

PUBLICATION

Trump's DOL Working Overtime to Change Obama-Era Policy

June 08, 2017

Although the Trump Administration's Department of Labor (DOL) had been off to a slow and shaky start, Secretary R. Alexander Acosta is wasting no time. Exactly 40 days since his swearing in, yesterday Acosta withdrew the Obama Administration's 2015 and 2016 informal guidance on joint employment and independent contractors. Although not law, the guidance provided strict interpretations of the Fair Labor Standards Act (FLSA) and Migrant and Season Agricultural Worker Protection Act's definitions of "employ," "employer" and "employee," as well as higher scrutiny of joint employer status. The 2015 guidance essentially posited that virtually all workers were employees, creating additional barriers for upholding independent contractor status. The 2016 guidance followed the *Browning-Ferris* decision, finding a company and its contractor were joint employers even where the company did not exert control over workers' terms and conditions, and continued down that path to find joint employment more often than not.

Lifting the guidance does little to change the actual law – the standards set forth in the governing statutes, regulations and interpretive case law still control – but serve more to provide insight into Acosta's regime. In less than six weeks on the job, the guidance withdrawal takes an employer-friendly position. Yesterday Secretary Acosta also testified before the House's Subcommittee on labor regarding the DOL's budget. Among his comments, Acosta suggested that the rulemaking process for the DOL's new Fiduciary Rule was improper. The rule is scheduled to take effect on Friday, June 9, 2017, and while he acknowledged that it is unlikely he can delay the effective date beyond this Friday, the Secretary alluded to potential changes in the future. Indeed, he testified that the White House OMB requested information asking stakeholders for feedback on the Fiduciary Rule, and that the agency would likely send a similar request relating to the overtime rule.

It is clear there is much more to come from Secretary Acosta and the DOL and at a rapid pace. Based on yesterday's events, it is likely that his positions will be far more employer-friendly than the previous administration. Stay tuned!