

Legislate[®]

Key Legislative Developments Affecting Your Human Resources

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Focus on Supreme Court Vacancy, Overtime and NLRB Jurisdiction

The legislative branch was bustling despite Congress being on recess last week. A primary focus was on the Supreme Court vacancy created by Justice Antonin Scalia’s death. In this issue, we touch on that and on developments related to the DOL’s overtime pay regulations and the scope of “employer” under the National Labor Relations Act.

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Supreme Court Vacancy

As the country reflects on the death of Supreme Court Justice Antonin Scalia, President Obama and the Senate prepare to fulfill their responsibilities to fill the vacancy. The framework set forth in the Constitution is relatively clear and simple. The president nominates a successor and the Senate reviews and approves (or rejects) the nominee. Although the process may be swift, there are no deadlines to fill a vacancy and long stretches of time may pass before a nominee is confirmed. Indeed, in 1970, Justice Harry Blackman took his oath 391 days after Justice Abe Fortas resigned.



Last week, Senators and the president were sparring over their respective duties. President Obama made clear that it is his intention to nominate an individual “who indisputably is qualified” and “would serve with honor and integrity.” However, some senators, including presidential candidates Senator Marco

Rubio (R-FL) and Senator Ted Cruz (R-TX), have expressed the view that the duty should fall to the next president. This is particularly notable as Senator Cruz is a member of the Senate Committee on the Judiciary tasked with considering U.S. Supreme Court nominations. Moreover, Senator Cruz stated that he would filibuster any Obama nominee.

Filibuster

Interestingly, one of the most memorable threats of using a filibuster was brought by Senator Cruz in 2013. He spoke for 21 hours in an attempt to interfere with funding for the Affordable Care Act. For background on the Senate filibuster rules, which address tactics invoked to prevent a vote, please see our [November 16, 2015 *Legislate*](#).

Overtime

The [DOL's proposed regulations](#), issued in 2015, would increase dramatically the number of workers eligible for overtime pay. The white collar exemptions would be narrowed and the minimum salary threshold for these overtime exemptions would more than double. (For additional details and background, please see our [December 2, 2015 For Your Information](#).)

Some members of Congress have expressed concern that the DOL's proposed rule will have a negative impact on workers and small businesses. As [stated](#) by Rep. Cresent Hardy (R-NV), the proposed rule "will harm workers far more than it will help them."

In an effort to derail the DOL from implementing a final rule as currently drafted, 108 congressmen (including some Democrats) sent a [letter](#) to the DOL criticizing the rule and requesting the DOL reconsider moving forward with the rule as written. In addition, the House Education and the Workforce Committee Chairman John Kline (R-MN) and committee member Tim Walberg (R-MI) sent a [letter](#) to the DOL asking for information on the agency's outreach activities that led to the proposal and the DOL's [refusal](#) to provide additional time for public comment. The comment period was closed on September 4, 2015 despite [requests](#) by congressmen and various stakeholders to extend the public comment period.

Comment. The DOL's final rules are expected to be issued July. However, if the DOL's final rules are delayed and not issued before mid-May (perhaps earlier), the Republican controlled Congress will have a meaningful opportunity to undo the regulations. Specifically, Congress could use a procedure under the Congressional Review Act to disapprove the regulations. And, if a Republican presidential candidate succeeds President Obama, such congressional action would likely be upheld by the next administration, resulting in the DOL's final regulations having no impact whatsoever.

NLRB and "Indian Tribes"

As highlighted in the [November 23, 2015](#) edition of *Legislate*, House and Senate bills ([H.R 511](#) and [S. 248](#)) were introduced to prohibit the NLRB from having jurisdiction over "any Indian tribe, or any enterprise or institution owned and operated by an Indian tribe and located on its Indian land." Essentially, the legislation would treat the tribes and tribal entities like states and their political subdivisions and exclude them from coverage under the National Labor Relations Act. The White House previously indicated that the administration does not support the legislation.

Comment. The legislation is expected to stall in the current Congress. Indeed, with the upcoming presidential and congressional elections, numerous and lengthy congressional recesses, and focus on the Supreme Court vacancy, most legislation will not gain traction this year.

Now, the Supreme Court may opt to weigh in on the topic, too. Specifically, on February 12, the Little River Band of Ottawa Indians Tribal Government, believing that it is exempt from the NLRA as a public employer, filed a [petition](#) with the Court requesting review of a 6th Circuit Court of Appeals ruling. The petition seeks to have the Supreme Court decide whether the NLRB has jurisdiction to regulate tribal governments' labor relations laws governing the tribes' employment of public employees working on tribal trust lands.

Comment. It is unlikely that this issue will be settled in 2016. Even if the Supreme Court accepts the case, a decision will not be issued this year.

Looking Ahead

This week, the Supreme Court vacancy and the presidential election will continue to dominate the congressional agenda.

Authors

Allison R. Klausner, JD
Nancy Vary, JD

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