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Final Rules on Overtime, Crystalline Silica, and Persuader Agreements are Expected in the First Half of 2016

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On Friday, federal agencies released their Fall 2015 Regulatory Plans and Unified Agendas. These semiannual reports detail all agency rulemaking efforts at their various stages of development and implementation. The regulatory plan, published along with the fall edition of the agenda, identifies agency priorities and provides information about the significant rulemaking actions the agencies expect to take in the year ahead.

The surprises in this year's fall agendas lie not with the anticipated proposed and final rules themselves, but rather with their projected issue dates or lack thereof. While the stated timeframes are always more aspirational than concrete, they do indicate where the agencies are fixing their attention and/or shifting priorities.

In May 2015 the Federal Acquisition Regulatory (FAR) Council published its highly anticipated [Notice of Proposed Rulemaking](#) (NPRM) to implement the so-called "blacklisting" procedures ordered by President Obama in his Fair Pay and Safe Workplaces Executive Order ("blacklisting EO"). The Department of Labor (DOL) issued separate guidance on this EO. Taken together, the NPRM and DOL guidance are expected to impose significant obligations on federal contractors, and increase their risk of doing business with the federal government. The final rule implementing the blacklisting EO is slated for an April 2016 publication date.¹ The May 2015 NPRM announced, however, that a separate rulemaking would be forthcoming on the topic of state laws covered by the blacklisting EO. No such rulemaking has been issued, nor did a separate entry appear in the FAR Council's latest regulatory agenda.

Another rule employers are waiting for is the DOL Wage and Hour Division's (WHD) final rule revising the Fair Labor Standards Act's overtime exemptions for bona fide executive, administrative, or professional employees. According to the DOL's [Fall 2015 Statement of Regulatory Priorities](#), the WHD is currently analyzing comments to the [proposed rule](#), first announced on June 30, 2015, and plans to finalize the rule in July 2016.

The DOL's Office of Labor-Management Relations (OLMS) agenda also included some surprises.

¹ The FAR Council initially included this regulatory item on its long-term list, but revised the final rule's publication date several hours later.

The OLMS pegged March 2016 as its estimated date for issuing its controversial "persuader" rule. Proposed back in 2011, the persuader rule would both broaden the activities that trigger reporting requirements under the Labor-Management Reporting and Disclosure Act (LMRDA) and narrow those who are currently exempt. It is expected that if the final rule resembles the initial proposal, this rule would have an extreme chilling effect on attorney-client communications. Notably, an accompanying proposal that would clarify elements of labor consulting Form LM-21, required under section 203(b) of the LMRDA, is not slated to be issued until September 2016. The LM-21 form is a key element to complying with the labor consultant provisions of the LMRDA. Therefore, if the OLMS adheres to its regulatory schedule, guidance on how to comply with the new rule will be issued six months *after* the rule itself is finalized.

On the employment safety front, the Occupational Safety and Health Administration (OSHA) plans to move on its rule creating a new standard for occupational exposure to crystalline silica. The agency expects to issue a final rule setting new exposure limits by February 2016. According to OSHA, since this rule was proposed in September 2013, it has received more than 1,700 comments and heard testimony from over 200 stakeholders during public hearings.

The following provides a brief summary of other items on this year's fall agenda.

Department of Labor

The DOL is currently working on [71 regulatory matters](#), including 25 final rules, 27 proposed rule, and 19 items at the pre-rule stage. An additional 16 rules have been placed on the regulatory backburner. The agency's Statement of Regulatory Priorities outlines the five components of Labor Secretary Thomas Perez's "opportunity agenda":

- Training more people, including veterans and people with disabilities, to have the skills they need for the in-demand jobs of the 21st century;
- Ensuring that individuals have the peace of mind that comes with access to health care, retirement, and federal workers' compensation benefits when they need them;
- Safeguarding a fair day's pay for a fair day's work for all hardworking Americans, regardless of race, gender, religion, sexual orientation, or gender identity;
- Giving workers a voice in their workplaces; and
- Protecting the safety and health of workers so they do not have to risk their lives for a paycheck.

A variety of divisions within the DOL are tackling these priorities.

