

Beltway Buzz, February 22, 2019

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The Presidents' Day holiday (more on this below), a snow day for the federal government, and Congress being out of town resulted in a slow week on the labor and employment policy front. Nonetheless, here are a few things that we've been tracking this week.

The Nomination Game. Though the U.S. Senate is in recess, it gaveled in and out several times this week for sessions that lasted little more than a few seconds. What gives? Well, with scores of vacancies still remaining at executive branch agencies, it is likely that neither Senate Minority Leader Chuck Schumer (D-NY) nor Speaker of the U.S. House of Representatives Nancy Pelosi (D-CA) (see [U.S. Constitution, Article I, Section 5, Clause 4](#)) permitted the Senate to recess in order to prevent President Trump from making recess appointments to those vacancies. As the Supreme Court of the United States stated in [Noel Canning](#), "Three days is too short a time to bring a recess within the scope of the [Recess Appointments] Clause."

Wage and Hour Guidance Issued. On February 15, 2019, the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) issued two Field Assistance Bulletins (FABs):

- FAB No. 2019-2 concerns [tipped employees](#). It provides further guidance on the WHD's November 2018 [opinion letter that eliminated the 80/20 rule](#). Obviously, this FAB should be of particular interest for employers in the hospitality and service industries.
- FAB No. 2019-1 concerns payments of [subminimum wages](#) to workers with disabilities, which is permitted under certain conditions pursuant to Section 14(c) of the Fair Labor Standards Act (FLSA).

Interestingly, the [Raise the Wage Act](#) would eliminate both the tip credit and subminimum wage.

H-1B Speedup Available Again. On February 18, 2019, United States Citizenship and Immigration Services (USCIS) renewed premium processing for certain H-1B petitions. Melissa Manna and Stephen H. Smalley have the [details](#) on this fast-track process.

Regulatory Review. This lull in the breakneck pace of labor and employment policy developments gives us a chance to review the regulatory landscape to see what might be heading our way as we

head into warmer months.

- The DOL's overtime proposal was sent to the Office of Information and Regulatory Affairs (OIRA) for review on January 16, 2019. Upon OIRA's approval—which could come any day now—the *Buzz* expects the DOL to issue a notice of proposed rulemaking *tout suite*. Due to the lengthy rulemaking process, the administration will need to move quickly in order to ensure that any overtime changes are finalized before the 2020 election.
- *Regular Rate*. A corollary to the overtime proposal, the regular rate proposal is intended to update current regulations in order to account for how modern forms of compensation or benefits should be included (or excluded) in the regular rate for purposes of calculating overtime. This proposal went to OIRA on January 23, 2019.
- *Joint Employer (DOL)*. In the regulatory agenda issued in October 2018, the WHD noted that it planned to issue by December 2018 a proposal to update its joint-employer regulations under the FLSA to “[provide clarity to the regulated community and thereby enhance compliance](#).” Obviously, the proposal has not issued yet, so the business community is growing anxious for the reason mentioned above.
- Comments closed in late December 2018 on the Employee Benefits Security Administration's proposals to increase usability of health reimbursement arrangements and to expand the availability of multiple employer plans (MEPs). Now we are just waiting on the final rules.
- *Joint Employer (NLRB)*. The *Buzz* has been writing about this issue extensively over the last few weeks. The comment period on this proposal closed on February 11, 2019. This is just a hunch, but the *Buzz* is guessing that we could see a final rule by the fall of this year.
- *Ambush Elections*. It's been well over one year since the National Labor Relations Board (NLRB) asked the regulated community if it should retain, modify, or rescind its 2015 changes to its union election procedures. Since the comment period closed on this request for information in the spring of 2018, Board Chairman John F. Ring has indicated that any changes are likely to occur in piecemeal, rather than comprehensive, fashion. Ring further indicated that an initial proposal could issue this winter.
- *Immigration (H-4 EAD)*. The proposal to rescind a 2015 rule extending eligibility for employment authorization to certain H-4 dependent spouses of H-1B nonimmigrants arrived at OIRA on February 20, 2019. Depending on how long OIRA's review lasts, this proposal could be issued very soon.
- After being instructed by a federal judge to redo its 2016 Americans with Disabilities Act and Genetic Information Nondiscrimination Act of 2008 regulations concerning incentives to participate in employer-sponsored wellness programs, the Equal Employment Opportunity Commission (EEOC) is forecasting new proposals by June of this year. However, the EEOC currently lacks a quorum (this would prohibit rulemaking), and there is no indication that this will change anytime soon. Consequently, the *Buzz* predicts that it may take a bit longer for the Commission to issue its proposals.

As you can see from this overview, the next few months might be a prime window for movement of several proposed and final rules.

Washington's Birthday. Those of you who got a great deal on a brand-new mattress this weekend know that this past Monday was Presidents' Day. However, the celebration in its current form is a relatively recent phenomenon. The holiday [originally began as a tribute to President George Washington](#) one year after his death in 1799 and was celebrated on the anniversary of his birthday: February 22. The annual tradition known as Washington's Birthday was eventually codified pursuant to a law signed by President Rutherford B. Hayes in 1879. All was well and good for about 100 years, until the [Uniform Monday Holiday Act](#), which took effect in 1971, moved Washington's Birthday to the third Monday of February. During the debate of this bill, a proposal was floated to combine Abraham Lincoln's birthday remembrance with Washington's, but the proposal was dropped. However, this idea, combined with the fact that the third Monday of February falls between Lincoln's and Washington's birthdays (Lincoln was born on February 12), led many to start referring to the holiday as Presidents' Day. Marketers and many state governments followed suit, and while the federal holiday is still officially Washington's Birthday, it is now colloquially referred to as Presidents' Day.

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