

Ag labor issues up in the air during transition



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This is a short update on two key ag employer issues to consider going into 2017.

The federal overtime (OT) rule that was to go into effect on Dec. 1, 2016, was sidelined by a federal judge. Although the Fifth Circuit court agreed to an expedited schedule on Dec. 9, 2016, the Department of Labor's (DOL) reply brief was not due until Jan. 31, after the inauguration.

As of now, the new OT standard is not in effect, and many believe it will not be implemented under the Trump administration because of speculation that DOL may drop the appeal. So, those of you who may have had employees for whom you were making salary or status changes for your non-production agricultural operations do not have to implement those now.

Remember, most production agricultural activities are exempt from federal OT rules, although some states are not – California and Minnesota, most notably. There is also activist-led litigation against dairy OT exemptions ongoing in Washington state that bears watching, because it could spread.

Because it is not certain that an appeal could be successful should the incoming administration's DOL continue to defend, most employment lawyers recommend keeping your plans handy, because it is possible that the rule could be applied retroactively. One attorney suggests at minimum that employers should keep accurate records of hours worked, records that you will need if you are ever Wage and Hour (WHD) audited anyhow, because in lieu of accurate and verifiable records, WHD will take the worker's word for the hours worked and the burden is on the employer to prove otherwise. As is always the case in WHD and other government audits, your properly kept records are your only defense. Best guesses at this point



are that the incoming administration and the incoming congress have little appetite for this rule, however.

Partly as a continuation of the current presidential administration and international activist group concerns, and partly as a direct result of the president-elect's video calling on federal agencies to "crack down" on potential abuses of foreign workers, expect strong, even extreme, scrutiny on anything that looks like trafficking, controlling or otherwise abusing any foreign workers. The most common charges are holding employees against their will through intimidation, withholding money or withholding documents – never hold anyone's passports, identification, travel documents or money, even if they request it for "safe keeping." Do not even hold documents overnight to "make copies" or for other reasons. In any kind of investigation or audit, it is likely that workers will be asked "does the boss hold your papers or money," and if they answer yes, it will be considered evidence that you have held them against their will or even engaged in human trafficking.

We will continue to work with the new administration and the incoming congress to ask for improvements on all ag employer issues. As noted before, we have reason for both optimism and significant concern based on who some of the key players are and their history with agricultural needs. Our key concern at this point is that border security and attempts to "turn off the job magnet" with harsh employer enforcement and penalties could outpace efforts to provide legal agricultural workers. We will be working in Washington, D.C., to keep worker supply provisions sequenced with enforcement efforts.

Because it is widely expected that the incoming administration and Congress may be somewhat more employer friendly, we must expect to see the activist community move toward litigation and state and local actions. We expect the Washington state dairy OT litigation and the recent litigation that resulted in loss of the agricultural exemption from workers' compensation insurance in New Mexico to be opening shots. VGN