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Obama's OT Expansion Could Hit Restaurants, Retailers Hard

By **Ben James**

Law360, New York (March 12, 2014, 7:54 PM ET) -- The Obama administration's anticipated efforts to change U.S. Department of Labor regulations to extend overtime pay rules to millions of workers currently considered exempt will face a groundswell of opposition from employers, management-side lawyers say, calling the potential changes an "ambush" and warning that they could be devastating for some restaurants and retailers.

On Thursday, President Barack Obama will direct the Department of Labor — which has the authority to define the exceptions to federal overtime requirements through regulation — to strengthen overtime pay protections, a White House official announced Wednesday. Lawyers say this could be a harbinger of a lengthy rulemaking process that brings a slew of workers currently considered exempt within the scope of the FLSA's overtime requirements.

Worker advocates saw benefits in potential changes to overtime regulations, but employer-side attorneys warned the move could increase litigation and hurt businesses, particularly in the restaurant and retail sectors, without conferring much of a benefit to workers.

If the push to expand the Fair Labor Standards Act's overtime protections proceeds as anticipated, it will generate impassioned opposition from employers and potential congressional action aimed at thwarting the changes, lawyers said.

"This tees up a pretty significant political battle because of what they appear to be trying to do. It sounds like the changes are designed to reduce the number of employees who have exempt status. That's a big deal," said Paul DeCamp, former head of the DOL's Wage and Hour Division and leader of Jackson Lewis PC's wage and hour practice.

"In the abstract, it sounds great to say: Hey, why don't we give all these people overtime so they can make more money? But the reality is that there's no free lunch," he said.

A push to change overtime regulations wouldn't be unprecedented. The DOL changed FLSA overtime rules in 2004 — a "tough job" that took more than two years, noted Tammy McCutchen, a Littler Mendelson PC shareholder who served as administrator of the DOL Wage and Hour Division from 2001-04.

Even if the DOL begins revisiting the overtime regulations immediately, it could take a year — and probably longer — for changes to wind their way through its rulemaking process and take final effect, lawyers said.

Recently, the conventional wisdom has been that the DOL was focused primarily on independent contractor versus employee misclassification, according to McCutchen, who said changes to the overtime regulations hadn't been listed on the DOL's agenda.

"Its an ambush," McCutchen said. "This is a surprise to everybody, at least on the employer side."

Specific changes that might be on the table include raising the threshold for invoking white collar exemptions under the FLSA, which currently require a worker to be paid a salary of at least \$455 per week.

Higher figures might make sense in places such as New York and California, which already have their own elevated thresholds of \$640 and \$600 per week, but they would threaten jobs and the viability of businesses if implemented in rural areas in the Midwest or the South, said McCutchen.

Another change lawyers said might be in the cards concerns the executive employee exemption, which requires that the exempt employee's "primary duty" be managing.

Setting a fixed percentage of an employee's work that has to be devoted to managerial tasks — like California's rule that more than one-half of an exempt employee's time has to be devoted to exempt work — could have a "devastating" impact in the retail and restaurant sectors, where managers frequently step in and handle nonexempt tasks when needed, said McCutchen.

"I think the Obama administration wants federal law to look like California law, which is the law most favoring employees," McCutchen said.

Relatively low profit margins for retailers and restaurants, combined with the way those establishments are typically staffed, means those businesses could bear the brunt of the economic impact of changes to overtime regulations, DeCamp said.

And according to DeCamp, expanded overtime protections are unlikely to put more money in workers' pockets, because employers will either lower base salaries to adjust for anticipated overtime or strictly limit work time to no more than 40 hours per week to avoid triggering overtime requirements.

"The unintended consequences are going to be more severe than any benefit overall," he said.

But while the changes to the overtime regulations that could be on the horizon have their critics, they also have vocal supporters who say it's time workers got their due.

"President Obama's anticipated proposal to expand overtime protection for hardworking families is an important step towards raising wages, creating jobs and lifting the economic tide for millions," AFL-CIO President Richard Trumka said in a statement Wednesday. "This will help to build an economy that honors work, not one that steals from workers,"

A substantial group of workers are labeled as overtime-exempt managers but perform a lot of nonmanagerial work, and they deserve to earn overtime when they put in long hours, according to Kim Bobo, founder of the advocacy group Interfaith Worker Justice.

"The basic thrust of the proposal makes absolute sense and is certainly in line with the direction and the goals of the FLSA," Bobo told Law360 on Wednesday.

Wigdor LLP's Douglas Wigdor said that clarity from the DOL could end up benefiting both workers and businesses.

"I think that the guidance will be useful not only to plaintiffs lawyers, but also the companies, which will have a clear picture of how they should be compensating their employees," Wigdor said.

So while questions remain about exactly what the expected regulatory push will look like, a pitched battle appears to be looming. Some observers are already expressing concern about the use of regulation to achieve what they say is an end-run around an intractable Congress.

"It's a bit startling to use the administrative rulemaking process to greatly expand coverage. Typically, this is something you would expect from congressional action. It should be a significant concern to employers," said Kevin Hyde, chair of Foley & Lardner LLP's labor and employment practice. "This is a labor issue, but really, it is a political issue."

How November's midterm elections will impact the House and Senate is still unclear, and those elections may be a big factor in determining whether Republican lawmakers will be able to muster an effective challenge, said Seyfarth Shaw LLP's Alexander Passantino, a former acting administrator of the DOL's Wage and Hour Division.

But it's a safe bet that stakeholders on both sides of the issue will stand up and make vociferous cases for themselves at the DOL, Passantino added.

"This is going to be a significant rulemaking where there will be a lot of activity on both sides — the employer and employee side — in an effort to move the needle on whatever proposal comes out," he said.

--Editing by Kat Laskowski and Chris Yates.