# Labor & Employment Law Update

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VedderPrice

# United States Department of Labor Moves Hint at Policy Changes, but Employers Await Clarity

Presidential administration transitions almost always result in policy and enforcement initiative changes at the U.S. Department of Labor (DOL). This year appears to be no different, but it is not yet clear how some recent DOL changes will impact employers and the law. We discuss below two recent DOL moves that have the potential to significantly impact how employers compensate employees for overtime, use independent contractors and evaluate risks and opportunities associated with joint employment arrangements.

## (1) Trump DOL Withdraws Appeal After Texas Federal District Court Invalidates Obama Overtime Rule

Labor Secretary Alexander Acosta fueled speculation about the DOL changing tack during his Senate confirmation hearings by agreeing with the Obama DOL that the salary rule was ripe for an update, but suggesting that the new salary threshold went too far.

As we have noted in prior publications, the Obama DOL issued a revised overtime rule that would have dramatically increased the salary threshold under the Fair Labor Standards Act (FLSA) for the "white collar" exemptions (i.e., executive, administrative and professional) from $455 per week ($23,660 annually) to $913 per week ($47,476 annually). The heightened salary requirement was a direct result of President Obama's directive to the DOL to take aggressive steps to ensure that more employees received higher pay. As a result of the new rule, four million additional employees were expected to receive overtime.

However, in the days leading up to the December 1, 2016 effective date, a federal court in the Eastern District of Texas preliminarily enjoined enforcement of the new rule in *Nevada, et al. v. U.S. DOL, et al*., No. 4:16-CV-00731. The court held that the new regulations placed too much emphasis on the salary requirement and would have resulted in the reclassification of substantial groups of employees who otherwise performed the requisite exempt executive, administrative and professional duties.

Although then-Secretary of Labor Thomas Perez quickly appealed the decision to the U.S. Court of Appeals for the Fifth Circuit, significant questions remained

about whether the Trump administration would prosecute or withdraw the appeal, or possibly change course. Labor Secretary Alexander Acosta fueled speculation about the DOL changing tack during his Senate confirmation hearings by agreeing with the Obama DOL that the salary rule was ripe for an update, but suggesting that the new salary threshold went too far. Labor Secretary Acosta posited that one potential alternative to the $47,476 salary threshold was to tie the salary increase to cost of living adjustments, which he suggested could result in a salary threshold of approximately $33,000.

Consistent with Acosta's remarks, in late June 2017, in briefs filed with the Appellate Court, the Trump DOL withdrew its defense of the increased salary threshold. In its brief, the Department of Justice (DOJ) explained: "[T]he department has decided not to advocate for the specific salary level ($913 per week) set in the final rule at this time and intends to undertake further rulemaking to determine what the salary level should be." Notwithstanding its request that the Court not opine on the legality of the new salary threshold, the DOJ did ask that the court affirm the DOL's authority to establish a salary level under the Fair Labor Standards Act.

On August 31, 2017, a month before oral argument in the appellate case, the Texas federal district court confirmed its earlier ruling and granted summary judgment to the twenty-one states and business associations that had challenged the rule. The court again held that the significantly heightened salary test had in essence eliminated the other white collar exemption requirements that employees engage in certain types of duties and/or have certain levels of responsibilities. Significantly, the court did not decide whether the DOL has the authority to set a salary threshold in the first place.

As a result of the district court's order, on September 5, 2017, the Trump DOL filed a motion to withdraw its appeal, suggesting that the appeal was mooted and that the agency was comfortable with the district court's ruling. Assuming the Fifth Circuit grants the DOL's (unopposed) motion, which is probable, the Obama overtime rule will be permanently invalidated, giving the Trump DOL an opportunity to issue its own rule. Indeed, further suggesting that the DOL will issue a new salary threshold rule.

The DOL had issued a public request for comment in June seeking feedback on questions such as:

- Would updating the 2004 salary level for inflation be an appropriate basis for setting the standard salary level and, if so, what measure of inflation should be used?
- Should the regulations contain multiple standard salary levels?
- Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of salary be preferable to the current standard test?

In the DOL's view, only those individuals who are truly in business for themselves and have the managerial authority and skill to affect their profit or loss may be considered independent contractors.

Responses may be submitted on or before September 25, 2017. *See* https://www.gpo.gov/fdsys/pkg/FR-2017-07-26/pdf/2017-15666.pdf.

While we wait for the DOL to set its course, employers must continue to ensure that employees are properly classified for overtime purposes under the current federal regulations and state law. Employers in California and New York should know that their states have already instituted higher salary thresholds.

