The Law@Work

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Occupational Safety & Health Administration

OSHA's Increased Potential Fines & Decreased Deference

By M. Scott Young & Candice S. Thomas

On November 2, 2015, President Barack Obama signed the Bipartisan Budget Act of 2015, which included a provision allowing the Occupational Safety and Health Administration to increase its civil penalties for the first time in 25 years. Section 701 of the "Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015" now permits OSHA fines to rise with inflation. These increases will take effect through interim final rulemaking no later than August 1, 2016.

Up to this point, OSHA was exempt from the requirement that federal agencies increase fines to match inflation. In addition to annual increases, the bill calls for a catch-up adjustment tied to the Consumer Price Index, dating back to the last penalty increase in October 1990. From October 1990 to September 2015, the Consumer Price Index rose 78.24 percent. With the maximum increase, the current maximum fine of $7,000 for "serious" and "other-than-serious" violations could expand to around $12,500, and the $70,000 fine for "repeat" and "willful" violations could increase to a maximum of around $125,000. The new law gives OSHA discretion to implement an adjustment less than the maximum amount.

While the new deal is not set in stone just yet, it is fully expected that OSHA will take the maximum increase. Assistant Secretary David Michaels has been advocating increased maximum penalties for years, so it seems likely that OSHA will take full advantage of this opportunity. Just last month, he commented, "Simply put, OSHA penalties must be increased to provide a real disincentive for employers accepting injuries and worker deaths as a cost of doing business." By allowing OSHA to implement inflationary increases, OSHA will join the ranks of many other

For more details on any of the topics covered in *The Law@Work*, please contact the authors via the links at the end of each article or Tim McDonald, editor-in-chief. For information on our Labor & Employment practice, please contact Stephen Richey, practice group leader.

federal agencies that are permitted to increase fines by inflation, including the Environmental Protection Agency, the Food and Drug Administration, the Federal Highway Administration and the Equal Employment Opportunity Commission.

While OSHA may have been given more latitude to increase its fines, the courts' deference to its administrative interpretations may be on the decline. In the last two terms of the Supreme Court and even in the last few months, it is becoming more apparent that some of the current justices believe that automatically affording deference to an agency's interpretation of its own regulations is no longer an appropriate approach in reviewing agency decisions.

On March 9, 2015, in *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199 (2015), the Supreme Court held that a federal agency is not required to use notice-and-comment rulemaking procedures when changing an interpretation of its regulations if those procedures were not necessary when the agency issued its initial interpretation. While the holding dealt with whether an agency (in that case, the Department of Labor) needed to adhere to the procedures before withdrawing prior contrary interpretations of legislative rules, the case has broader implications affecting agencies' interpretations of their own regulations. Historically, once a legislative regulation is in place, agency interpretations have been given so much deference under the *Seminole Rock* doctrine—finding that courts should give deference to an agency's interpretations of its regulations—that they are virtually insulated from challenges by a regulated entity. But following *Perez v. Mortgage Bankers Association*, members of the Supreme Court seem increasingly willing to reconsider this long-standing doctrine of deference once the appropriate case comes along.

And now the case is here in *Perez v. Loren Cook Co.,* 2015 U.S. App. LEXIS 17767 (8th Cir. 2015), decided on October 13, 2015. In this OSHA compliance case involving the Department of Labor, an *en banc* panel of the Eighth Circuit ruled that Secretary of Labor Thomas E. Perez's interpretation of a workplace hazards rule was not entitled to the *Seminole Rock* deference. The court also cited the 2012 Supreme Court decision in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), which noted that "[The] practice [of deferring to an agency's interpretation of its own ambiguous regulations]" undoubtedly has important advantages, but "[T]his practice also creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat[ing] the notice and predictability purposes of rulemaking.'" In *Loren Cook Co.*, the Secretary of Labor issued a $490,000 fine against a company whose employee was fatally injured by a piece of equipment breaking free from its machine and striking the employee. In addition to the fine, the secretary issued two citations for the company's failure to provide barrier guards to protect employees from ejected workpieces.

