

Regulations coming down like spring rainstorms



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Our predictions that 2016 would be the “year of the regulator” were, unfortunately, correct. This was one prognostication I would have been more than happy to have gotten wrong.

By the time you read this, at least two new federal rules will be final.

First, a new final rule from the Occupational Safety and Health Administration (OSHA), part of the U.S. Department of Labor (DOL), extends the reach of OSHA into more workplaces and changes reporting rules, including the making of significant portions of injury/death statistics and details public.

Currently, the reporting requirements and the potential penalties for not reporting on time are the most important issues for growers. Longer term, there is the concern that one or more major incidents of severe injury or death in the workplace could result in specific OSHA oversight of an industry segment in a particular state, or even nationally.

Your attention to on-the-job safety is important to your entire industry. OSHA and DOL continue to focus their attention on specific jobs and/or industry segments that stand out to them as particularly “dangerous” statistically. It is the responsibility of each of us to do our part to help prevent our own industry joining this list.

The long-anticipated DOL final overtime rule became effective May 18. The U.S. business community universally opposed much of this rule, as well as the proposed 60-day implementation, right up to the last week, when the White House budget folks cut off scheduling of more 1288 hearings. 1288 hearings are the last “Hail Mary” opportunity to present evidence to the White House that a rule will have negative impacts on stakeholders. NCAE partnered with the National Council of Farmer Cooperatives for a 1288 hearing on May 10. It appears little has changed from the original proposed rule, other than reducing the threshold from \$50,400 to \$47,476 and moving the implementation date to Dec. 1, instead of “60 days” from publication.

That change to Dec. 1 is significant to most of agriculture, as it means you will not have to figure this out in the middle of the season. It also offers time for potential congressional intervention. More detailed analysis of the ramifications for agricultural employers will be forthcoming, and the topic will be addressed in depth at both the Labor Forum in Las Vegas and at the February 2017 NCAE Annual Meeting in Washington, D.C. NCAE and other organizations continue to work with Congress to revise this rule, but we will most likely run out of time in this Congress before anything useful could happen.

Relative to the overtime rule, the majority of your farming activities are exempt, as are most of your packing operations if you are packing only your own fruit and vegetables. The most significant impact on most growers will be seen in costs and availability of services from your up- and down-stream supply chain, many of whom have technical, service and professional staff on salary who in

some cases will have to become hourly workers and may have their hours limited. Overall business forecasts are that the rule will slow hiring, will cause some managers to be “demoted” to hourly, and may result in some year-round staff becoming seasonal in businesses like agriculture.

You have probably read the news stories about farms and other businesses being fined hundreds of thousands, even millions of dollars, for various labor law violations, usually by DOL’s Wage and Hour Division and often involving payroll record keeping discrepancies. Many of these have revolved around improper record keeping and/or work assignment practices between domestic and H-2A workers, but many involve only domestic work forces.

Over the past several years, federal agencies, partly due to lack of additional funding approval from Congress, have quietly increased the Civil Money Penalties for various violations, substantially – substantially being magnitudes of 10 or more in many cases. At the same time, aggressive enforcers are more likely to write up every instance of an inaccuracy or error as a separate violation. As a result, the first assessment by, let us say a Wage and Hour auditor, for one wrong pay calculation per employee, for 100 employees, for 10 pay periods, could equal 1,000 separate violations! The initial assessments can easily tally up to hundreds of thousands or even millions of dollars. The auditor may quickly suggest you sign off on some substantially smaller “penalty,” in addition to a pledge to comply with some specified practices immediately. If presented with such a scenario, seek legal counsel before you sign anything.

Mark your calendars for the NCAE Ag Labor Forum in Las Vegas, Nov. 30-Dec. 2. **VGN**