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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

5 Top Labor And Employment Laws & Regs From 2019

By **Vin Gurrieri**

Law360 (December 19, 2019, 1:14 PM EST) -- Federal labor agencies spent the bulk of 2019 polishing a slew of regulations that have been at the top of the Trump administration's to-do list, including a long-awaited rule revamping how white collar workers are paid overtime, while employee-friendly states like California spent the year locking in a multitude of key worker protections.

Here, experts discuss five laws and regulations that made waves over the past year.

DOL Finalizes New Overtime Rule

From the outset of the Trump administration, one of the big-ticket items on the U.S. Department of Labor's cramped regulatory agenda has been a white-collar overtime rule after a more worker-friendly version the DOL pursued during the Obama administration was derailed in the courts.

The DOL's latest iteration of the rule, which takes effect Jan. 1, updates the Fair Labor Standards Act's overtime and minimum wage exemptions for executive, administrative and professional — or EAP — workers by hiking the standard salary threshold to $35,568 per year or $684 per week for those employees to qualify as exempt.

That threshold is about a $12,000 increase from the level set in 2004, but about $12,000 lower than the threshold the Obama administration had proposed in a 2016 rule that was later invalidated by a federal judge.

The rule was finalized despite a tumultuous year at the DOL that saw Deputy Labor Secretary Patrick Pizzella take over as acting labor secretary after the mid-year departure of then-labor secretary Alex Acosta. Current labor secretary Eugene Scalia took the helm at the agency in late September.

Jason Reisman, co-chair of Blank Rome LLP's labor and employment practice, said that since the salary threshold hadn't been hiked in a decade and a half, the time had come for it to be raised, leaving only the details up in the air.

"I think that the department did its diligence and came out with a new threshold … which is certainly a vast improvement on what it was," Reisman said.

But since the Obama administration's version of the rule and its approximately $47,000 salary threshold, which worker advocates unsuccessfully urged the DOL to maintain, came so close to becoming effective, Reisman said that many employers are well-prepared this time around to handle the new mandate.

He noted that some businesses had already given certain workers raises ahead of the 2016 rule's demise to put their salaries above the threshold and most of them had left those wage hikes in place after the rule was scrapped.

"I think most employers that are conscientious — they were preparing in 2016 to be in compliance," Reisman said. "I also think that from the employers' standpoint ... the employers are a lot more confident that this is going to [remain] in place."

Fluctuating Workweek

Another item from the DOL's regulatory agenda in 2019 was its November proposal to let employers use the "fluctuating workweek" method of calculating overtime compensation to pay their employees bonuses.

The fluctuating workweek formula for employers whose workers' hours vary widely from week to week lets businesses pay overtime hours at diminishing rates as long as they pay workers a minimum base salary, regardless of how many hours they work. The method makes employers pay out overtime hours at half of a worker's "regular rate," the base wages employers multiply by one-and-one-half when paying overtime. The DOL separately issued a proposed rule late in the year modifying its stance on how the regular rate should be calculated.

The fluctuating workweek rule, if finalized, would replace an Obama-era regulation meant to block businesses from shorting workers by shifting the bulk of their base salaries into bonuses.

"The fluctuating workweek [rule] was in some sense a total surprise to the employment world. I don't think anybody was expecting it," Reisman said.

He added that the DOL's proposal is a "clarifying statement" for employers that gives them leeway to pay bonuses, premium payments and other forms of compensation aside from salary while still being able to use the fluctuating workweek method.

"For employers, having that clarity will be tremendously helpful" if the rule is finalized without major changes, Reisman said, noting that there have been some previous oscillations on the policy within the DOL between Republican and Democratic administrations.

NLRB Modifies Union Election Process

Late in the year, the National Labor Relations Board issued a rule scaling back an Obama-era regulation that had been intended to streamline and speed up the process for workers to vote on whether they want to be represented by a union, with the labor board relaxing certain deadlines.

Although the new rule didn't tear up the NLRB's 2014 union election rule, which business derisively tabbed the "ambush" election rule, it did modify several portions of it to lengthen the timeframe for union elections to be held. Annual data released by the NLRB shows that union elections before the 2014 rule were held a median of 38 days after workers petitioned to organize, a number that dropped to 23 days over the past four fiscal years since the Obama-era rule was issued.

For example, the new rule gives parties 14 business days of lead time for preelection hearings to resolve disputes rather than the eight calendar days provided by the old rule, and it gives employers eight days after they receive notice of a hearing to compile briefs laying out their arguments. Under the 2014 rule, employers had to file their briefs no later

than one day before the hearing. NLRB regional officials will also have more leeway to extend these deadlines under the new rule.

And while the new rule doesn't restore the pre-2014 minimum 25-day gap between the days the board orders an election and stages a vote, it directs regional officials to set elections no fewer than 20 days after approval, unless the parties agree to a shorter timeline.

The new rule also directs that disputes over which workers should be included in the bargaining unit and disputes over whether certain proposed members are union-ineligible supervisors be litigated and decided before an election**.** Under the Obama rule, workers in many cases would vote about whether to join a union and an agency official would decide eligibility questions later.