When vacating the citations and fine in *Loren Cook Co.*, the Eighth Circuit found the Secretary of Labor's interpretation of 29 C.F.R. § 1910.212(a)(1) to be unreasonable and thus, not entitled to deference. This is because (i) the secretary's interpretation of the regulation strained a common-sense reading, (ii) the secretary failed to provide evidence showing that he had consistently interpreted § 1910.212(a)(1) in the manner that he did in this case, and (iii) his announcement of such an unprecedented interpretation in the citation against the company amounted to unfair surprise. If this case is appealed to the Supreme Court, that court may decide that the *Seminole Rock* deference is no longer appropriate. In that case, the bark behind the impending penalty increases may lose some of its bite.

For more information, please contact Scott Young, Candice Thomas or any member of the Labor & Employment group.

Other Recent Publications

OFCCP Issues Final Rule on Pay Transparency for Government Contractors

New EO: Government Contractors Must Cough Up Sick Days for Covered Employees

NLRB Expands Scope of "Joint Employer" Status to Include Contractors & Franchisees

Fair Labor Standards Act

How to Prepare for Potential Changes in the Overtime Regulations

By Nancy M. Barnes

Last March, President Obama directed the Secretary of Labor to update, modernize and simplify the Fair Labor Standards Act's (FLSA's) current white collar exemption standards. According to the Department of Labor's (DOL's) calculations, the proposed rule would result in nearly 5 million workers, who are currently exempt, becoming entitled to minimum wage and overtime protection under the FLSA.

The Fair Labor Standards Act's Current Requirements

By way of background, the FLSA requires employers to pay employees minimum wage and overtime pay (one and one-half times the employee's regular rate for hours worked over 40 in a workweek). The FLSA also provides a number of exemptions from these requirements. With respect to the white collar exemptions, employees who are currently paid at least $455/week ($23,600/year) on a salary basis and whose primary duties consist of certain executive, administrative and/or professional duties, are exempt from the FLSA's minimum wage and overtime requirements. The regulations were last updated in 2004.

Proposed Rule

As proposed, the new rules would more than double the salary basis for employees to qualify for the administrative, executive, professional and computer-related occupation exemptions – raising the salary basis from $455/week ($23,600/year) to an amount "equal to the 40th percentile of earnings for full-time salaried workers," which was $921/week ($47,892/year) in 2013 and is currently projected to be $970/week ($50,440/year) in 2016. The proposed rule also raises the salary basis for the highly compensated employee exemption. Previously, an employee who made at least $100,000 per year and performed at least one exempt duty would be exempt under the highly compensated employee exemption. Under the proposed rule, an employee must now receive a total annual compensation at the "annualized value of the 90th percentile of weekly wages of all full-time salaried employees" ($122,148/year in 2013) to be eligible under the exemption. Outside salespeople would not be impacted by these changes as proposed.

In addition to the change with respect to the salary portion of the exemption test, the DOL also sought comments on the "primary duties" test because it is considering revising those regulations as well. One possibility is that the DOL will require that exempt employees spend 50 percent of their time performing exempt duties – similar to the requirements currently in place in California – as opposed to the current regulations which focus on an exempt employee's "primary duty."

Finally, the DOL requested comments from employers in the computer and information technology industry as to whether changes should be made with respect to the types of positions and duties that should be included as examples of exempt positions/duties in computer-related roles.

The public comment period for the Department of Labor's proposed changes to the overtime regulations ended on September 4, 2015. Over 250,000 comments were received, which represent a high level of interest and concern about these potential changes, especially the steep and sudden increase in the salary level required for exemption.

The two changes are also likely to accelerate an employment litigation trend in the federal court system. Federal lawsuits alleging violations of the FLSA reached 8,160 nationwide in fiscal 2014, up 8.8 percent from the previous year and the highest since 1993, according to data released in March 2015 by the Administrative Office of the U.S. Courts.

No one can be certain when the final regulations will be issued or when they will go into effect. However, the DOL has indicated that the final rule will likely be issued in July 2016, and because this is a major initiative of the Obama administration, most commentators believe that the regulations will go into effect in 2016.

Preparing for the Changes

With that prediction in mind, employers should begin to take proactive steps now to prepare for the effective date of the new regulations. The first recommendation is for the employer to complete an assessment of its current workforce with particular focus on exempt employees who do not meet the salary threshold. For those who are close to the $50,000 salary level, an employer could budget for and be prepared to raise salaries to the necessary threshold to maintain exempt status.

