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The Landscape of Labor Policy: Where Are We Now?

BY DOUG KANTOR, EVA RIGAMONTI, AND MICHAELA CAMPBELL, STEPTOE & JOHNSON LLP

The first half of the year has been busy on the labor policy front, with the agencies leading the way in adjusting a number of labor standards affecting fuel marketers and retailers. The Department of Labor (DOL) released its much-anticipated, re-written overtime rule, while DOL and the National Labor Relations Board (NLRB) both put out new proposed rulemakings regarding the joint employer standard. In a win for SIGMA members, each of these proposed rules lines up with SIGMA's long-held positions on overtime and joint employment. The proposals now are much clearer than in the past and easier to follow.

What's New With the Overtime Rule?

The overtime rule is set by DOL to help determine which employees must be compensated for overtime and which employees are considered "exempt" (and do not have to be paid additional compensation for hours worked above full-time hours). The rule generally consists of two tests: a salary test and a duties test. The salary test contains a threshold below which most employees would need to be paid overtime. However, the duties test must also be considered; employees who fulfill certain duties do not need to be paid overtime. The two tests, when taken together, help to determine when an employee needs to be paid overtime.

Since 2004, the salary threshold has been set at $23,660 per year. It is generally understood that this salary is too low to keep pace with the existing labor market and should be updated. In 2016, the Obama-era DOL said it would raise the salary threshold to $47,476 per year, but a federal court blocked the rule from going into effect.

Most recently, in March 2019, DOL proposed a new overtime rule, setting the salary threshold at $35,308 per year. SIGMA believes DOL analyzed the correct data to reach this figure – which is more in line with current salaries. DOL followed the methodology recommended by SIGMA in its comments to the agency. DOL also said that bonuses could be considered for up to 10 percent of an employee's total compensation for purposes of determining their wages. SIGMA agreed that bonuses are an ▶

important part of compensation and should be considered part of total compensation for purposes of determining salary. But SIGMA told the Department it sees no need to cap consideration of bonuses at 10% of the salary threshold. Instead, SIGMA told DOL "those payments should be fully counted as part of the standard salary level."

DOL took comments on its proposal and will now work on incorporating that feedback into a final rule. It is not yet known when that final rule may be released.[1]

What is Going on With the Rules on Joint Employment?

A joint employment situation occurs when two businesses are determined to both employ the same individual and have legal responsibility for employment and labor issues relating to that employee. Joint employment can arise with staffing firms, subcontractors, franchises, and other contractual relationships among businesses. Notably for fuel retailers, contracts covered by the Petroleum Marketing Practices Act may be implicated by joint employment concerns depending on how the law is interpreted.

Traditionally, joint employment occurred when one business actually exerted control over another business's employees. Under the Obama Administration, however, the NLRB ruled, in a case known as Browning-Ferris, that a business may be considered a joint employer if it even has the potential to control the terms and conditions of a person's employment. A business could also be a joint employer if it indirectly had control over an employee. This standard makes it very difficult for businesses—particularly small businesses that may lack the resources, legal and otherwise, to determine compliance—to understand when they are and are not a joint employer.

The NLRB and DOL (which both have oversight in the labor arena) have waded into the discussion via rulemaking. At the end of 2018, the NLRB issued a proposed rule that would return the joint employer standard to the traditional definition of actual control under the National Labor Relations Act. A few months later, DOL issued a proposed rule that would also put the traditional standard into effect under the Fair Labor Standards Act. SIGMA supports the traditional definition of joint employment, as it makes clear that businesses must actually have control over an employee for joint employment to exist. Basing joint employment on the potential to control the terms of employment could create significant legal risks for all franchise and similar business relationships and could upend a large part of how the U.S. economy is structured.

The agencies took comments on the proposed rules, but neither rule has been finalized.[2]

[1] *As of the date of drafting of this article on August 9, 2019.*
[2] *No joint employer rulemaking has been finalized as of August 9, 2019.*

What has Congress Been Doing on Labor Policy in 2019?

Much of the labor policy action in the 116th Congress has taken place in the House of Representatives. In July, the House passed the Raise the Wage Act (H.R.582), which would raise the minimum wage to $15 for almost all workers in the United States While the bill passed the House with Democratic support, it is unlikely to pass in the Republican-controlled Senate.

In addition, the House Committee on Education and Labor has been working on a bill called the Protecting the Right to Organize (PRO) Act (HR.2474). That bill makes a number of changes to collective bargaining, but also contains a provision that would codify the Obama-era NLRB's joint employer standard—to the detriment of SIGMA members and many others in the business community. That bill has not yet been reported out of committee or considered by the full House.[3] If the bill moves, it could pass the House but, as with the Raise the Wage Act, would be expected to die in the Senate.

What's the Takeaway on the State of Labor Policy?

With Republicans controlling the Senate and the White House, labor policy is moving in a more business-friendly direction. As discussed above, the agencies are moving forward with rules that are in line with SIGMA's positions on the issues of joint employment and overtime—a win for fuel marketers and retailers. It seems likely that those rules could be finalized before any potential shift in government with the 2020 elections. While any final rule could be prevented from going into effect due to lawsuits, the agencies appear to be following procedures to solicit public comment and consider relevant factors in any final rule that should help insulate them from legal challenges.

In Congress, the House has been pursuing a number of more liberal labor policies, but those policies are unlikely to become law due to opposition in the Senate and White House. As such, the rulemaking process is the only likely way that labor policy will change before 2021. ★

Douglas Kantor is a partner, **Eva Rigamonti** is an associate, and **Michaela Campbell** is a legislative assistant in Steptoe & Johnson LLP's Washington D.C. office.

Steptoe & Johnson LLP is counsel to the Society of Independent Gasoline Marketers of America.

[3] *As of August 9, 2019.*