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School Law FYI

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Federal Agency Updates with the DOL (FLSA Exemptions) and the USCIS (I-9 Forms)

BACKGROUND

In our May 2016 FYI Newsletter, we reported that the Department of Labor (Department) published a final rule (2016 Final Rule) to update regulations under the Fair Labor Standards Act (FLSA). The Department made these changes in light of President Obama's directive to "update and modernize" the overtime exemption rules under the FLSA. The 2016 Final Rule made a number of changes to these exemptions, including increasing the salary threshold for certain exemptions generally from $455 per week to $913 per week. The 2016 Final Rule was to be effective on December 1, 2016.

However, the effective date of the 2016 Final Rule was delayed due to pending litigation. In our November 2016 School Law Update Newsletter, we reported that a group of states had sued the Department in federal court to challenge the 2016 Final Rule. On November 22, 2016, a federal district court judge granted an emergency injunction to stop the new regulations from taking effect. *See Nevada et al. v. U.S. Department of Labor*, 218 F.Supp. 3d 520 (E.D. Texas 2016). The ruling barred the implementation of the 2016 Final Rule nationwide. The Department appealed this decision on December 1, 2016, to the U.S. Court for Appeals for the Fifth Circuit. As a result, employers have been in a wait-and-see mode, pending the outcome of any final decision by the Fifth Circuit.

Since that time, Donald Trump was inaugurated as President on January 20, 2017, and Alexander Acosta was sworn in as Secretary of Labor on April 28, 2017. Of course, with a new federal administration, there are changes. In Executive Order 13777, President Trump tasked federal agencies with identifying regulations for repeal, replacement, or modification. Consistent with this Order, the Department is reviewing the 2016 Final Rule with a focus on lowering regulatory burden.

NEW DEVELOPMENT – REQUEST FOR INFORMATION ON POSSIBLE NEW REGULATIONS

On July 26, 2017, the Department of Labor published a Request for Information (RFI) seeking input from the public concerning the regulations related to the exemptions. The purpose of the RFI is to gather information for formulating a proposal to revise the exemption requirements. The RFI is a strong indication that the Department will likely abandon the 2016 Final Rule issued under President Obama. All public input is due on September 25, 2017. The Department stated that, in light of the pending litigation in Texas, it decided to issue the RFI rather than proceed immediately to a notice of proposed rulemaking.

In seeking public comment, the Department acknowledged concerns that the salary level in the 2016 Final Rule was "too high." In the RFI, the Department has requested responses to eleven sets of comprehensive questions. Some of the questions include the following:

- Should the regulations contain multiple standard salary levels? If so, how should these levels be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method?

- Should the Department set different standard salary levels for the executive, administrative, and professional exemptions?

- Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer be preferable to the current standard test?

- Does the salary level set in the 2016 Final Rule work effectively with the standard duties test or does it eclipse the role of the duties test in determining the exemption status? At what salary level does the duties test no longer fulfill its historical role in determining exempt status?

These questions show that the Department will be analyzing a number of different aspects related to the salary threshold (including whether it should apply differently depending on the employer, region, and position) and the duties tests (including whether the duties requirement should be sufficient without meeting any salary level).

NEW DEVELOPMENT – ORAL ARGUMENT SET IN TEXAS CASE FOR OCTOBER 3, 2017

The federal court case (*Nevada et. al*) discussed above is still currently on appeal to the Fifth Circuit. Both the states and the Department have filed briefs on this matter, and the Fifth Circuit has now scheduled oral argument for October 3, 2017.

Interestingly, in its June 30, 2017, reply brief to the Fifth Circuit, the Department stated that it was not advocating for the specific salary level ($913 per week) established in the 2016 Final Rule and informed the court that it would be undertaking further rulemaking to determine what the salary threshold should be. The Department requested that the court not address any legal issue concerning the salary level set by the 2016 final rule, but instead only focus on the legal issue of whether the Department had the statutory authority to set any salary level. It will be interesting to see if the court follows the Department's request, or if it issues an order to revive the 2016 Final Rule.

NEW DEVELOPMENT – DEPARTMENT REINSTATES ISSUANCE OF WAGE AND HOUR OPINION LETTERS

On June 27, 2017, Secretary Acosta also announced that the Department will be reinstating its former practice of issuing opinion letters. An opinion letter is an official, written opinion by the Department's Wage and Hour Division addressing how the wage and hour laws apply in specific circumstances presented by a party requesting the opinion. Although opinion letters are not binding authority, they provide guidance on how the Department interprets its own laws.

This resumes a practice that existed for seventy years prior to 2010. The Department abandoned the practice of issuing opinion letters in 2010 under President Obama in part because it viewed the opinion letters as not an efficient or productive use of resources. At that time, the Department stated that it would instead issue Administrator Interpretations if further clarity regarding a law was appropriate.

With this reinstatement, the Department's collection of opinion letters on specific subjects will likely increase. This development is just another example of a different approach taken under the Trump administration. Along these lines, the Department also recently withdrew two Administrator Interpretations addressing the issues of joint employment and independent contractors that were issued by the Obama administration.

CONSIDERATIONS FOR SCHOOL DISTRICT EMPLOYERS

With all of these developments coming from the Department of Labor, it is important for school districts to ensure that they are aware of how these changes impact their own employment practices. In 2016, many school districts changed salary thresholds for certain positions within the school district in light of the impending changes by the 2016 Final Rule. However, it is now unclear as to whether these changes will ever be implemented, in light of both the pending litigation in Texas as well as the potential new rulemaking in light of the RFI. We will continue to keep you apprised of any further updates.

NEW DEVELOPMENT -MANDATORY USE OF REVISED FORM I-9 STARTS SEPTEMBER 18, 2017

As a reminder, the United States Citizenship and Immigration Services (USCIS) released a revised version of the Form I-9 in July 2017, which must be used beginning no later than September 18, 2017. This revised form comes on the heels of a revision released in 2016, which was required to be used starting this past January. We highlighted those changes in the December 2016 FYI Newsletter. Many of the newer changes to the Form are subtle, focusing on revising the Form's instructions and wording, and clarifying the list of acceptable documents. In addition, the USCIS also revised the Handbook for Employers (M-274) and the Instruction for completing the Form I9, which are available on the USCIS website (https://www.uscis.gov/i-9).

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