Most employers, however, have a number of employees who meet the duties test but are far from meeting the proposed salary threshold. There are a number of ways to address the handling of these employees once the regulations go into effect. The employer should first assess how many hours per week are actually currently worked by the employee. If the employee regularly works 40 hours or fewer, the overtime requirements should have no budgetary impact. If an employee regularly works more than 40 hours, however, there are a couple of options available. An hourly rate could be calculated that results in the same compensation over the course of the year even though the employee would collect overtime for the hours over 40 worked each week. Another alternative is to restructure the job with fewer duties being performed so that the person who becomes non-exempt can perform their assigned duties within a 40-hour workweek, resulting in no overtime. As a side note, employers are permitted to forbid employees from working more than 40 hours in a workweek without prior authorization.

Second, employers should examine and track the work of all employees who are currently exempt. Tracking is important for a number of reasons. Job descriptions should be updated to accurately reflect work that is actually being performed by the employee in that position. In addition, if the DOL makes changes that require that exempt employees spend 50 percent of their time actually doing exempt functions, an employer will want to assess whether the role will meet that new standard. In some cases, it may be possible to juggle functions and responsibilities between two or more roles such that at least one job will meet the duties requirement even if another one does not. Thus, instead of having two non-exempt positions, one may be exempt and the other not.

For most employers, these new regulations will result in at least some employees moving from exempt to non-exempt status. Formerly exempt employees often see reclassification as a “demotion” and may resent being converted to an hourly position – even if they become eligible for overtime. Employers should consider putting together a communication plan with employees to explain the conversion. Moreover, training may be required for employees who previously did not have to track their time by the hour. Other time-related issues may also have to be addressed, including working outside normal work hours, travel time and other compensable time issues.

While it appears that these changes will go into effect next year, employers currently have significant lead time to prepare for what seems to be inevitable. By putting this issue on the list of New Year’s resolutions, employers will be well-prepared to implement and budget for the changes that are expected in 2016.

For more information, please contact Nancy Barnes.

Thompson Hine Repeats 100 Percent Ranking on 2016 HRC Corporate Equality Index

For the fourth year in a row, Thompson Hine LLP earned the top rating of 100 percent and recognition as a Best Place to Work for LGBT Equality on the Corporate Equality Index (CEI), an annual survey administered by the Human Rights Campaign (HRC) Foundation. The CEI measures an employer’s commitment to policies, practices and protections pertinent to lesbian, gay, bisexual and transgender (LGBT) employees. Thompson Hine joins the ranks of major U.S. businesses that also earned the top mark this year.

Affordable Care Act

The ACA Is Here to Stay: Prepare for the Cadillac Tax

By Julia Ann Love & Stephen R. Penrod

When the Patient Protection and Affordable Care Act (ACA) was passed in 2010, employers and practitioners wondered about the so-called Cadillac Tax, which was to become effective eight years later in 2018. Many questioned whether the ACA itself would survive legal and constitutional challenges, and if so, whether the Cadillac Tax would survive to look anything like its first iteration in Section 4980I of the Internal Revenue Code (Code).

Well, the ACA has survived two U.S. Supreme Court challenges, and the Internal Revenue Service (IRS) and U.S. Department of Treasury (DOT) have recently issued two notices offering suggested guidance on the Cadillac Tax and seeking comments from interested stakeholders. As a result, unless congressional action to amend Section 4980I of the Code is successful, the Cadillac Tax will go into effect in 2018. Employers therefore need to review their employer-sponsored group health plan arrangements to determine how the Cadillac Tax will affect them in 2018 and beyond.

What Is the Cadillac Tax?

The Cadillac Tax is a 40 percent excise tax on the aggregate cost of employer-sponsored group health plan coverage that exceeds specified statutory dollar limits. For 2018, the statutory dollar limits are $10,200 for single coverage and $27,500 for other coverage.

The statutory limits are expected to be indexed for inflation and subject to an age and gender adjustment, if applicable for an employer, and higher dollar limits will apply for qualified retirees and employees who are engaged in high-risk professions or who repair or install electrical or telecommunication lines.

