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WAGE AND HOUR DIVISION

The Wage and Hour Division has been receiving a lot of attention for its rule-making initiatives. The white collar overtime rule it is drafting has aroused heated discussion even before the agency issues its proposal. Its years-long effort to bring most home care workers within the purview of federal minimum wage and overtime laws has been derailed pending appeal of a court's rejection of the home care workers rule.

WHD Prepares to Issue White-Collar Rule, Deal With Scuttling of Home Care Rule

By Gayle Cinquegrani

The Labor Department's Wage and Hour Division is occupied with two high-profile rulemakings as it works feverishly on its proposal to revise the white collar overtime exemption and its appeal of recent court rulings rejecting its controversial home care workers wage rule.

The Fair Labor Standards Act requires employers to pay most employees overtime pay at time and one-half their regular pay rate for the hours they work in excess of 40 in a workweek. However, there is an exemption from overtime pay for executive, administrative and professional employees.

To qualify for the so-called white collar overtime exemption, employees must be paid a weekly salary of at least \$455 and have job duties that include managerial responsibilities or require the use of independent judgment or advanced knowledge.

In March 2014, President Barack Obama instructed the Labor Department to revamp the white-collar rule so more workers are eligible for overtime. Obama noted that workers increasingly log in to their workplaces from home computers and mobile devices and that the exemption's low salary threshold allows employers to avoid paying overtime to workers earning as little as \$23,600 a year.

The DOL's fall 2014 regulatory agenda said the proposed rule would be issued in February, but in a Jan. 12 interview with Bloomberg BNA, Wage and Hour Administrator David Weil implied it might arrive later. "We want to get this right," Weil said. WHD wants to issue a rule "that really stands the test of time and gives clarity," he said.

Working Overtime on Overtime Rule

Weil said the WHD has done "an unprecedented level of outreach" to gather information from stakeholders and that, as Labor Secretary Thomas Perez likes to say, "We're working overtime on the overtime regulation." He wouldn't comment on the details, such as whether the new rule will retain both a duties test and a salary threshold or whether it will adopt a bright-line salary test that some observers think would be easier to understand.

Instead of shepherding the home health-care industry and state Medicaid programs through the implementation of the home care workers rule that had been scheduled to take effect Jan. 1, the DOL finds itself fighting for the ruling's reinstatement. After the U.S. District Court for the District of Columbia rejected the WHD's attempt to apply the FLSA to most home-care workers, the department filed an appeal Jan. 23 with the U.S. Court of Appeals for the District of Columbia Circuit (*Home Care Ass'n of Am. v. Weil*, D.C. Cir., No. 15-05018).

After the U.S. District Court for the District of Columbia rejected the WHD's attempt to apply the FLSA to most home-care workers, the department filed an appeal Jan. 23 with the U.S. Court of Appeals for the District of Columbia Circuit.

The rule, which represented the culmination of several years of work and planning by the agency, would have covered all home-care workers, including live-in workers, who are employed by a third party such as a home health-care agency, regardless of their job duties. The rule also would have applied to workers who are employed directly by the consumer or consumer's family primarily to perform medical duties or domestic duties that benefit other household

members.

The only workers who would have remained exempt from the FLSA's minimum wage and overtime provisions would have been those employed directly by a consumer or consumer's family to provide companionship services such as playing cards, visiting with neighbors and taking walks.

The district court eviscerated the rule, however, with a Dec. 22, 2014, decision that invalidated the part of the rule that excluded third-party employers from taking advantage of the companionship exemption and a Jan. 14 decision that vacated the rule's definition of companionship services (*Home Care Ass'n of Am. v. Weil*, D.D.C., No. 1:14-cv-00967).

DOL Defends Its Rule

In a Jan. 14 statement, the department defended its rule, describing it as "legally sound" and "the right policy." The DOL said it "strongly disagrees" with both of the district court's decisions.

