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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

The Top Employment Regulations Of 2016

By **Vin Gurrieri**

Law360, New York (December 20, 2016, 3:33 PM EST) -- After a year that included a flood of legislative actions from the Obama administration and individual states on employers that ranged from overtime expansion to revised reporting requirements, the pendulum could be ready to swing sharply in the opposite direction under incoming President Donald Trump.

"There's been a huge amount of regulation in [the labor and employment] sector over the course of the last eight years," said Venable LLP partner Brian Turoff. "Some employers have felt like they've been trying to drink from a firehose to try and keep up."

But the incoming Trump administration and Republican-controlled Congress are expected to move quickly to reverse a majority of the Obama administration's regulatory initiatives, lawyers say.

Here, Law360 looks at some of the biggest regulatory developments that happened in 2016 and where they may be headed.

The Overtime Rule

Of all the regulations and initiatives pursued by the Obama administration in 2016, perhaps none caused as much consternation among employers than the U.S. Department of Labor's expansion of overtime protection under the Fair Labor and Standards Act to about 4 million more workers.

Finalized in May, the DOL's controversial rule doubled the minimum salary threshold required to qualify for the FLSA's white-collar exemption to $47,476 per year or $913 per week and created an index for future increases.

The rule would have offered overtime protections to workers whose salaries fell between the new threshold and the old number of $23,660.

But a contingent of 21 states, led by Nevada and Texas, along with various business groups challenged the regulation in federal court, convincing U.S. District Judge Amos Mazzant to issue a preliminary injunction in November, just days before the rule's Dec. 1 implementation.

Even though the injunction blocked the rule for the time being, its issuance so close to the date it was slated to take effect meant that many employers who had spent months preparing for the changes had to go through with any planned changes anyway or risk employee backlash.

"Large employers especially had already made preparations and changed things to start paying people overtime who fell in the gap or give them a raise to comply with the law," said Mike Delikat, leader of Orrick Herrington & Sutcliffe LLP's global employment practice. "Most of those employers can't go back because [they may harm] workers' morale and other reasons."

Similarly, Cindy Schmitt Minniti, managing partner of Reed Smith LLP's New York office, said it will

be hard for some employers "to give a raise one day and then take it away the next."

David Paxton of Gentry Locke said the outcome of the case "will be fascinating," adding that the overtime rule, of all the recent regulations issued, was the one "that has the broadest impact on employers."

"For small businesses and nonprofits, it's a major financial disaster," Paxton said. "Trying to undo it will be problematic — I don't know how it will play out."

The Persuader Rule

Finalized in March, the DOL's so-called persuader rule requires employers and their legal consultants to report any arrangement in which the consultants attempt to influence employees, either directly or indirectly, during a unionization drive.

The DOL's rule generally would have provided employees with information about their employers' use of third-party labor relations consultants, by modifying the definition of "advice exemption" under the Labor Management Reporting and Disclosure Act to include oral and written recommendations.

Before the rule, there had been an exemption carved out for "advice" in which employers only had to disclose the hiring of outside firms in the run-up to union elections when the legal consultants made direct contact with employees.

The rule also would have broadened the scope of reportable activity, such as "indirect persuasion" activities.

Several lawsuits challenged the rule. In one of those cases, Texas federal Judge Sam R. Cummings in November found the DOL's rule was unlawful, permanently blocked its implementation and awarded summary judgment to the National Federation of Independent Business and other business groups.

The law firms who led the case on the business groups' behalf recently asked a federal court to award nearly $500,000 in attorney fees.

Littler Mendelson PC shareholder Michael Lotito, whose firm led one of the lawsuits challenging the rule, said the incoming administration of President-elect Donald Trump "will have the chance to accept the court's conclusion" and forgo an appeal, which "would be the end of persuader."

New EEO-1 Reports

Besides the DOL, the U.S. Equal Employment Opportunity Commission also waded into the regulatory waters in 2016, unveiling new pay data reporting requirements in an effort to tighten the gender pay gap.

The regulation requires all businesses with 100 or more workers to submit pay data by gender, race and ethnicity on their employer information report, known as EEO-1. It is expected to cover 60,000 employers and 63 million employees, and the first deadline for the new EEO-1 report is March 2018.

The current EEO-1 report only collects data about race, gender, ethnicity and job category. The new form would build on that reporting structure to include information about the number of workers within 12 specified pay bands.

Gerald T. Hathaway, a New York-based partner at Drinker Biddle & Reath LLP, said the revised forms will mean employers will have to compile data that didn't previously have to get tracked, which will be a time-consuming process, and that the salary bands were "somewhat randomly

picked."

"The question is, what value does this data have?" Hathaway said. "It's highly burdensome on employers and not likely to yield anything meaningful."

Gentry Locke's Paxton said he believes the EEO-1 regulations are likely to be rolled back "either completely or substantively changed" but noted that the EEOC is still likely to pursue wage discrimination cases under the Trump administration.

"Over the years, even with Republican administrations, there have been certain segments of the EEOC that are not political appointees and have been aggressive in their interpretation of statutes," Paxton said.

The Blacklist Rule

In August, the Obama administration finalized its Fair Pay and Safe Workplaces rule, which required potential bidders for most federal contracts worth over $500,000 to disclose violations of federal labor law dating back three years to contracting officers, as well as related remedial efforts. Those disclosures, under the controversial rule based on a 2014 executive order, would then be taken into account in decisions on the award or extension of contracts.

Detractors, however, quickly argued that the regulation could open companies up to potential federal "blacklisting" even for otherwise minor violations, giving the regulation its label as the blacklisting rule.

"It's probably high on the incoming administration's list for executive orders [to] reverse," said Kris Meade, chair of Crowell & Moring LLP's employment practice, who noted that the incoming administration would still have to go through the normal rule-making process to rescind the regulation.

In October, U.S. District Judge Marcia Crone granted a preliminary injunction blocking the government from enforcing the rule's new reporting requirements on federal contractors and subcontractors and from the part of the rule restricting the availability of arbitration.

Still intact, though, is the rule's paycheck transparency provision, which requires contractors to provide wage statements and other information to workers.

"I'd be surprised if the [incoming administration] pursued litigation to defend it," said Joe Baumgarten, co-leader of Proskauer Rose LLP's labor and employment practice. "I'm sure they'd be very happy to see it die on the vine."

OSHA Injury Reporting Rule

The Occupational Safety and Health Administration got in on the regulatory action as well in 2016, finalizing an injury reporting rule in May that required employers to electronically submit workplace injury and illness reports and curtailed post-accident drug testing to encourage employees to come forward.

As with many of the other regulations, however, OSHA's injury reporting rule faced a legal challenge from business groups seeking to block portions of it.

But U.S. District Judge Sam A. Lindsay in late November allowed the rule to be implemented on Dec. 1, rejecting the groups' claims that they would be irreparably harmed.

Timm Schowalter of Sandberg Phoenix & Von Gontard PC said that although more high-profile regulations like overtime and persuader got widespread attention, it is actually the OSHA rules could affect the most employers.

"Most companies don't normally think of OSHA, but they can sneak up on you," Schowalter said. "It's one of the most aggressive agencies."

--Editing by Brian Baresch and Emily Kokoll.