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Post-Labor Day Report

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Labor Day once again served as an occasion for many policymakers around the country to focus on laws and regulations governing the workplace. The holiday capped a relatively quiet month in Washington as lawmakers left town for the congressional August recess. Even with Congress out of town, the administration and the courts made headlines with some notable workplace developments. The business community received long-awaited decisions on three significant Obama-era workplace policy initiatives—the overtime rule, the "fiduciary" rule, and the EEO-1 Report. The fate of other regulations will play out in the months ahead as the Trump administration continues to puts its stamp on workplace policy.

Overtime Rule

On August 31, 2017, the U.S. District Court for the Eastern District of Texas invalidated the 2016 Department of Labor (DOL) overtime rule. The rule, which redefined who qualifies as an exempt employee under the federal Fair Labor Standards Act (FLSA) "white collar" exemption, would have raised the minimum salary level for exempt white collar employees from $455 per week ($23,660 annually) to $913 per week ($47,476 annually). In November 2016, the court issued a nationwide preliminarily injunction blocking the rule from taking effect, a decision the DOL appealed to the Fifth Circuit.

Last month's decision converts the preliminary injunction into a final order declaring the overtime rule to be invalid for all purposes. Notably, the court made clear that the rule was enjoined before its scheduled effective date of December 1, 2016, meaning that the rule never went into effect. The court also clarified that the preliminary injunction protected all businesses and state governments nationwide from compliance with the rule. The court reasoned that the DOL lacked authority to set a salary threshold so high that it defeated the purpose of the FLSA to establish a functional test for exempt status based upon job duties. The judge noted, however, that he was not opining on the general authority of the agency to issue a salary-level test.

On September 5, the DOL moved to drop its appeal of the Texas trial court's preliminary injunction; the Fifth Circuit agreed to the DOL's request the following day. The DOL's decision to drop the appeal in light of the final judgement puts an end to the legal fight over the 2016 overtime rule. Yet, it is not the end of the story with respect to rulemaking on the white collar overtime exemption. The DOL has published a Request for Information (RFI) in advance of a likely new rulemaking. The RFI solicits input on questions related to the salary-level test, the duties test, varying costs-of-living across different parts of the United States, inclusion of non-discretionary bonuses and incentive payments to satisfy a portion of the salary-level test for highly compensated employees, and automatic updating of the salary-level tests. The feedback will serve to inform the Department in formulating a new rule, and is thus a critical component of the rulemaking process. Comments are due on September 25, 2017.

The same day the DOL dropped its appeal of the preliminary injunction, President Trump announced his selection of Cheryl Stanton as the nominee to head DOL's Wage and Hour Division, the agency overseeing the FLSA and future rulemaking on the white collar exemption. Stanton is currently the Executive Director of the South Carolina Department of Employment and Workforce. The position requires Senate confirmation, the timing of which remains uncertain.

Fiduciary Rule

Another controversial Obama-era DOL rule, the so-called "fiduciary" rule dealing with conflicted investment advice for retirement plans, has been delayed. The fiduciary rule, the related "best interest contract" exemption, and the principal transactions exemption first became applicable on June 9, 2017, although transition relief was provided through January 1, 2018. "Financial institutions" and "advisers," as defined in the exemptions, that wish to rely on these exemptions for covered transactions during this period must adhere to the "Impartial Conduct Standards" only. On July 6, 2017, the DOL published in the Federal Register an RFI to seek public input that could form the basis for new exemptions or changes to the rule. The RFI also sought input regarding the advisability of extending the January 1, 2018 applicability date.

On August 31, the DOL published another proposal to further delay the effective date. The Department is proposing a delay of 18 months "based on the evidence before it at this time while it continues to conduct this examination." Comments on the proposed delay are due September 25, 2017.

EEO-1 Report

For months, employers facing an impending deadline to comply with the revised EEO-1 Report have been wondering about its fate under the Trump administration. The revised report, finalized by the Equal Employment Opportunity Commission (EEOC) last year, would have required private-sector employers with 100 or more employees and covered federal contractors to provide information on employee compensation and hours worked in addition to demographic information. The new requirements would have applied to EEO-1 Reports for 2017, which would have been due by March 31, 2018. Many in the employer community had taken issue with the revised report's burden and questionable utility in promoting pay equity. In February, the U.S. Chamber of Commerce sent a letter to the Director of the White House Office of Management and Budget (OMB) requesting that OMB review and reject the revised EEO-1 Report for failing to satisfy the burden, benefit or confidentiality prerequisites of the Paperwork Reduction Act (PRA). Senator Lamar Alexander (R-TN), Chairman of the Senate Health, Education, Labor and Pensions (HELP) Committee, had also asked OMB to reject the revised report.

On August 29, OMB informed the EEOC that it was initiating a review and immediate stay of the new pay data collection aspects of the EEO-1. The indefinite delay of new requests for data on wages and hours worked is no doubt welcome news for employers grappling with the new reporting obligations. The EEOC may continue to use the previously-approved EEO-1 form to collect data on race/ethnicity and gender during the review and stay.

The PRA authorizes the Director of OMB to determine the length of approvals of collections of information and to determine whether collections of information initially meet and continue to meet the standards of the PRA. The memo notes that OMB may review an approved collection of information if OMB determines that the relevant circumstances related to the collection have changed and/or that the burden estimates provided by the EEOC at the time of initial submission were materially in error. The memo goes on to state that "OMB has determined that each of these conditions for review has been met." OMB found that the public did not receive an opportunity to provide comment on the method of data submission to the EEOC and that its burden estimates did not account

for the use of particular data file specifications, which may have changed the initial burden estimate. The memo also expressed OMB's concern "that some aspects of the revised collection of information lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues."

