge decisions related to the DOL's foreign labor certification programs, and that there "was no oversight provision" regarding the labor secretary when the board was created. And in its more than three decades of existence, the board has "developed an extensive body of precedent" that helps employers make decisions about their businesses and workforces, even if practitioners don't always agree with the board's rulings, he said.

"The reality is that Secretary Scalia has the power to impact long-standing precedent and lines of cases relied on for years by employers filing for both temporary (H-2A and H-2B) and permanent labor certifications," D'Arrigo said.

--Editing by Aaron Pelc and Kelly Duncan.