## (2) Trump DOL Withdraws Independent Contractor Classification and Joint Employer Guidance

In another move by the Trump DOL, which drew far less media coverage but was nevertheless significant, the agency withdrew two controversial Obama era "Administrator's Interpretations" relating to misclassification of independent contractors and the definition of joint employment. Both informal interpretations were penned by the then-head of the DOL Wage and Hour Division, David Weil, and sought to significantly broaden the scope of the employment relationship.

In the 2015 independent contractor interpretation (Administrator's Interpretation No. 2015-1), Weil had postulated, consistent with the Obama DOL's initiative to expand coverage of the Fair Labor Standards Act to purportedly misclassified independent contractors, that "most workers are employees under the FLSA's broad definitions." Toward this goal, the interpretation sought to narrow the circumstances under which an individual could qualify as an independent contractor. In the DOL's view, only those individuals who are truly in business for themselves and have the managerial

authority and skill to affect their profit or loss may be considered independent contractors. We described the Obama DOL's interpretation in detail in our July 2015 bulletin. vedderprice.com/DOLindependentcontractor2015.

In its 2016 joint employment guidance (Administrator's Interpretation No.2016-2), the Obama DOL sought to expand the circumstances under which multiple employers would be considered joint employers and thus potentially held liable for violations of the Fair Labor Standards Act, including minimum wage and overtime violations. While the interpretation applied to all industries, it made specific reference to industries where usage of subcontractors is common such as in agricultural, construction, hospitality, janitorial, logistics/warehousing and staffing.

Weil concluded that the DOL's joint employment guidance was necessary due to the modern workplace's increasingly complex employment arrangements and corresponding room for labor violations. Weil commented that "[p]rotecting workers in fissured workplaces—where there is increasingly the possibility that more than one employer is benefiting from their work—has been a major focus for the Wage and Hour Division in recent years." Many commentators interpreted Weil's comments and the DOL's broadened definition of a joint employer as a means to collect moneys from larger and better financed entities in joint employment relationships, e.g., corporate entities contracting with staffing agencies to provide workers.

Notably, while the withdrawal of the Administrator's Interpretations is a positive development for employers, the Trump DOL made clear that its removal of the two interpretive documents from its website "does not change employers' legal responsibilities" under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act. As such, employers should continue to be mindful of potential liability relating to the misclassification of independent contractors and joint employment. To be sure, the Trump DOL has an obligation to pursue claims of independent misclassification and other abuses of the FLSA. Moreover, state departments of labor have become increasingly aggressive in pursuing wage and hour violations.

If you have any questions regarding the issues in this article, please contact **Joseph K. Mulherin** or any Vedder Price attorney with whom you have worked.

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# The Immigration Report: 200 Days of the Trump Administration

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Wherever you fall on the political spectrum, there is no denying that the first 200 days of President Trump's administration have been an interesting time for employers impacted by immigration regulations. The whirlwind of activity—much of it playing out in federal courts across the country—has created uncertainty that can make it difficult for businesses to operate and plan for workforce movement. In an effort to remove some of that uncertainty, this article provides a brief summary of what has actually changed and makes several recommendations regarding how employers can prepare for the new environment in which they likely will be operating.

## Limits on Legal Immigration—the RAISE Act

Most recently, President Trump promoted legislation introduced to overhaul the family- and employment-based immigration systems currently in use. The Reforming American Immigration for Strong Employment (RAISE) Act radically limits family-based immigration to spouses and minor children of U.S. residents, ends the diversity lottery and restricts the number of refugees able to gain residency. For employment-based immigration, the RAISE Act creates a skills-based point system that factors in English-language proficiency, education, age and salary. Many other pieces of legislation have been proposed to amend the employment visa system. None is close to becoming law, and any legislation is unlikely to be enacted in its current form. However, there are common components to the proposed laws that employers should note, including a preference system that favors individuals educated in the United States and a substantial increase in the wages that must be paid to workers.

## Executive Orders, the "Travel Ban" and National Security

The most contentious immigration issue of President Trump's brief time in office has been the travel ban on foreign nationals from Iran, Libya, Somalia, Sudan, Syria and Yemen. In June, the U.S. Supreme Court partially granted the current administration's request to reinstate the travel ban by limiting its scope through

a "bona fide relationship" test. Specifically, foreign nationals from the six listed countries would be barred from entering the United States if they lacked a close familial relationship with a person in the United States (including parents, spouses, children and siblings) or a bona fide relationship with a U.S. entity (including students and applicants with established eligibility for an employment-based visa). The Supreme Court will revisit the issue in October.