Aggregate Cost of Employer-Sponsored Coverage

No proposed or final regulations have been issued about determining the aggregate cost of employer-sponsored coverage for purposes of the Cadillac Tax. Two notices issued by the IRS and DOT, however, give insight into how regulators are thinking in connection with how to determine the aggregate cost of employer-sponsored coverage, and what constitutes employer-sponsored coverage.

In general, the aggregate cost of employer-sponsored coverage is to be determined under rules similar to those used for determining the applicable premium cost for continuation coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA).

COBRA premiums are determined based on the cost of coverage for similarly situated non-COBRA beneficiaries. For an insured plan, the cost of COBRA coverage is the premium charged by the insurance company for the coverage plus an administrative charge of up to two percent. For a self-insured plan, the cost of coverage can be determined by using the actuarial basis method or the past cost method and then adding an administrative charge of up to two percent.

Similarly, for purposes of the Cadillac Tax, the IRS and DOT have suggested that the aggregate cost of coverage for each employee is to be determined based on the average cost of that type of applicable coverage for that employee and all similarly situated employees. For an insured plan, the average cost of coverage is to be determined based on the premiums charged by the insurance company. For a self-insured plan, the average cost of coverage is to be determined using the actuarial basis method or the past cost method.

What Is Employer-Sponsored Coverage?

It's the million-dollar question, really. Employer-sponsored coverage, at least if the proposals announced in the notices are adopted, is:

- Coverage under any group health plan made available to an employee by the employer, which is excludable from the employee's gross income under Section 106 of the Code.
- Coverage under a medical flexible spending account (FSA).
- Coverage under a health savings account (HSA).
- Coverage under a health reimbursement arrangement (HRA).
- Coverage for executive physicals.
- Coverage at an onsite medical clinic other than an onsite medical clinic that offers only first aid and other *de minimis* medical care to employees.
- Retiree coverage.
- Coverage under a multiemployer plan.
- Coverage under arrangements providing coverage for a specified disease or illness, or under hospital indemnity or other fixed indemnity insurance (if paid on a pretax basis or subject to a deduction).

Under the notices, the following **do not** constitute employer-sponsored coverage for purposes of the Cadillac Tax:

- Coverage under which medical benefits are secondary or incidental to other insurance benefits.
- Coverage under long-term care insurance.
- Coverage under limited scope dental and vision insurance (whether insured or self-insured).
- Coverage under an employee assistance program that is an excepted benefit for ACA purposes.
- Coverage under arrangements providing coverage for a specified disease or illness, or under hospital indemnity or other fixed indemnity insurance (if paid on an after-tax basis or not subject to a deduction).

What Employers Should Do, Now

Based on all currently available guidance, employers should determine whether their group health plan arrangements will cause them to be subject to the Cadillac Tax in 2018 or in later years. If so, and if they want to avoid the Cadillac Tax, they should consider the following strategies to reduce the aggregate cost of their employer-sponsored coverage:

- Reduce benefits over time to avoid the applicable thresholds;
- Move to a full replacement high deductible health plan model;
- Implement strategies to reduce overall costs, thus reducing premium costs;
- Reduce contributions to or eliminate account-based plans such as FSAs, HRAs and HSAs;
- Eliminate executive physical programs;
- Reduce the scope of services available at onsite medical clinics to only first aid and other *de minimis* medical services; and
- Eliminate pretax specified disease or fixed indemnity insurance.

Additionally, employers should monitor further developments relating to the Cadillac Tax and be prepared to make changes to their group health plan arrangements if necessary to avoid it. Employers who ignore the Cadillac Tax risk feeling like they have been hit by a domestic luxury car when they have to pay an excise tax for providing group health plan coverage that exceeds the specified statutory dollar limits.

For more information, please contact Julia Love or Stephen Penrod.

National Labor Relations Board

NLRB OKs Electronic Union Card Signatures

By Eric S. Clark & Megan S. Glowacki

On September 1, 2015, the General Counsel of the National Labor Relations Board (NLRB) officially sanctioned the use of electronic signatures on the union authorization cards necessary to support a union's showing of interest for an election petition. Traditionally, unions have been required to collect handwritten signatures from at least 30 percent of eligible workers in order to hold an organizing election. Union organizers can now side-step this requirement, allowing workers to quickly sign an authorization card with one click of a button.

