

LEGISLATIVE UPDATE

October 2016

Groups Seek to Stop Expansion of Overtime Rules

As previously reported here, the Department of Labor's expansion of overtime rules for employees earning a salary of less than \$913 per week is set to take effect on December 1, 2016. Employers are scrambling to figure out how to handle this change, which doubles the minimum wage amounts for employees to be exempt from overtime provisions.

Meanwhile, 21 states, including Ohio, and 50 business groups have filed two separate but similar lawsuits to delay or prevent the rules from becoming effective. Both lawsuits have been filed in the Eastern District of Texas and are pending before U.S. Federal Judge Ron Clark.

The lawsuit filed by the states, captioned *Nevada v. United States Department of Labor*, argues the new regulations were improperly implemented and seeks an injunction preventing their enforcement. The business groups, in a suit captioned *Plano Chamber of Commerce v. Perez*, in which several chambers of commerce have joined with national business groups including the National Association of Manufacturers, National Retail Federation, and the National Federation of Independent Businesses, make similar arguments.

In addition to complaints about the amount of the initial increase in the minimum salary threshold, the business groups argue that business will need to go through burdensome reevaluation procedures every

three years due to the automatic rate changes built into the law. It is expected that the court will issue an initial ruling before the December 1 effective date.

While businesses and states have taken their complaints to the court for determination, Congress is attempting to block enforcement of the new regulations. On

September 20, 2016, the House of Representatives voted in favor of a bill that would delay the enforcement of the regulations until June 1, 2017. That bill, titled "Regulatory Relief for Small Businesses, Schools, and Nonprofits Act" is now before the Senate.

Despite the various actions to delay or avoid enforcement of the new regulations, employers should continue to prepare for the possibility that the overtime regulations will not be delayed. Unless and until either the federal court cases rules to suspend enforcement, or the pending Act is passed into law, the overtime rules will become effective on December 1, 2016.



EEO-1 Form Changes

On September 28, 2016, the EEOC announced it will begin collecting summary pay data from employers with 100 or more employees for reporting year 2017. To give employers time to prepare this additional information, the deadline for submitting the 2017 reports will be extended to March 31, 2018. Employers with 50-99 employees will still be required to submit EEO-1 forms with sex, ethnicity, race, and job categories, but will not be required to submit summary pay information. Additional information is available on the EEOC's website: <https://www.eeoc.gov/employers/eo1survey/2017survey.cfm>

OSHA's Injury Tracking and Anti-Retaliation Rule

On July 21, 2016, the Ohio Supreme Court held OSHA modified its injury recording rule in the Code of Federal Regulations Part 1904 to require the direct electronic reporting by employers of injury and illness data to OSHA. The final rule became effective on August 10, 2016. OSHA will publish the individual employer's injury and illness data history on its public website thereby providing access to this information by employees, employers, union representatives, attorneys, and the public at large. OSHA also delayed enforcement of the anti-retaliation aspect of the final rule until November 1, 2016. The anti-retaliation provision is set forth in 29 CFR 1904.35 and requires employers to:

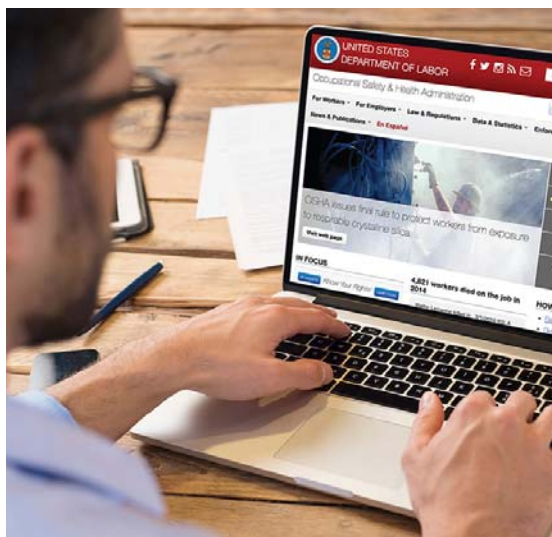
- Establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately. OSHA has indicated a procedure is not reasonable if it discourages or deters a "reasonable employee" from accurately reporting a workplace injury or illness;
- Inform each employee of the procedure for reporting a work related injury or illness; and
- Inform each employee that they have the right to report work related injuries and illnesses free from retaliation or discrimination by the employer.

The Occupational Safety and Health Act already prohibits discrimination by an employer against any employee for reporting injuries and illnesses under Section 11(C). However, OSHA previously was not able to independently take action under Section 11(C) until an employee filed a complaint within 30 days of the alleged act of retaliation. Now, under this new rule, OSHA will be able to issue citations and assess penalties against an employer for retaliation even if employees do not file a complaint.

Employers should be aware that OSHA has indicated in commentary to the rule that most post-accident drug testing policies as well as certain safety incentive programs likely violate the new anti-retaliation rule. OSHA

recommended that drug testing should be limited to situations in which the alleged drug impairment is likely to have contributed to an accident, and for which the appropriate drug test can accurately identify impairment. OSHA indicated that standard automatic post-accident drug testing policies, unless implemented pursuant to workers' compensation law, likely deter reporting without contributing to workplace safety. Similarly, OSHA contends that certain employee incentive programs may violate the new anti-retaliation rule because they discourage the reporting of work injuries and illnesses.

Employers, therefore, should review handbook policies, drug testing policies, and workplace safety incentive programs to ensure compliance with this new anti-retaliation rule.



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