In a statement announcing the indefinite delay, Acting EEOC Chair Vicki Lipnic affirmed that the "EEOC remains committed to strong enforcement of our federal equal pay laws, a position I have long advocated." She added:

> Going forward, we at the EEOC will review the order and our options. I do hope that this decision will prompt a discussion of other more effective solutions to encourage employers to review their compensation practices to ensure equal pay and close the wage gap. I stand ready to work with Congress, federal agencies, and all stakeholders to achieve that goal.

The OMB's decision to indefinitely delay the revisions to the EEO-1 Report is unlikely to end the discussion and debate about pay equity by policymakers in Washington, D.C. and in state capitals around the country.

Wellness Regulations

The EEOC must also contend with a review of its regulations governing wellness programs in the wake of a decision by the U.S. District Court for the District of Columbia. The court found that the EEOC's final regulations on financial incentives for "voluntary" wellness programs under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) failed to pass muster under the Administrative Procedures Act (APA). In a case initiated by the American Association of Retired Persons (AARP), the judge concluded that the EEOC did not sufficiently justify its decision to permit incentives and penalties of up to 30% of the cost of an employee's health insurance coverage. The court stated that neither the final rules nor the administrative record contain any concrete data, studies or analysis that would support any particular incentive level as the threshold past which an incentive becomes involuntary in violation of the ADA and GINA. The court rejected the EEOC's rationale for adopting the 30% incentive level in order to harmonize its regulations with HIPAA, as amended by the Affordable Care Act (ACA). The court found fault with the EEOC's underlying reasoning on this point, noting that Congress chose the 30% number in a different context and that the 30% of the cost of self-only coverage level for voluntariness was in fact inconsistent with the final HIPAA/ACA wellness regulations.

In determining that the EEOC had failed to adequately explain its decision to construe the term "voluntary" in the ADA and GINA to permit the 30% incentive level adopted in both the ADA rule and the GINA rule, the court further noted that judicial deference to the agency's decision "does not mean that courts act as a rubber stamp for agency policies." Although the court remanded the rules to the EEOC for further consideration, it did not vacate the regulations, citing the potential for "widespread disruption and confusion." Nonetheless, employers will continue to face uncertainty about the operation of their wellness programs and the regulatory environment.

Immigration

Judicial and administrative action in August resulted in some long-anticipated rollback of the prior administration's workplace policy agenda. Yet, congressional action to chart a new course on workplace policy had to wait at least until after the Labor Day holiday and must now contend with an increasingly crowded legislative calendar. Lawmakers returning to Washington in September will embark on an ambitious agenda. In addition to trying to advance tax reform legislation, Congress tackled the debt ceiling and hurricane relief and now has to address other "must-pass" legislation, including, possibly, immigration-related legislation. On September 5, Attorney General Jeff Sessions announced that the Department of Homeland Security was rescinding the Deferred Action for Childhood Arrivals (DACA), with a six-month delay for current recipients. The six-month delay puts pressure on Congress to come up with a legislative solution in the months ahead.

Health Care Reform

Congress is also facing pressure to shore up the health insurance market in the wake of the failure to repeal and replace the ACA. Senator Alexander, Chairman of the HELP Committee, and Senator Patty Murray (D-WA), the Committee's Ranking Member, announced a series of bipartisan hearings in September on stabilizing premiums in the individual insurance market. The 18 million Americans who do not get their health insurance from the government or through a job need "peace of mind that they will be able to buy insurance at a reasonable price for the year 2018." Alexander continued, "While there are a number of issues with the American health care system, if

your house is on fire, you want to put out the fire, and the fire in this case is in the individual health insurance market."

Unless Congress acts by September 27, when insurance companies must sign contracts with the federal government to sell insurance on the federal exchange in 2018, Alexander said that 9 million Americans in the individual market who receive no government help purchasing health insurance and whose premiums have already skyrocketed may see their premiums go up even more. Murray called for "working across the aisle, transparency, and coming together to find common ground where we can."

To this end, on September 6, the Committee held a hearing soliciting input from state insurance commissioners. The following day, the Committee heard from governors. Two additional hearings are scheduled for September 12 and 14 to address state flexibility and to hear from other health care stakeholders.

One likely component of any bipartisan ACA legislation will be continued funding for the ACA's cost-sharing-reduction (CSR) subsidies that insurance companies provide to reduce out-of-pocket costs for deductibles and co-pays for individuals with low incomes. Because a House-filed lawsuit challenging the validity of the subsidies is pending, continued funding by the administration is far from certain.

A report by the Congressional Budget Office concluded: "Because they would still be required to bear the costs of CSRs even without payments from the government, participating insurers would raise premiums of 'silver' plans to cover the costs." Although not targeted directly at employer-sponsored health coverage, the hearings and the fate of the individual market nonetheless could have important implications for employers, including cost-shifting to employer-sponsored coverage. The U.S. Chamber of Commerce has called upon Congress to fully fund the CSR payments, and the administration to provide them.

What other provisions may be added to the legislation remains to be seen. The window of opportunity to pass "repeal and replace" legislation through the budget reconciliation process expires at the end of the month, and Republicans show no appetite to revisit their failed effort to gut and revamp much of the ACA. Therefore, any such legislation to stabilize the individual insurance market and other ACA-related changes will require 60 votes to pass the Senate, necessitating bipartisan support. Congress may therefore face mounting pressure to pass such a bill before the end of the month.

With President Trump and Congressional Republicans eager to advance tax reform, September will be a pivotal month for the White House and lawmakers to show progress on this front while also contending with other priorities. Meanwhile, confirming important slots at the National Labor Relations Board and the DOL remain on the Senate's list of unfinished business. With Congress back in session, the coming months could be key in charting the administration's new course of labor and employment policy.