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Reading the Employment Law Tea Leaves: What Can Employers Expect in 2019?

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While it is always risky to attempt to predict the future with any certainty, employers trying to read the tea leaves for 2019 can be sure of at least one thing – significant changes to employment law are coming. Here are some of the most important developments to monitor in 2019.

Overtime Exemption Rule

One of the most anticipated developments for the new year is the expected announcement from the U.S. Department of Labor (DOL), regarding changes to the overtime exemption rules. The DOL plans to reveal its position on the overtime exemption issue in March of 2019. Following a ruling by a Texas federal judge striking down the proposed increase to overtime exemption salary requirements in 2017, the DOL has not yet declared its position on the overtime exemption issue. Many experts watching this area expect the DOL to increase the minimum salary amount for exemption from overtime by a more modest amount than the prior Obama-era proposed rule that sought to increase the exemption amount to an annual salary of $47,476.

"Joint Employer" Definition

In addition to changes in wage and hour exemption regulations, employers can also anticipate adjustments to the definition of a "joint employer" from the National Labor Relations Board (NLRB), as well as the DOL. The NLRB proposed a new rule last September that would redefine the joint employer relationship. The comment period for the new rule had been expected to close in December of 2018, with the final rule to be issued sometime in 2019.

The proposed regulation would create a joint employer "of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction." As the NLRB has framed it, a joint employer "must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another employer's employees in a manner that is not limited and routine."

The new definition would narrow the scope of joint employer relationships, making it more difficult for an employee to demonstrate such a relationship existed. It would overrule the Board's 2015 *Browning-Ferris Industries* decision holding that a joint employment relationship could exist "even where one company only has the right to exert indirect or potential control over the terms and conditions of another company's employees." The proposed 2019 definition would reestablish the joint employer definition that existed for many years prior to the *Browning-Ferris* decision. The Obama-era decision in *Browning-Ferris* had made it easier for employees of temporary agencies and franchises to seek to unionize.

However, in a late 2018 decision issued on December 28th, the D.C. Circuit Court of Appeals issued a ruling in the *Browning-Ferris Industries of California, Inc. v. NLRB* case that partially upheld the Obama-era standard of the "right to control" employees and "indirect control" of an employee's terms and conditions of employment. This decision sends a cautionary signal to the NLRB to consider any narrowing of the common law meaning of joint employer carefully, lest the courts determine that the agency has overstepped the bounds of its rulemaking authority.

In light of the D.C. Circuit's decision and the "unique circumstance" the case presents, the NLRB has extended the comment period for its proposed rule on joint employers until January 28, 2019 with the reply period extended to February 11, 2019. Thus, we can predict that the debate regarding the appropriate scope of the definition of joint employer will continue to evolve this year.

The DOL is also expected to update its stance on joint employers and move to a definition more in line with the NLRB's proposed rule. However, the DOL has not yet published a proposed rule on the issue at this point, so companies will need to wait a bit longer to see its final proposal. Industry analysts predict that the DOL will also move to a rule that requires a joint employer to share the role of determining the essential terms and conditions of employment and to *actually* exercise such control. It is not yet clear how any changes to the NLRB's rule in the wake of the D.C. Circuit's decision in *Browning-Ferris* will affect the DOL's stance on the joint employer issue.

Deference to Agency Regulations

In addition to changes in wage and hour and labor regulations, the U.S. Supreme Court will issue a ruling in 2019 that may clarify how much deference courts must give to agency regulations. This ruling could be significant for employers if the Supreme Court holds that courts have given ambiguous agency regulations and informal rulings too much deference in the past. The Court agreed to hear a case called *Kisor v. Wilkie* that will review whether federal agency regulations and informal guidance are entitled to the high level of deference courts have previously been granting them. In the case involving a denial of veterans' disability benefits, the lower court deferred to the Department of Veterans Affairs' interpretation of its own ambiguous regulation, relying on another Supreme Court decision, *Auer v. Robbins*. In *Auer*, the Supreme Court held that courts must defer to an agency interpretation of its own ambiguous regulation as long as the interpretation is reasonable. If the Supreme Court overrules *Auer*, federal agencies will need to be much more specific in providing clear guidance to covered entities regarding regulated conduct. Within the employment arena, this means that courts may rely less on informal guidance or opinions, in addition to vague regulations from agencies such as the Equal Employment Opportunity Commission (EEOC), DOL, and NLRB. This could be an improvement for employers over the current regulatory climate by requiring agencies to provide clear guidance on the nature of prohibited conduct.

States and Local Laws

In addition to expected announcements from key federal agencies and the courts relating to employment issues, employers will need to be vigilant about complying with state and even local laws pertaining to issues such as leave, pay, and harassment. States like New York and Delaware have begun enacting laws requiring employers to train employees regarding sexual harassment and adopt anti-harassment policies. Further, many states are contemplating revising wage and hour laws or have already done so. In 2019, ***twenty*** different states, from California to Maine, are raising minimum wages through state legislation and ballot initiatives. For example, the minimum wage for employees in New York City working for employers with 11 or more employees will increase to $15 per hour. Massachusetts is also increasing its minimum wage from $11 an hour to $15 an hour over five years. Ballot initiatives in both Arkansas and Missouri helped to usher in increases in the minimum wage in those states. Finally, the movement toward required paid leave continues, as a number of new states and cities are enacting laws or municipal codes requiring various forms of paid leave. For example, Michigan joins states like Maryland, Rhode Island, and California in requiring private employers to provide paid sick and safe leave beginning in 2019.

As more and more states enact laws in these areas, we can expect additional states to follow suit. Although the future may be hard to predict, based on these trends, employers can expect significant developments in the wage and hour, leave, and harassment arenas to continue to emerge in 2019.

For assistance in understanding how these developments may affect your company, contact any member of Baker Donelson's Labor & Employment Group.