

Trump Administration Freeze on Regulations

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On January 20, 2017, President Trump took a step to fulfill his campaign promise to reduce regulations on businesses when his Chief of Staff, Reince Priebus, directed federal agencies to freeze all pending regulations. Although similar moves are common for incoming administrations, the amount of contentious employment-related regulations pending either before federal courts or awaiting effective dates makes this freeze an important consideration for employers.

For example, the Department of Labor (“[DOL](#)”) promulgated an Overtime Exemption rule, which would have raised the minimum salary required for employees to qualify for a white-collar overtime exemption under the Fair Labor Standards Act (“[FLSA](#)”). The rule, which had a December 1, 2016 effective date, would have raised the minimum salary for the executive, administrative, and professional exemptions from \$23,660 to \$47,476 per year (\$455 to \$913 per week). The rule would have also raised the minimum salary for the highly compensated employee exemption from \$100,000, including commissions and non-discretionary bonuses, to \$134,004 per year. The DOL estimated that approximately four million workers would have either become immediately eligible for overtime premium pay or had their salaries raised to the new threshold to remain exempt. The rule also would have automatically increased the minimum salary threshold every three years, starting January 1, 2020, to keep pace with inflation.

A federal judge in Texas temporarily barred enforcement of the Overtime Exemption rule just one week before the rule’s effective date. The DOL appealed the judge’s order to the Fifth Circuit Court of Appeals, but that court could not consider the appeal until February. Given the current freeze on regulations, we believe the Trump Administration will choose to dismiss the appeal and take steps to withdraw the rule—at a minimum.

Although the salary increase threshold will likely never become effective, any audit conducted by an employer to determine whether its salaried positions were properly classified as exempt are still valid. The Overtime Exemption rule did not change the duties tests to determine whether a particular employee is exempt or nonexempt. Employers that recently audited their organizations in anticipation of the Overtime Exemption rule becoming effective should still consider making changes to positions or to the way it pays those employees who were treated as exempt but may not have really been performing white collar duties. They should be careful though. Those employees who become non-exempt might not like that fact and could look for the overtime they were not paid in the past. Each situation is different, and employers should consider working with their human resources professional or lawyers to consider their options.

Although the Overtime Exemption rule was the most public and visible employment-related regulation effected by the freeze, other rules are similarly in jeopardy. The DOL’s Persuader rule, which would have greatly expanded required disclosures by professionals assisting employers about

union avoidance or collective bargaining was similarly barred pursuant to a permanent injunction issued in November 2016, after President Trump was elected. Similar to the Overtime Exemption rule, the Persuader rule will die if the new administration does not pursue an appeal.

Rules to implement federal contractor disclosure obligations were similarly enjoined by a Texas judge in October 2016. Those rules would have required federal contractors and subcontractors to disclose findings of violations of federal and state labor laws and executive orders from the preceding three years when competing for and performing certain federal contracts.

An Equal Employment Opportunity Commission rule, which would have required the disclosure of compensation data grouped by sex, race, and ethnicity, will likely never become effective. It was not scheduled to go into effect until March 2018.

Finally, a recordkeeping rule promulgated by the Occupational Safety and Health Administration may also be effected by the freeze or by a later action. The “Improve Tracking Workplace Injuries and Illnesses” rule prohibits employers from requesting employees to take post-accident drug tests in many situations. The rule became effective on December 1, 2016, after a Texas judge denied a request by several trade associations for an injunction prohibiting the DOL from enforcing the rule.

For more information on this topic, please contact a member of Benesch's Labor & Employment Practice Group.

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