Handwritten signatures have historically been required to protect against fraud and forgery. To ensure these protections still exist in the electronic era, the NLRB established the following guidelines for proper submission by electronic signature:

- the electronic signatures must include the signer's name, email address or social media account, phone number, authorization language agreed to, date and the name of the employer;
- the signer must receive a return message confirming what he or she has submitted; and
- the union must provide a declaration attesting to the method used to validate the signatures.

The NLRB's pronouncement is the latest in a series of changes that have made it easier for unions to organize. In April 2015, the NLRB implemented its "ambush" election rules that have significantly reduced the time between submitting a petition for election and holding the election. These procedural changes, combined with the NLRB's *Purple Communications* decision, which in certain circumstances permits employees to use their employer's email system during non-working hours to engage in union activities, have significantly changed the landscape for companies who may be a target for a union campaign. While such companies may have previously been aware of organizing activities and had at least six weeks to combat a union campaign after an election petition was filed, such transparency and time are becoming rarer.

The NLRB General Counsel's holding that parties may submit electronic signatures in support of a showing of interest for union elections if certain requirements are met continues the line of NLRB actions in recent years that permit unions to more quickly organize workers and make the NLRB's election processes easier for unions.

With the onset of the electronic signature rule, union organizers are able to reach employees through the Internet or social media without ever setting foot outside company grounds. In addition, employers have no means to gauge the number of signatures being collected as a union campaign ramps up; workers could be electronically signing union cards and the employer would never know it. To avoid the pain of a surprise and quick union election, employers at risk for union organizing should prepare for an organizing drive before the election petition is ever even filed.

If you have any questions, please contact Eric Clark or Megan Glowacki.

Immigration

Changes from DOS & USCIS Create Uncertainty & Confusion for Those Pursuing Permanent Residency

By Staci M. Jenkins & Sarah C. Flannery

In recent months, the Department of State (DOS) and United States Citizenship and Immigration Services (USCIS) took steps intended to mitigate the burdens of the very long wait for a green card. The effort proved to create quite a bit of confusion, though, and worse yet, the confusion resulted in expectations of relief that quickly vanished. The DOS issued a notice in early September that would have allowed many foreign nationals to file for permanent residency in October instead of waiting many years for eligibility to file. Then, just over two weeks later, the DOS issued a "corrected" notice that resulted in many of these foreign nationals no longer being eligible to file.

Background – the Old Process

The date on which the first stage of the green card process is filed for a foreign national is called the priority date. That date sets the foreign national's place in the queue for a green card. It used to be the case that the final petition required in the green card process (I-485 petition) could be filed only when the priority date became current and eligible for final action (i.e., was at the front of the line). When a foreign national is eligible to file his or her I-485, so too can the foreign national's spouse and children under 21 years of age. Additionally, work authorization and travel authorization documents can be filed alongside the I-485.

The Change – A Dual Chart System

On September 9, 2015, DOS announced that it would move to a dual chart system that lists priority dates available for final action (i.e., at the front of the green card waiting line) and another set of priority dates eligible to file I-485s. The two charts are referred to as the Final Action Date chart and the Filing Date chart. In some cases, the difference between dates eligible for I-485 filing and final action were years.

DOS and USCIS indicated that this dual chart system will create more stability by allowing them to better predict demand and ensuring that they have enough applications in process to utilize all available visas. Meaning, by accepting petitions earlier for filing, they will have petitions in the queue for adjudication when green cards become available. The value to foreign nationals is that they will be able to file I-485s years ahead of what the old system allowed, facilitating the process of their family members obtaining work authorization.

Many foreign nationals relied on this September 9th notice and immediately requested that their petitions be prepared for filing on October 1st. Then on September 25th, the DOS issued a revised notice pushing back the dates announced in the Filing Date chart. Overall, this was met with extreme disappointment due to: a continued delay for the individuals affected, the inability to obtain adjustment-related benefits for family members, and the expenses incurred in preparing filings that were no longer eligible for submission.