Another key measure in the push to improve security of the United States has been the recent implementation of "extreme vetting." Extreme vetting employs an in-depth visa questionnaire for U.S. consular officers to examine applicants for immigrant and nonimmigrant visas. The questionnaire seeks social media usernames, 15 years of travel and employment history, sources of funding for travel, and other biographical information. Extreme vetting will create delays in international travel as individuals wait to clear security checks.

President Trump's "Buy American, Hire American" Executive Order announced his intention to reform the H-1B visa program and to increase enforcement against those who abuse the program. This executive order (EO) creates no new law or regulation; actual change to the H-1B visa program must occur through Congressional action. In connection with this EO, the Department of Labor (DOL) also announced that it would strenuously investigate violations of the H-1B visa program. Similarly, an EO issued in January called for interior enforcement activities by federal agencies. The increased enforcement activities will include both the apprehension of individuals unlawfully present in the United States and audits of employers' visa applications and Forms I-9.

In connection with this EO, the Department of Labor (DOL) also announced that it would strenuously investigate violations of the H-1B visa program.

## Rollback of President Obama's Measures

In addition to implementing his own measures, President Trump has sought to eliminate some of the Obama Administration's actions relative to immigration. In July, the Department of Homeland Security delayed the implementation of the International Entrepreneur Rule until at least March 2018. The Rule was to give the agency discretion to permit an initial stay of up to 30 months to facilitate an applicant's ability to oversee start-up entities in the United States.

Further, in June, the Trump Administration rescinded the deferred deportation program for unauthorized parents, known as "DAPA," which would have deferred deportation of parents of certain U.S.-citizen and permanent resident children through the use of prosecutorial discretion. Please refer to our September 6 Immigration Bulletin, "What Employees Need to Know About DACA Rescission Announcement," on our website, for further information. *See*:vedderprice.com/DACARescission2017

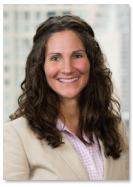
## What It All Means

There are important lessons to be learned from the President's activities thus far. Foremost is that compliance with existing immigration rules has never been more important; it is more prudent than ever to be prepared for government audits. Companies would be well advised to review their policies in all aspects of employment, from Form I-9 to visa usage to global mobility.

Second, the Trump Administration's policies have created greater delays for all those traveling internationally. In the face of this uncertainty, it is a good time for businesses to review their global mobility, recruitment and talent retention programs to ensure that their needs are being met. It is important to make timely and prudent decisions with respect to international travel and assess the best ways to move employees into the United States.

Finally, it is important to remember that substantial immigration reform requires bipartisan Congressional action, which is difficult to come by these days. President Trump has accomplished about all he can through EOs; additional EOs are likely to present policy goals rather than substantive legal changes. Thus, for all of the rhetoric and, at times, hysteria, surrounding immigration laws, substantive changes have been relatively limited, and any future change is likely to take considerable time to happen.

If you have any questions about this issue or wish to discuss this topic, please contact **Sara B. DeBlaze**, **Ryan M. Helgeson** or any Vedder Price attorney with whom you have worked.

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# California Corner: New Notice Requirements Regarding Domestic Violence Victims' Rights and LA's Ban the Box Ordinance

## Domestic Violence Victims' Rights

California Labor Code sections 230 and 230.1 provide certain rights to employees who are victims of domestic violence, sexual assault or stalking, including the right to take time off from work relating to such issues and the right to reasonable accommodations upon request. Additionally, employers are prohibited from terminating, discriminating or retaliating against any employee who exercises such rights or who is a victim of domestic violence, sexual assault or stalking.

On July 1, 2017, the City of Los Angeles began active enforcement of its Fair Chance Initiative for Hiring Ordinance (FCIHO), which was enacted on January 22, 2017.

Section 230.1 was amended last year to require employers with 25 or more employees to provide written notice to employees regarding their rights under sections 230 and 230.1, based on a form to be developed by the State Labor Commissioner. On July 1, 2017, the Labor Commissioner posted on its website the sample Notice that employers are now required to provide to their employees. Pursuant to the Notice, employers are required to provide the Notice to new workers when hired and to other workers who ask for it. A copy of the required Notice can be found at: https://www.dir.ca.gov/dlse/Victims_of_Domestic_Violence_Leave_Notice.pdf

Covered employers should now provide this Notice to all new hires and to any employees who ask for a copy, or employers may use a notice that is substantially similar in content and clarity.