Wage and Hour Division

As already noted, the WHD is slated to issue its final overtime rule by July 2016. The division is also expected to move on rules implementing Executive Order 13706 ("EO 13706"), signed by President Obama on September 7, 2015, that will allow federal contractor employees to earn up to seven days of paid sick leave per year. This regulatory item was highlighted in the agency's Statement of Priorities. EO 13706 requires the DOL to act by September 2016. To this end, the WHD plans to issue a proposed rule by February 2016, and a final rule by the September deadline.

Also by February 2016, the WHD plans to issue a request for information (RFI) regarding the impact of the use of electronic devices by nonexempt employees on their hours worked. According to the agency's rule list, the purpose of the RFI is to "gather information about employees' use of electronic devices to perform work outside of regularly scheduled work hours and away from the workplace, as well as information regarding last minute scheduling practices being utilized by some employers that are made possible in large part by employees' use of these devices."

Several WHD regulatory actions remain on the long-term priority list. Rules that are not expected to be acted upon within the next twelve months are traditionally relegated to this long-term category. For example, the "right-to-know" regulation that would require employers to disclose to workers their status as employees or independent contractors and explain how their pay is calculated has not moved off this list, and has no estimated completion date.

Employee Benefits Security Administration

While several lawmakers have been actively trying to prevent the EBSA from finalizing a rule to clarify the circumstances under which a person will be considered a "fiduciary" when providing investment advice related to retirement plans, individual retirement accounts, and other employee benefit plans, the DOL considers this rule a priority:

The proposed rule includes a prohibited transaction exemption for any advice that raises any conflict of interest concerns so that the advice has to first be provided pursuant to a contract where the advisor agrees to provide the advice in the best interest of the client. The underlying principle is very simple and rooted in basic common sense: if you want to give financial advice, you have to put your clients' best interests first, and not your own. EBSA continues to review the extensive public comments submitted on the proposed rule.

While no firm date is set, the EBSA's rule list indicates the agency will finish reviewing comments on this rule by the end of this year.

Occupational Safety and Health Administration

One of OSHA's stated priorities is "developing a Final Rule that will address employers' electronic submission of data required by agency regulations governing the Recording and Reporting of Occupational Injuries." A final rule governing this electronic reporting system is scheduled to be issued in March 2016.

By the end of 2016, the agency plans to issue a proposed rule that would create an infectious disease standard. According to OSHA, this new standard would "ensure that employers establish a comprehensive infection control program and control measures to protect employees from infectious disease exposures to pathogens that can cause significant disease."

Several regulatory items are still languishing on OSHA's long-term actions list. Among them are rules requiring employers to develop and implement an Injury and Illness Prevention Program ("I2P2") and creating a column on the OSHA 300 Log to record musculoskeletal injuries.

Office of Federal Contract Compliance Programs

By the end of this year, the OFCCP has made it a priority to issue a final rule updating its sex discrimination regulations. By May 2016, the agency is expected to issue a proposed rule revising construction contractors' affirmative action requirements, as well as a final rule requiring federal contractors and subcontractors to submit summary data on the compensation paid to their employees, including data by sex and race. The latter rule was spurred by an April 8, 2014 Presidential Memorandum to Labor Secretary Perez, ordering him to propose such a rule within 120 days.

Equal Employment Opportunity Commission

According to the EEOC's Statement of Regulatory Priorities, the agency intends to finalize its two rules governing the legality of employer wellness programs under the Americans with Disabilities Act (ADA) and the Genetic Information Non-Discrimination Act (GINA) by February 2016. The EEOC only [recently published](#) its proposed rule amending GINA, and issued the proposed rule amending the ADA [last April](#).

Most of the eight items on the EEOC's [agency rule list](#) involve the federal sector and/or are administrative in nature.

Conclusion

With little more than a year left in the Obama Administration, the latest regulatory agenda reflects the last priorities that could come to fruition before the next Administration takes over. Even with the apparent indefinite timeframe for some actions, if the others listed in the regulatory agenda are indeed completed as scheduled, employers will face an onslaught of new obligations.

A complete list of federal agency regulatory plans and the unified agenda of regulatory and deregulatory actions can be accessed from the Office of Information and Regulatory Affairs' [web page](#).