The year 2015 was a busy one for the U.S. Department of Labor, private litigants, the courts and lobbyists for both employers and employees — indeed, for anyone with an interest in the Fair Labor Standards Act, the law that establishes the federal minimum wage and the obligation to pay overtime to nonexempt workers who labor more than 40 hours in a workweek. Don’t expect less excitement in 2016!

Indeed, while many employers will be happy to see 2015 in the rear-view mirror, the drama is just beginning for other employers. One reason is that 8,781 new FLSA suits were filed in federal courts during the federal government’s fiscal year that ended Sept. 30, 2015. That’s a 7.6 percent increase over the 8,160 lawsuits filed in the previous fiscal year. Many of these new cases will settle before the parties have invested too much in attorneys’ fees and discovery costs, while some cases will be thrown out as obviously lacking merit or on procedural grounds. But some of the cases filed last year may become the next blockbuster FLSA litigations that lawyers, human resources folks and the media will be talking about when 2016 winds down. Stay tuned.

White Collar Exemptions

Even a fraudulent soothsayer with a badly scratched crystal ball could tell you that the biggest FLSA news in 2016 will be the fate of the proposed changes to the white collar exemptions. As readers should know by now, DOL published a proposal in 2015 to increase to roughly $970 per week the minimum salary needed to satisfy the executive, administrative and professional exemptions. That proposed change has not taken effect yet — indeed, the $970 figure is only an estimate of what the rule will require, notwithstanding the way the figure has been portrayed in many news stories. DOL is busy reviewing the nearly 300,000 public comments it received on the proposed regulations, and it now anticipates that final regulations will be published in the summer of 2016. Whenever it publishes the final rule, DOL will announce the actual salary figure necessary for exemption, which likely will be much higher than the current $455 per week.

Don’t be surprised if, in addition to increasing the minimum salary for exemption, the final regulations change the definition of “primary duty” to mean the activity that an employee performs at least 50 percent of his working time. Currently, there is no minimum percentage of time that an employee must devote to a duty for it to be called “primary.” It just has to be his “most important” duty. (“Primary duty” is important because a worker must meet the salary basis test and one of the duties tests to be an exempt executive, administrative and professional employee. Just being “salaried” does not make an employee exempt.)

Then again, there’s a chance that congressional intervention, bureaucratic inertia, or some as-yet-unforeseen higher priority will keep new FLSA regulations from being issued or taking effect at any time before President Obama leaves office. Only time will tell.

Home Care Final Rule

Last year was a roller-coaster for home care agencies that historically relied on the FLSA’s “companionship services” and “live-in domestic services” exemptions to control personnel costs. The short story is that DOL announced new rules in 2013 that would have prohibited the use those exemptions by third-party employers effective Jan. 1, 2015. At the eleventh hour, in December 2014, a federal district court threw out the new rules. Then in September 2015, a federal appeals court reversed the district court and reinstated the rules. Most recently, on Nov. 19, 2015, an association representing home care agencies filed an appeal to the U.S. Supreme Court seeking to kill the rules once and for all. The Court gets to decide if it wants to hear the case. If it declines, DOL will have won. If the Court does hear the case, a decision could be out by summer. In the interim, DOL is already enforcing the new rules, so employers
affected by them should get educated if they haven’t done so already.

Other U.S. Supreme Court FLSA cases

On Nov. 10, 2015, the Supreme Court heard oral arguments in *Tyson Foods v. Bouaphakeo* (No. 14-1146). The issues in that case include whether:

1) differences among individual class members may be ignored and a collective action certified under the FLSA where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample; and

2) an FLSA collective action may be certified or maintained when the class contains hundreds of members who were not injured and have no legal right to any damages.

A decision can be expected sometime in 2016.

A petition for writ of certiorari (the fancy lawyer’s term for a request that the Supreme Court hear a case) has been filed in a case called *Encino Motorcars, LLC v. Navarro*. The issue there is whether “service advisors” at car dealerships are exempt under 29 U.S.C. §213(b)(10)(A), which exempts from the FLSA’s overtime-pay requirements “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers.” The Court will announce in due course whether it will hear that case and what the schedule for doing so will be.

Independent Contractors

Finally, watch out for the federal DOL, its state counterparts and the Internal Revenue Service to continue to crack down on the misclassification of employees as independent contractors. Workers in the latter category usually do not receive fringe benefits and are not paid overtime, making it tempting for an “employer” to classify workers as contractors, not employees. Like any other FLSA violation, the damages for an improper classification can be significant, including back overtime pay, liquidated damages and attorney’s fees. Of course, this should not intimidate companies from using the independent contractor classification when it is appropriate.

Conclusion

Can we expect other FLSA developments in the coming year that we have not yet imagined, especially given that a president who has worked hard to leave his imprint on our labor laws will be winding-down his last term in office? To paraphrase Shakespeare’s soothsayer in *Julius Caesar*, there are no developments that I know will be, but much that I fear may chance. So, stay alert!

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