Where We Are Now

The DOS will continue to issue two charts for employment-based preference cases in the Visa Bulletin. One chart will list the priority date for final action and the other will list an earlier priority date for individuals to file their applications. The USCIS will then indicate which chart may be used by foreign nationals to determine if they are eligible to file in the upcoming month. While the priority date for filing purposes is not as early as it was when the new charts were initially released in early September, the dual chart approach by DOS and USCIS does allow for earlier filings for adjustment than what occurred under the prior single chart approach. Thus, foreign nationals will likely be able to file earlier than anticipated several months ago, but not as early as the DOS led them to believe in early September.

If you have any questions, please contact Staci Jenkins or Sarah Flannery.

Ohio Workers' Compensation

Timing of Work Rule Violation Critical to Eligibility for Disability Compensation

By Philip B. Cochran

The Supreme Court of Ohio is considering an appeal which could clarify the issue of an injured worker's eligibility to receive temporary total disability (TTD) compensation when he has been terminated for violating a written work rule. In *State, ex rel. Cordell v. Pallet Cos. (2014)*, 2014 Ohio 5561, the Tenth District Court of Appeals held that the relator, James Cordell, was entitled to receive TTD for his work-related right leg fracture which occurred on February 16, 2012, despite the fact that he was terminated from employment on February 22, 2012 for violating the employer's drug free workplace policy (DFWP).

Under certain circumstances, an injured worker's voluntary abandonment of his former position of employment may preclude payment of TTD compensation (compensation paid to the injured worker when he is temporarily incapable of performing his regular job). Some work rule violations resulting in termination have been found to fall under voluntary abandonment of employment because of the rationale that an injured worker should be accountable for behavior which he willingly undertook and which resulted in his termination. Voluntary abandonment has been significantly litigated over the past 20 years.

In the *Cordell* appeal, the Supreme Court is once again asked to determine the impact of the timing of the work rule violation upon the injured worker's eligibility for TTD. Mr. Cordell's TTD was denied by the Industrial Commission of Ohio, which found that he violated the employer's drug free workplace policy by testing positive for marijuana and morphine. The commission also found that Mr. Cordell ingested the drugs **prior to the injury** and therefore the work rule violation occurred during a time in which Mr. Cordell was **not** disabled.

The Court of Appeals reversed the Industrial Commission's decision, finding that Mr. Cordell was eligible for TTD despite his termination for violating the employer's DFWP. The Court of Appeals relied upon *State, ex rel. Ohio Welded Blank v. The Industrial Commission* (2009), Tenth District No. 08-AP-772, in which the court held that the time of the discharge from employment (for a positive drug test) occurred **after the date of injury and at a time in which the injured worker was unable to return to his former position of employment**. Therefore, the court held that pursuant to *State, ex rel. Gross v. Industrial Commission* (2007), 115 Ohio St. 3d 249, an injured worker cannot be considered to have voluntarily abandoned his job when he was not capable of performing said job at the time of the work rule violation. Stated otherwise, the *Gross* court held that you cannot voluntarily abandon a job that you are not capable of performing.

The employer in *Cordell* argued that the date of the work rule violation was when the marijuana and morphine were used, not the date of the drug test or the date of termination. The employer argued that in *State, ex rel. Paysource USA, Inc. v. Industrial Commission* (2009), Tenth District No. 08-AP-677, the Industrial Commission approved TTD because the injured worker's positive drug screen (cocaine) and his termination (DFWP violation) both occurred after the injured worker had become disabled from his job. The *Paysource* court described the commission's analysis as "seriously flawed" because the commission viewed the work rule violation date to be the date of the positive drug test instead of the date of ingestion or "use" of the cocaine. The court held that the drug test was only the means of detecting the use of an illegal substance; the prohibited conduct (work rule violation) was the injured worker's use of cocaine, which occurred prior to the date of injury when the injured worker was not disabled. Relying upon *Ohio Welded Blank* and *Gross*, the Tenth District Court of Appeals found in favor of Mr. Cordell that he did not voluntarily abandon his job and was therefore eligible to receive TTD. Therefore, the timing of the work rule violation is critical to a finding of voluntary abandonment. We appear to be at a crossroads for drug policy violations and the voluntary abandonment doctrine as the Supreme Court considers this issue in *Cordell*.

With any questions, please contact Phil Cochran.