## Ban the Box Ordinance in Los Angeles

On July 1, 2017, the City of Los Angeles began active enforcement of its Fair Chance Initiative for Hiring Ordinance (FCIHO), which was enacted on January 22, 2017. FCIHO prohibits employers during the application process from asking any applicant seeking employment in the City of Los Angeles whether they have a criminal history. FCIHO also prohibits employers from seeking any information regarding the applicant's criminal history unless and until a conditional offer of employment is made to the applicant. Additionally, even post-offer, the employer cannot take any

adverse action against the applicant based on his or her criminal history, unless the employer performs a written assessment that effectively links the specific aspects of the applicant's criminal history with risks inherent in the duties of the employment position sought by the applicant, and provides the applicant with certain information and rights prior to taking the adverse action.

FCIHO applies to private employers who have either: (i) ten or more non-exempt employees who perform at least two hours of work on average each week within the City limits; or (ii) ten or more employees and who also have any contract or subcontract with the City of Los Angeles. Employers who violate FCIHO are subject to fines up to $500 for the first violation, $1,000 for the second violation and up to $2,000 for each subsequent violation. FCIHO also contains other requirements, including certain notice, posting, record retention and anti-retaliation provisions, as well as certain limited exceptions. We suggest that all employers subject to FCIHO contact counsel to ensure they are in compliance with the new City of Los Angeles ordinance.

If you have any questions regarding the topics discussed in this article, contact **Thomas H. Petrides**, **Christopher A. Braham** or any of our California Labor & Employment attorneys.


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# Is Going on Holiday Going Away? UK/EU Employers Confront Challenges Posed by Employees Who Don't Take Their Vacations

While many US employers struggle to make sense of the patchwork of state and local sick leave laws, European Union (EU) employers face a different set of challenges involving mandatory vacation entitlements. In the EU, the law provides employees with mandatory levels of vacation. For example, in the UK, a full-time employee is entitled to take 28 days, while in France, employees receive 5 weeks of vacation (in addition to public holidays).

One popular option is adopting "Use It or Lose It" policies whereby employees are not permitted to carry over unused holiday days into the next year.

Surprisingly, many EU employers are finding it difficult to get their employees to take their holidays—either spread out in a manageable way throughout the year, or in some cases, at all. Employees who don't take their holidays—or who don't think about it until November or December—can pose problems for employers trying to manage their budgets as well as for their workforce. Those employees who fail to take the vacation time to which they are entitled can also make it difficult for employers to comply with their obligations under legislation relating to working time, much of which is seen, in European terms, as deeply rooted in health and safety.

There are solutions. Employers can try various initiatives to get employees to take their holidays. One popular option is adopting "Use It or Lose It" policies whereby employees are not permitted to carry over unused holiday days into the next year. Such policies, however, must be enforced with an eye on other employment rights. Employees on prolonged leave for a protected reason—such as maternity or adoption leave, not only continue to accrue holiday, but also must be permitted by law to carry this over so that they have a meaningful chance to use it. Whole volumes could be written about the European law on how holiday is affected by both short-term and long-term sickness, so this is another area to be aware of here.

Some employers have decided to do away with the minimum entitlements described above and go entirely the other way—offering unlimited holidays. At first blush,

this sounds like a very attractive initiative, and one which should give employees a sense of empowerment and personal responsibility. Unlimited holiday time is a rather new concept in the UK, where the right to a set period of annual leave is deeply rooted in the public conscience. Some studies suggest, however, that it does not end up encouraging employees to take holidays, and could be challenged in the EU as failing to ensure employees take the level of holiday which the law protects.

Meanwhile, there are a number of industries which have particular reasons to enforce mandatory taking of holiday. For example, institutions regulated by the Financial Conduct Authority are well advised to require, in their contracts and in supporting policies, that regulated employees take at least one block of two weeks' holiday a year. The aim here is to help avoid a rogue trader situation, so that any issues and hidden positions with their books come to light if a trader is unable to manage them for an enforced stretch.

Employers doing business in the EU would be well advised to make sure their employees are using their holiday as it falls due, as hoarding/delaying usage can lead not only to difficult conversations but to a host of legal entanglements. Please contact **Jonathan Maude** or **Esther Langdon** to discuss initiatives which can help encourage this, or for advice on any other EU employment law issue.


