



Electronic Alert

Volume 20, Issue 28

January 11, 2018

More Changes to Come in 2018

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With many provisions of the Tax Cuts and Jobs Act taking effect at the beginning of the new year, it is easy to overlook a number of other agency, executive, and departmental actions that may affect employers in 2018. Below is an overview of some notable changes for employers to consider:

Department of Labor Adopts New Test for Interns Under the FLSA: The Department of Labor adopted a “primary beneficiary” test to evaluate whether or not an intern is an employee for purposes of protection under the Fair Labor Standards Act. The new rule, which is intended to reduce confusion and to align the DOL’s position with that of a number of courts who have rejected the previous six-part test, includes a holistic review of several non-dispositive factors affecting the employment relationship. If, upon review, the ultimate beneficiary of the relationship is the company, the intern is considered an employee for purposes of the FLSA and must be paid accordingly. If the ultimate beneficiary is the intern, the worker is not considered an employee for purposes of the FLSA.

Federal Government Changes Course on Marijuana: The Department of Justice has withdrawn previous Obama-era guidance on the federal enforcement of marijuana under the Controlled Substance Act. Although the practical impact of the withdrawal remains unclear for the time being, the move is the first in what could be a sweeping reversal of the federal government’s previous deferral to states on issues related to medical and recreational marijuana.

Wage and Hour Division Reinstates Bush-Era Opinion Letters: On January 5, the Department of Labor made good on Labor Secretary Alexander Acosta’s promise to reinstate a number of opinion letters that provide guidance and interpretation on a wide range of wage and hour issues. Rather than issue or respond to new requests, the Department has simply reinstated letters that were published in the late days of the Bush Administration, and then subsequently withdrawn under the Obama Administration.

Labor Board Looking to Overhaul Rules on Confidentiality: The National Labor Relations Board may soon revisit its current ban on requiring confidentiality agreements in exchange for severance pay. The previous ban, which prohibited such agreements on the grounds that they infringed on employees’ ability to engage in concerted activity, is a point of interest for the NLRB’s new members, who have said specifically that they plan to revisit the legality of the current interpretation in 2018.

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