Another rule, the federal contractor minimum wage rule, did go into effect on schedule. Weil said the WHD is "very excited" about the rule, which raises the minimum wage for workers on federal service and construction contracts to \$10.10 per hour and indexes it to inflation in future years.

The rule applies to new contracts and replacements for expiring contracts that are solicited or awarded on or after Jan. 1. Weil said the WHD is doing outreach via fact sheets, posters, the DOL website and prevailing wage seminars attended by federal contractors.

The WHD realizes that no matter how successful it is in collecting back wages from employers that didn't pay their workers adequately, the crucial part is ensuring the workers actually receive the back pay owed to them, Weil said. "We take this issue really seriously. That's certainly a top priority for me in the coming year."

The WHD collects wages on behalf of workers and holds the payments in an account until it locates the workers. To make it easier for workers and worker advocates to find out whether the WHD is holding back-wage payments for them, the agency is developing a website called the Workers Owed Wages (WOW) System. The WOW system is intended to be user-friendly and will be available in Spanish as well as English.

A lot of workers "are difficult to find," according to Weil. Consequently, he said, the WHD has a consulate partnership program with 11 countries that helps it locate foreign workers who might have returned to their native country.

Pondering Predictable Scheduling

An emerging issue beginning to grab the agency's attention is predictable scheduling—the concept that workers should have some rights to a predictable, stable work schedule, or at least to know in advance what their work schedule will be.

Proponents say that without predictable schedules, workers find it difficult to arrange for child care and transportation and to hold a second job or take classes to improve their careers.

"We're looking very actively at that issue now. It's popping up on our radar screen," Weil said. "It does raise big work life balance issues." He said, "It's an open question" as to whether the FLSA covers predictable scheduling.

Computerization may provide opportunities for workers to give input into their work scheduling, according to Weil. For example, he said, workers might be able to go online to check the work shifts for which their employer needs coverage and then request schedule changes. Weil said the WHD is pondering how technology can be used more effectively to meet the needs of both workers and employers.

The agency also incorporates technology to maximize its human resources by analyzing enforcement data to decide where to deploy its staff. "We don't have nearly enough investigators," with only "a little over 1,000 investigators" to monitor 7.3 million establishments in which 135 million workers work, Weil said. "We have to grapple with limited resources," so "strategic enforcement and outreach" becomes an "absolutely essential activity."

Increasing Targeted Investigations

Therefore, the WHD is increasing the number of investigations it opens based on the statistical likelihood of noncompliance in a specific industry or by a specific employer (called targeted or directed investigations) instead of relying only on investigations opened in response to specific complaints from workers, Weil said. Most employers try to comply with the law, he said, but "we have a subset of employers that are not only violating the law but retaliating" against workers.

In fiscal year 2014, approximately 43 percent of WHD investigations were directed rather than complaint-driven, up from only 27 percent in fiscal 2010, Weil said. The targeted approach seems to be working, he said, because in "more and more of those proactive investigations, we find real problems." He said, "We're being much more sophisticated" in targeting. He noted the amount of back wage findings has been increasing consistently during the past few years, even though the WHD has been concentrating on lower-wage workers.

Robert Boonin, a partner with Dykema Gossett PLLC in Detroit and the chair of the Wage and Hour Defense Institute, talked to Bloomberg BNA Jan. 15 about the WHD's recent activity. "A lot of employers are very, very concerned" about the upcoming white collar overtime rule, he said. If the WHD dramatically increases the salary threshold that exempts workers from overtime, "that's going to make a lot of people in a lot of industries non-exempt. That's going to change how a lot of industries operate," he said. "I think it will hurt a lot of businesses and not have as big an upside as the administration thinks," Boonin said. "The smaller ones just won't be able to afford the additional cost," he said.

Boonin said the Labor Department is "being very aggressive" in its enforcement of overtime and prevailing wage laws. "I think the courts are going to push back" in some cases, such as those in which the DOL goes against franchisers as well as franchisees, he predicted.

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