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Department of Labor Rule Rescissions Are on the Rise

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September 11, 2017

The Department of Labor (DOL) has recently issued a number of proposed rulemakings, which serve the sole purpose of rescinding prior rules or regulations. After the delayed appointment of a Secretary of Labor, it appears the Trump Administration is making efforts to revoke a number of Obama-era rules that may not have been so employer friendly.

Tip Pooling

In late July 2017, the DOL announced its intention to reverse regulations enacted in 2011 under the Obama Administration, restricting the ability of employers who do not take a tip credit to implement tip pooling. This is good news for employers, particularly restaurants, who wish to use tip pooling as a way to increase the wages of their non-tipped staff.

While the DOL takes steps to rescind the 2011 Rule, it issued a non-enforcement policy regarding the 2011 Regulation. The 2011 Rule says that tips are the property of the employee and may not be kept by the employer or distributed to other workers even if the employer does not take a tip credit and pays all employees, even tipped employees, at least full minimum wage.

Since the 2011 Rule's publication, the Rule has been analyzed by several courts, resulting in a split among the Circuits regarding its validity, which is an issue that is now before the United States Supreme Court. While the DOL has announced that it will take action to rescind the 2011 Rule, this will take time: the DOL will have to issue a Notice of Proposed Rulemaking and solicit comments from the public. Such a notice was expected to be published in August, but has not yet been issued. Employers should continue to act with caution in the handling of employee tips until the DOL has acted; remember that individuals can still seek to enforce the regulations through private lawsuits and some state laws will still impose similar prohibitions on tip pools.

Persuader Rule

In June 2017, the DOL published a Notice of Proposed Rulemaking and proposed to rescind its prior March 2016 Rule interpreting the "advise" exemption to the reporting requirements under the Labor-Management Reporting and Disclosure Act (LMRDA). The LMRDA generally requires unions and employers to report certain arrangements and agreements with consultants or other organizations with the purpose of persuading employees either to exercise or not exercise the right to unionize. The March 2016 Rule more narrowly interpreted what constituted advice and was exempt from the reporting requirements.

In November 2016, the U.S. District Court for the Northern District of Texas issued a nationwide permanent injunction continuing its preliminary injunction against the enforcement of the rule. This injunction was imposed before the new rule was ever implemented, and therefore the rescission of the rule will have little effect on the current reporting requirements with the injunction still in place. According to the DOL, the proposed rescission is part of the DOL's "continuing effort to fairly effectuate the reporting requirements of the LMRDA." Due to the injunction, the rescission of the March 2016 Rule will likely have little effect on employers.

Drug Testing for Unemployment Compensation

Also on the chopping block this year was an August 2016 Rule pertaining to states' rights to impose drug testing requirements on applicants for unemployment benefits through state programs. In August 2016, the DOL issued a final rule that restricted the instances in which state unemployment insurance programs could have drug testing carried out as a prerequisite to the provision of unemployment benefits. The rule attempted to define "occupations" under the Middle Class Tax Relief and Job Relief Act of 2012, which set forth the limited circumstances when states were permitted to impose drug testing as an eligibility requirement for jobless benefits. Those limited circumstances included when the applicant for benefits was terminated from his prior job for unlawful use of controlled substance, or when the only suitable work available to the applicant was in an occupation that regularly conducted drug testing.

Congress passed a joint resolution disapproving the rule and President Trump signed the same into law on March 31, 2017. Following the rescission of this rule, the DOL, through acting Secretary of Labor Ed Hugler, indicated that it supported the nullification and looks forward to "examining additional flexibilities for states relative to the drug testing of persons seeking unemployment benefits." For now, states no longer have the authority to drug test applicants based on the criteria under the 2012 law, but it appears that the DOL intends to expand the prior rule and its definition of "occupations."