The rule comes just months after the NLRB — an agency historically averse to rulemaking — issued a separate rule in August that sought to update three particular union representation processes. Those were the NLRB's handling of so-called blocking charges, its voluntary recognition bar and certain collective bargaining relationships involving employers in the construction field.

Hugh Murray of McCarter & English LLP said the latest rule changes the time frame that governs the preelection process "quite a bit."

"At least in the narrow world of union elections, [the rule] is relatively big," Murray said. "What it does, from an employer's point of view who may not know that a union petition is about to be filed, it's less of a panic fire-drill than under the [2014] rule."

Murray noted that there was no marked statistical change over the five years the 2014 rule was in place in the number of elections won by unions, and that he "suspects" the board's latest modifications likewise won't cause those numbers to change in any significant way.

California Adopts New Independent Contractor Test

While various arms of the executive branch pursued rules widely perceived to be business-friendly, certain states attempted to serve as a counterweight by imposing new statutes aimed at protecting workers.

Among the most controversial of the new state employment laws enacted in 2019 was California's A.B. 5, which was among a slew of worker-friendly statutes signed over the past year by Gov. Gavin Newsom. The legislation, which takes effect in 2020, was aimed largely at ensuring that employers in the so-called gig economy don't misclassify individuals who perform work for their companies as independent contractors but impacts businesses in a wide range of industries.

It codifies and expands the three-prong ABC test that was adopted by the California Supreme Court in its landmark Dynamex decision to assess whether businesses have correctly classified their workers as independent contractors. Workers who fall into that classification have fewer workplace protections than do employees.

Under the test, an employer can only classify workers as independent contractors if it shows each of three things: that the workers are free from their hiring entity's control, work outside its "usual business" and "customarily" do the work they do for their alleged employer as part of an "independent business."

Linda Adler, a partner in Liebert Cassidy Whitmore's San Francisco office, said the issue of independent contractor classification is "one that has always been difficult for employers,"

and that businesses should "take a close look" at their independent contractor arrangements in light of the new law.

"While I think this codification of the California Supreme Court's ABC test [from] the Dynamex case is going to provide greater clarity, I think there's still going to be a challenge for employers to interpret what some of the requirements are," Adler said. "In terms of impact, I think it's going to have a significant impact on smaller businesses and I think larger businesses are going to be in a better position to absorb the increased costs associated with running their business."

Meanwhile, worker advocates who have raised the alarm about purported independent contractor misclassification say A.B. 5 will go a long way toward addressing the problem both within the gig economy and in other industries.

Rebecca Smith, director of the National Employment Law Project's works structures program, said when it takes effect in January, A.B. 5 will put more than a million workers across numerous industries "one step further on the road to good, secure jobs" regardless of whether they got their job online.

"That's because California's historic bill … ensures that this basic foundation of rights and protections applies to most workers across the state, reining in the gaming that has been endemic to these industries," Smith said. "The movement to protect and expand workers' rights has been fueled by a surge of worker organizing, especially in the gig economy. Already, policymakers are taking up the challenge in New Jersey, New York, Seattle and Los Angeles, and we expect to see more campaigns as 2020 unfolds."

"California is paving the way for other states to ensure that workers are not carved out of the employee rights and benefits that they need and deserve," Smith said, while adding that the ABC test is a "clear and fair" way to assess "when a company must be accountable to workers as its employees."

Nevada Limits Pre-Hire Drug Screens

But although California made headlines with laws like A.B. 5 and other statutes that addressed issues such as employment arbitration agreements and workplace sexual harassment, other states made their own waves when it came to employment laws.

One of those is Nevada, which delved into the increasingly thorny issue of cannabis and its application to the workplace. The Silver State, which legalized marijuana for recreational use several years ago, enacted a law that prevents an employer from rescinding a job offer if a job applicant tests positive for marijuana after the offer was made.

"I think there [are] evolving attitudes [about cannabis] but the bottom line is that marijuana is still illegal at a federal level," said Mackenzie Warren, a Nevada-based lawyer at McDonald Carano LLP. "So, the idea that screening be eliminated entirely is not an option. I think a baseline is employers are going to have to build out some new policies that are a little bit creative to establish some new screening practices, and, then more importantly, [train] the workers to be able to spot impairment."

Diane Welch, Warren's colleague at McDonald Carano, noted that exceptions in the law exist for individuals in professions like police, fire or emergency medical services or jobs that require operation of heavy equipment, among others.

But she said the area "most ripe for challenge" by employees is a catch-all provision in the statute that allows employers to determine when workplace safety could be adversely affected.

"The legalization of marijuana for recreational use has really created a quandary for employers, especially those that rely on federal dollars and operate under a federal grant," Welch said. "And that is because it's still illegal under federal law, so those restrictions apply, but yet you've got employees [who] may not be that aware of federal requirements, and all they know is [that] state law permits it."

Nevada's law looks at just one element of the intersection between cannabis law and the workplace. Blank Rome's Reisman believes that, more generally, issues related to marijuana usage are the next frontier in labor and employment law.

"I think the marijuana law issue is still absolutely, crystally unclear," Reisman said. "That's obviously a big issue that still has a huge future. I really think it's the next decade — it's our issue for 2020 and forward. That's when we're probably going to get much more clarity and [many] more issues coming up [about] it."

--Editing by Pamela Wilkinson and Kelly Duncan.
