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Overtime Changes May Be Top Legal Trend for 2019

Proposed rule sent to Office of Management and Budget

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January 11, 2019

Human resource professionals will pay attention to what legislation moves in the Senate and the newly Democratic-controlled House of Representatives in 2019, including a possible minimum-wage increase and paid-leave proposals, and what rulemakings advance, including the overtime rule. The Department of Labor has sent the proposed overtime rule to the Office of Management and Budget (<https://www.wsj.com/articles/trump-administration-nears-release-of-new-overtime-proposal-11547146014>) (OMB), which is often a sign that public release is near, according to *The Wall Street Journal*.

Republican control of the Senate and White House may block the House's proposals, but compromise on some issues is possible. Additional employment law activity is likely at the state level, although at least 13 states now have split-party control over state government.

Overtime Rule

The biggest questions about the long-anticipated overtime rule are whether it will be issued and, if so, when, said Tammy McCutchen, an attorney with Littler in Washington, D.C. The rule's arrival at the OMB doesn't mean it is a done deal; the proposal could stall there, or Democrats on Capitol Hill may try to block it. If so, the Obama administration's blocked overtime rule

(www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/pages/judge-blocks-flsa-overtime-rule.aspx), which would have more than doubled the \$23,660 annual salary threshold to \$47,476, could be reinstated if Democrats retake the White House in 2020, she said.

Secretary of Labor Alexander Acosta has testified to Congress that the salary level below which overtime must be paid should be near \$33,000 (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/trump-acosta-dol-overtime-rule-inflation.aspx). "So, the question for the Democrats is whether they want to try to block a rule that will increase the salary level" but not by as much as the Obama administration's rule provided for, said Susan Harthill, an attorney with Morgan Lewis in Washington, D.C.

The Department of Labor (DOL) has predicted that it will issue a proposed rule in March (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/pages/hearing-march-overtime-rule.aspx). McCutchen said that, now that the DOL has sent the rule to the OMB, it is much more likely the department will publish the proposed rule then. The Trump administration will seek to issue a final rule this year to lessen the impact on the 2020 election, she predicted. But this may be a challenge, as the DOL is likely to receive "hundreds of thousands of comments" in response to the proposed rule. The Obama administration reviewed 270,000 comments before issuing the 2014 overtime rule.

Robert Boonin, an attorney with Dykema in Detroit and Ann Arbor, Mich., said experts wonder if the proposed rule includes indexing for increases in future years and different rates depending on profit or nonprofit status, geographical region or size of employer.

Business groups have expressed opposition to these proposals, McCutchen said.

Minimum Wage

State minimum wages increased in 19 states in 2019 (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/many-states-and-cities-raise-their-minimum-wage-in-2019.aspx), including in California and New York. "Many of the increases are a result of legislation that will eventually bring the minimum wage to \$15 per hour, with gradual increases," said Nancy Gunzenhauser Popper, an attorney with Epstein Becker Green in New York City.

Jennifer Robinson, an attorney with Littler in Nashville, Tenn., noted that increased minimum wages "would move some workers out of poverty and help reduce income inequality."

McCutchen said the retail industry and restaurants were likely to oppose a federal minimum-wage increase to as high as \$15 per hour, though some Democrats have said they will push for it.

Off-the-Clock Work

With the increased use of technology, more employees are working after regular business hours, and "off-the-clock" lawsuits continue to rise, noted Stéphanie Smith, an attorney with Casner & Edwards in Boston.

Off-the-clock lawsuits are particularly likely in California in light of a 2018 ruling that pre- and post-shift activities may be compensable even if they are for minimal periods of time (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/california-high-court-said-starbucks-must-pay-workers-to-close-store.aspx). As a result of this decision, training supervisors about off-the-clock work is even more important in California, noted John Kuentler, an attorney with Barnes & Thornburg in Chicago and Los Angeles. But regardless of where supervisors are located, they shouldn't encourage off-the-clock work by nonexempt employees, he said.

Paid Leave

Policymakers at all levels of government will have a renewed interest in addressing paid family leave in the coming year. At the federal level, any paid-family-leave proposal will need bipartisan support in a divided Congress.

At least 11 states and more than 30 local jurisdictions have passed paid-sick-leave laws, and more proposals are expected in 2019. Currently, six states have approved paid-family-leave laws, although not all of them have taken effect.

"I believe that more states and local municipalities ... will consider paid-sick-leave legislation in the coming year," said Carin Burford, an attorney with Ogletree Deakins in Birmingham, Ala.

As more cities consider their own ordinances, state legislatures may attempt to stop them from passing leave laws. Nearly half of all states expressly pre-empt local governments (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/states-push-back-on-local-paid-sick-leave-laws.aspx) from adopting laws that provide leave benefits beyond the requirements set by federal and state law.

Pay Equity

Pay equity appears to be high on the agenda of many of the newly elected lawmakers, especially in light of the #MeToo movement (www.shrm.org/resourcesandtools/pages/workplace-harassment.aspx), Burford said.

Although most states have had equal pay laws on the books for years, many state lawmakers are updating those statutes to strengthen their impact. For example, some states have broadened the definition of comparable work by moving from an "equal work" to a "similar work" standard. Additionally, some states and cities prohibit employers from asking job candidates about their salary history so that wage disparities aren't perpetually carried forward.

Expanded Anti-Harassment Training

The #MeToo movement also prompted state legislators to pass anti-harassment laws, including expanded training requirements. "With California and New York (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/new-york-sexual-harassment-training.aspx) leading the way, I expect to see more states pass mandatory training laws," said Patti Perez, vice president of workplace strategy at Emtrain, a compliance training company based in California.

She thinks more companies will go beyond what the law requires and provide education on workplace civility and bystander intervention.

[SHRM members-only toolkit: Managing Equal Employment Opportunity (www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/managingequalemploymentopportunity.aspx)]

Marijuana Legalization

The trend to legalize marijuana (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/marijuana-legal-in-more-states.aspx) continued in 2018 and isn't expected to stop. So far, recreational marijuana use has been approved in 10 states, and medical marijuana laws have passed in more than 30. "2019 should see more medical and recreational marijuana legalization, mandates that employers accommodate medical marijuana usage, and, perhaps, a viable test for marijuana intoxication," said Michael Clarkson, an attorney with Ogletree Deakins in Boston.

Arbitration Agreements

Employers may want to update their arbitration agreements for 2019 in light of a recent Supreme Court ruling (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/pages/supreme-court-approves-class-action-waivers.aspx) that class-action waivers don't violate federal labor laws. For now, a properly written class-action waiver will be deemed enforceable and can be used as a powerful tool in thwarting most potential class claims, said Kristen Nesbit, an attorney with Fisher Phillips in Los Angeles. However, some state laws don't recognize class-action waivers for certain claims.

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