Federal Regulations Update

EXECUTIVE ORDER: Fair Pay and Safe Workplaces • DOL: Apprenticeship Program Discrimination Rule; Employment Retirement Income Security Act • OSHA • NLRB

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As the Obama administration was succeeded by President Trump, there was the expected spate of “midnight regulations” by the outgoing administration and beginning steps to undo that legacy.

In the weeks preceding the inauguration of President Trump, several “midnight” regulations went into effect or were announced. In the weeks after the inauguration, Congress and President Trump went about reversing those actions.

EXECUTIVE ORDER 13673

The Fair Pay and Safe Workplaces Executive Order (EO 13673) was scheduled to go into effect in late 2016. However, the regulations implementing EO 13673 were enjoined by a federal district court. That action presaged the eventual demise of implementing the regulations.

In March 2017, both houses of Congress jointly moved to rescind those regulations. That action was taken pursuant to the Congressional Review Act (CRA). Once the joint resolution was signed by President Trump, the regulations were nullified. Furthermore, the regulations cannot ever be reissued by the Executive Branch absent legislative authorization.

The rescinded regulations would have required government contractors to disclose “labor law violations,” prohibited mandatory predispute arbitration agreements with employees, and make disclosures to employees and independent contractors regarding certain facts about their employment status and how they were paid.
The last remaining action to undo EO 13673 was for President Trump to rescind the executive order itself.

**DOL**

**Apprenticeship Program Discrimination Rule**

In late December 2016, the Department of Labor (DOL) finalized a rule expanding nondiscrimination and affirmative-action requirements in apprenticeship programs registered with the DOL or state apprenticeship agencies.

In 1937, the National Apprenticeship Act authorized the DOL to develop and enforce labor standards in certain apprenticeship programs. The nondiscrimination requirements had not been updated since 1978. The rule prohibits discrimination based on age (40 and older), genetic information, sexual orientation, and disability, in addition to race, color, religion, national origin, and sex (now including pregnancy and gender identity).

The rule establishes new record-keeping procedures, as well as self-identification processes. The provisions of the rule were to be implemented over a two-year period.

**Employment Retirement Income Security Act**

Despite repeated court cases and even a broad hint of a presidential delay, the long-anticipated fiduciary rule was still scheduled to go into effect in April 2017. Then, in early April, the DOL officially delayed implementation of the rule until June 9, at the earliest. On June 9, it put the rule into effect, at least through 2017.

In April 2016, the DOL issued final regulations to hold financial advisers to a high fiduciary standard—the customer’s best interests when selling products for retirement accounts. The purpose of the regulations was to try to prevent excessive charges to the public on investments that are not in their best interests.

In February 2017, President Trump issued an executive order directing the DOL secretary to determine whether the new regulations impaired the public’s access to retirement information and financial advice. If the secretary determines there is an impairment, the secretary has been directed to rescind or revise the regulations. That action would be subject to the public-notice-and-comment requirements of the Administrative Procedure Act (APA).

On March 2, 2017, the DOL formally proposed to delay the rule for 60 days, from April 10 to June 9. It also announced a backup plan to
cover the contingency of a delay issuing after April 10. The DOL stated it would not temporarily initiate any enforcement action against an adviser or financial institution if they were not in compliance with the rule. While parts of the rule have gone into effect, the DOL continues to study the issue.

**OSHA**

The Occupational Safety and Health Administration (OSHA) issued in December 2016 a final rule requiring companies to keep records of workplace injuries for five years after the injuries occur.

The final rule was consistent with OSHA’s long-standing practice known as the “Volks rule.” That practice had been disrupted by a 2012 federal appellate decision that held that the practice was contrary to the Occupational Safety and Health Act’s (OSHAct) six-month statute of limitations. The new final rule was intended by OSHA to formalize its claim to “continuing violations” under the OSHAct.

The cycle continued in March when the House of Representatives voted under the Congressional Review Act to overturn the final rule. The Senate then passed HR 83 nullifying OSHA’s rule. Once President Trump signed the resolution, the OSHA rule was eliminated.

A second OSHA rule that has seen a great deal of pushback was its electronic record-keeping rule. That rule, which went into effect on December 1, 2016, requires employers to electronically file reports of workplace injuries and illnesses. Despite employer claims that the electronic record-keeping requirements are burdensome to employers, courts have, thus far, allowed the rule to go into effect.

The electronic record-keeping rule has a no-retaliation component. Under that aspect, OSHA has taken the position that automatic post-accident drug testing, not required under a federal or state drug testing program, would prevent employees from reporting accidents and injuries. OSHA’s position is that employers must have some “reasonable basis” for believing the accident has some relationship to an injured employee’s drug use. A third OSHA rule, allowing unions to accompany OSHA inspectors even when employees are not represented by a union, has been withdrawn.

**NLRB**

The National Labor Relations Board (NLRB) proposed and implemented a Final Rule to reflect modern technology and to eliminate some “legalese” in its rules and regulations. The Final Rule was deemed a procedural rule
not subject to the Administrative Procedure Act’s notice-and-comment requirements. It went into effect in March 2017.

In general, the Final Rule streamlines filing practices, changes all time periods to multiples of seven days, changes the requirements for extensions of time, and modernizes the oft-antiquated language of the rules and regulations.

The great unknown is how the NLRB would apply the Final Rule. In recent years, it has applied strict compliance standards to enforcement of its “quickie-election” rule. There is concern that similar compliance standards would adversely affect parties’ rights in NLRB proceedings. An impending Republican majority on the five-member NLRB and a likely Republican general counsel will infuse a strong dose of realism to enforcement of these new procedural rules.

In recent days, the DOL has signaled its intention to withdraw (and possibly replace) the overtime rule that had been scheduled to go into effect in December 2016; began the process to rescind the enjoined “persuader rule;” and revoked Administrator’s Interpretation of the Fair Labor Standards Act definitions of “independent contractor” and “joint employer.” Given the Trump administration directive that for every new regulation, two regulations will have to be abolished, it is unlikely there will be many new substantive regulations in the coming years. What is not known is how many existing regulations will see the axe.

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