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## Recently Announced Notable Recognition

Since our doors opened and phones began to ring at Vedder Price in 1952, the firm has been a leader in Labor and Employment law. Again, this year, nearly 40 of our dedicated L&E attorneys have received consistently high marks from significant legal services ranking directories and organizations for their work on our clients' behalf in 2017. To date, our attorneys have been recognized by:

- **Best Lawyers in America**
- **Chambers USA** and **Chambers UK**
- **Legal 500 United States** and **Legal 500 UK**
- **Fellows of the College of Labor & Employment Lawyers**
- **Fellows of the American College of Employee Benefits Counsel**
- **Leading Lawyers** and **Leading Lawyers "Emerging Lawyers"**
- **Super Lawyers** and **Super Lawyers "Rising Stars"**
- **Top 100 in Illinois** and **Top 50 Women in Illinois**

# Recent Accomplishments

**Aaron R. Gelb** convinced a state occupational safety and health agency to reclassify a citation issued to an employer from "willful" to "serious" following an employee fatality. After filing a notice of contest, Mr. Gelb successfully negotiated the reclassification of the citation before litigation started and persuaded the agency to withdraw three separate items from a related citation issued to the employer.

**Thomas G. Hancuch** and **Benjamin A. Hartsock** advised a professional services firm with offices in over 15 major U.S. cities on the design and implementation of paid time-off programs for over 2,000 employees that comply with the often inconsistent, and sometimes conflicting, applicable state and local paid leave laws.

**Elliot G. Cole** secured dismissal of a whistleblower complaint filed with the Indiana Department of Labor on behalf of a global manufacturing company. The Department of Labor agreed with the company that the employee had engaged in unreasonably disruptive behavior in violation of company codes of conduct.

**Thomas G. Hancuch** and **Patrick W. Spangler** successfully advised a major employer on a workforce restructuring involving the elimination of over 750 jobs, working with the client's legal, human resources and operations teams to design and implement selection and reassignment procedures, a project-specific severance benefit program, and a comprehensive set of employee communications materials. Disparate impact statistical analysis was conducted with the assistance of Gabriel Anello, Vedder Price Labor and Employment Analyst.

**Aaron R. Gelb** and **Caralyn M. Olie** obtained the dismissal of a federal lawsuit filed against a bank in the Northern District of Illinois. The plaintiff claimed the bank discriminated against him based on his race and disability, and terminated him in violation of the Family and Medical Leave Act. The Court first granted the bank's motion to dismiss with prejudice in 2016, only to reinstate the case after the plaintiff claimed he did not receive copies of the court's e-mailed orders directing him to file an amended complaint. After permitting the bank to pursue limited discovery into plaintiff's e-mail use, the Court dismissed the matter with prejudice – a second time – agreeing that the bank had established that the plaintiff had misrepresented his basis for failing to file a timely amended complaint with the Court.

**Elliot G. Cole** won an arbitration for a national manufacturing and distribution company. The arbitrator denied multiple grievances filed by the union and upheld the grievant's termination for violation of the company's attendance policy.

Working with our West Coast M&A team, **Patrick W. Spangler** and **Christopher T. Collins** handled the labor and benefits aspects of an asset sale transaction related to the acquisition of a water infrastructure business on behalf of one of the firm's corporate clients.

**Thomas M. Wilde** and **Emily C. Fess** obtained summary judgment for a national retailer in the United States District Court for the Northern District of Illinois. A former employee claimed he was discriminated against and terminated because of his race and gender.

**Heather M. Sager** led the Labor & Employment session of the PLI program "Acquiring or Selling the Privately Held Company" on June 1 in San Francisco. For more information on the session, please go to vedderprice.com/SagerJune2017

**Edward C. Jepson, Jr.** presented a workshop entitled "Mental Health Conditions in the Workplace: What Employers Need to Know" during the EEOC EXCEL (Examining Conflicts in Employment Law) Conference on June 29 in Chicago. For more detail on the EXCEL Conference and Mr. Jepson's workshop, please go to vedderprice.com/JepsonEXCEL2017

**Sadina Montani** hosted a live webinar presented by the Clear Law Institute on "Final Paychecks: How to Avoid Legal Risk with Accurate Calculation and Distribution" on July 19. To watch the webinar at your convenience, please go to vedderprice.com/MontaniClearLaw2017

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Vedder Price aligns workforces for better performance. We've been a leader in the field since our founding in 1952. Today, 50+ professionals are dedicated solely to workplace law and are consistently ranked as top-performing lawyers.

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