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# Fall 2018 Unified Agenda Forecasts Several Significant Employment-Related Regulatory & Deregulatory Actions

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On October 17, 2018, the Trump Administration released its Unified Agenda of Regulatory and Deregulatory Actions ("Agenda"). Reports such as these, usually issued twice a year, set forth each federal agency's forecast of its anticipated actions and rulemaking priorities for the next six-month period. It also provides estimated timelines for completion. This regulatory to-do list provides insight into the administration's upcoming priorities. The current Agenda emphasizes the Trump Administration's efforts to deregulate industry, but also includes several regulatory items of importance to employers.

Here is a summary, broken down by department, of the most significant employment-related items addressed in the Agenda.

## Department of Labor



### Wage and Hour Division

*Joint Employment.* The Obama administration took a much broader view of "joint employment" – situations in which a worker may be considered an employee of two or more separate employers. Following the lead of the NLRB, which last month issued its own proposed rule re-tightening the standard for joint employment, the DOL announced its intention to "clarify the contours of the joint employment relationship to assist the regulated community in complying with the Fair Labor Standards Act." A notice of proposed rulemaking is scheduled to issue as early as December 2018 and will hopefully modernize the method for determining joint employment in today's workplace.

*White Collar Overtime Exemption.* The DOL has listed as a priority its long-awaited rule to update the salary level for the exemption of executive, administrative and professional employees under the FLSA (the so-called white-collar exemption). It is expected to raise the threshold exemption for such employees from the historical level under the FLSA (\$23,660 annually), but not as high as the former rule adopted by the Obama administration, which would have more than doubled the minimum salary level but was enjoined by a court. The timeframe is somewhat unclear and has been pushed back twice already. The Agenda states it is now expected in March

2019.

*Regular Rate.* Under the FLSA, employers must pay covered employees time and a half their regular rate of pay for hours worked in excess of forty hours in a workweek. The DOL has stated its intent to amend its regulations “to clarify, update and define the regular rate requirements under the FLSA.” The new proposal is expected in December 2018.

*Tip Regulations.* In March of 2018, the omnibus budget bill amended the FLSA and addressed rules affecting tipped employees and so-called “tip pooling.” The DOL is expected to issue a proposed rule this month to clarify and address the impact of the 2018 FLSA amendments.

### **Occupational Safety and Health Administration**

*Tracking of Workplace Injuries and Illnesses.* OSHA proposed to amend its recordkeeping regulation to remove the requirement to electronically submit to OSHA information from OSHA Form 300 (Log of Work-Related Injuries and Illnesses) and OSHA Form 301 (Injury and Illness Incident Report) for establishments with 250 or more employees which are required to routinely keep injury and illness records. Under the proposed rule, these establishments would be required to electronically submit only information from the OSHA Form 300A (Summary of Work-Related Injuries and Illnesses). OSHA also proposed to add the Employer Identification Number (EIN) to the data collection to increase the likelihood that the Bureau of Labor Statistics (BLS) would be able to match OSHA-collected data to BLS Survey of Occupational Injury and Illness (SOII) data and potentially reduce the burden on employers who are required to report injury and illness data both to OSHA (for the electronic recordkeeping requirement) and to BLS. OSHA is reviewing comments and is expected to publish a final rule in June 2019. Many entities submitted comments regarding the anti-retaliation provisions of the rule, but it is not known whether OSHA will make further changes to that aspect of the rule. Meanwhile, OSHA issued a memorandum on October 11, 2018 with the stated intent of clarifying that the rule does not prohibit workplace safety incentive programs or post-incident drug testing. Action taken under a safety incentive program or post-incident drug testing policy would only violate 29 C.F.R. § 1904.35(b)(1)(iv) if the employer took the action to penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health. This rulemaking has been moved from the Proposed Rule Stage to the Final Rule Stage.

*Powered Industrial Trucks.* OSHA has initiated rulemaking to update 1910.178, the standard which governs fork trucks, tractors, lift trucks, and motorized hand trucks, etc. Noting that its standard still relies upon ANSI standards from 1969, OSHA has acknowledged that the Industrial Truck Association has been encouraging the agency to update and expand the OSHA standard to account for the substantial revisions to ANSI standards on powered industrial trucks over the last 45 years. The current standard, OSHA explains, covers 11 types of trucks, and there are now 19 types. In addition, the standard incorporates an out-of-date consensus standard. OSHA plans to begin the process to develop a proposed rule updating the consensus standard referenced from the 1969 version of the American National Standard B56.1 to the 2016 version. This effort is in the Pre-Rule stage.

*Lockout/Tagout.* Citing recent technological advancements that employ computer-based controls of hazardous energy (e.g., mechanical, electrical, pneumatic, chemical, and radiation) conflict with the existing lock-out/tag-out standard, OSHA has initiated rulemaking (Pre-Rule Stage) by issuing a Request for Information regarding the

use of computer-based controls that have become more prevalent as equipment manufactures modernize their designs. Additionally, OSHA will evaluate harmonizing U.S. standards with those of other countries. Noting that it has seen an increase in requests for variances for such devices, OSHA expects that this RFI will be useful in understanding the strengths and limitations of this new technology, as well as potential hazards to workers.

*Hazard Communication.* OSHA has been involved in a long-term project to negotiate a globally harmonized approach to classifying chemical hazards, and providing labels and safety data sheets for hazardous chemicals. The result is the Globally Harmonized System of Classification and Labeling of Chemicals (GHS). The GHS was adopted by the United Nations, with an international goal of as many countries as possible adopting it by 2008. OSHA incorporated the GHS into the Hazard Communication Standard (HCS) in March 2012 to specify requirements for hazard classification and to standardize label components and information on safety data sheets, which will improve employee protection and facilitate international trade. The GHS, however, has been updated several times since OSHA's rulemaking. Indeed, OSHA's rulemaking was based on the third edition of the GHS and the UN recently completed the seventh. OSHA is conducting rulemaking to harmonize the HCS to the latest edition of the GHS and to codify various enforcement policies that have been issued since the 2012 standard. This rulemaking is in the Proposed Rule Stage.

*Emergency Response and Preparedness.* Acknowledging that current OSHA standards do not reflect all the major developments in safety and health practices that have already been accepted by the emergency response community and incorporated into industry consensus standards, OSHA announced that it is considering updating these standards with information gathered through an RFI and public meetings. This rulemaking is in the Pre-Rule Stage.

### **Employment and Training Administration**

*Apprenticeships.* The department will issue by the end of the year a proposed rule to establish guidelines for third parties to accredit apprenticeship programs.

### **Equal Employment Opportunity Commission**

As the EEOC has no confirmed Republican majority, the Agenda did not contain any new items from that agency. Instead, the Agenda indicated that the EEOC was pushing back from January 2019 to June 2019 rules to address permissible incentives in workplace wellness programs under the ADA and GINA (Genetic Information Non-Discrimination Act).

### **National Labor Relations Board**

*Joint Employment.* As noted above, the NLRB last month issued its proposed rule on joint employment. The comment period is scheduled to close in November, and hopefully the rule will be finalized not long thereafter. In addition, the NLRB noted in the Agenda that any possible revision of the Obama-era so-called "ambush election rules" have now been placed on its "long term action list," so no further action is expected there for at least twelve months.

