Fall 2019 Regulatory Agenda

Department of Labor:

EBSA:

- Improving Effectiveness of and Reducing the Cost of Furnishing Required Notices and Disclosures (RIN: 1210-AB90)
  - NPRM comment period ended on November 22, 2019
    - NPRM issued on October 23, 2019
  - The NPRM would explore ways to reduce the costs and burdens imposed on employers and other plan fiduciaries responsible for the production and distribution of retirement plan disclosures required under Title I of the Employee Retirement Income Security Act, as well as ways to make these disclosures more understandable and useful for participants and beneficiaries.

OSHA:

- Prevention of Workplace Violence in Health Care and Social Assistance (RIN: 1218-AD08)
  - Initiation of the SBREFA process is targeted for January 2020 (previous target date was October 2019)
    - Last action – RFI published on December 2016
  - The RFI solicited information primarily from healthcare employers, workers and other subject matter experts on impacts of violence, prevention strategies and other information that will be useful to the Agency. OSHA was petitioned for a standard preventing workplace violence in healthcare by a broad coalition of labor unions, and in a separate petition by the National Nurses United. On January 10, 2017, OSHA granted the petitions.

WHD:

- Request for Information: The Family and Medical Leave Act of 1993 (RIN: 1235-AA30)
  - RFI targeted for November 2019 (this date was missed)
    - Original target date was April 2020
    - RFI sent to OMB for review on September 24, 2019
  - In this Request for Information, the Department will solicit comments on ways to improve its regulations under the FMLA to: (a) better protect and suit the needs of workers; and (b) reduce administrative and compliance burdens on employers.

- Modernizing Section 3(m) Regulations (RIN: 1235-AA29)
  - NPRM targeted for June 2020
    - Previously listed as a long-term action item
  - FLSA section 3(m) defines wage to include the reasonable cost to the employer of furnishing board, lodging or other facilities. WHD’s regulations in 29 CFR Part 531 interpret the meaning of this provision, but aspects of these regulations do
not provide adequate clarity and are out of date. The Department proposes to update part 531 to provide greater clarity on the meaning of “other facilities” and better guidance for complying with the FLSA in the 21st-century workplace.

- **Fluctuating Workweeks Under FLSA (RIN: 1235-AA31)**
  - NPRM comment period ended December 5, 2019
  - Previously listed as a long-term action item
  - The NPRM will clarify that payments in addition to the fixed salary are compatible with the use of the fluctuating workweek method of compensation, and that such payments must be included in the calculation of the regular rate as appropriate under the Act.

- **Regular and Basic Rates Under the FLSA (RIN 1235-AA24)**
  - Final rule targeted for November 2019 (this date was missed)
    - Final rule cleared OMB for review on December 2, 2019
    - NPRM issued March 2019
  - Clarify and update regular rate requirements under section 7(e) of the FLSA.

- **Joint Employment Under the FLSA (RIN 1235-AA26)**
  - Final rule targeted for December 2019
    - NPRM published on April 9, 2019
    - Final rule sent to OMB for review on December 3, 2019
  - Revise and clarify the responsibilities of employers and joint employers to employees in joint-employer arrangements.

OLMS:
- **Labor Organization Annual Financial Reports: Coverage of Intermediate Bodies (RIN 1245-AA08)**
  - NPRM targeted for November 2019 (this date was missed)
    - Sent to OMB for review on August 9, 2019
  - Proposing returning to its 2003 interpretation that intermediate bodies that are subordinate to a national or international labor organization that includes a labor organization are covered by the LMRDA.

OFCCP:
- **Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious-Organization Exemption (RIN 1250-AA09)**
  - Final rule targeted for March 2020
    - NPRM issued on August 15, 2019
  - OFCCP plans to update regulations to comply with current law regarding protections for religion-exercising organizations.
• Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures to Resolve Potential Employment Discrimination (RIN: 1250-AA10)
  o NPRM targeted for November 2019 (this date was missed)
    ▪ Sent to OMB for review on November 8, 2019
  o This NPRM would revise regulations at 41 CFR Parts 60-1, 60-300, and 60-741, which implement the nondiscrimination and affirmative action provisions of Executive Order 11246 (as amended), section 503 of the Rehabilitation Act (as amended), and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (as amended), respectively, to codify certain procedures and documents OFCCP uses to resolve potential violations of these laws by federal contractors and subcontractors. The proposed regulatory action would increase clarity and certainty for OFCCP stakeholders and enhance the agency’s efficiency in remediating employment discrimination.

National Labor Relations Board:

• Access Rule (RIN 3142-AA14)
  o NPRM targeted for February 2020
  o The NLRB will engage in rulemaking to establish the standards under the National Labor Relations Act for access to an employer’s private property.

• Student/Employee Status (RIN 3142-AA15)
  o NPRM comment period closes December 16, 2019
    ▪ NPRM issued on September 23, 2019
    ▪ Comment period extended on October 17, 2019
  o The Board will be engaging in rulemaking to establish the standard for determining whether students who perform services at a private college or university in connection with their studies are "employees" within the meaning of section 2(3) of the NLRA.

• Joint-Employer Rulemaking (RIN 3142-AA13)
  o Final rule targeted for December 2019
    ▪ NPRM issued on September 14, 2018
    ▪ Comment period extended on November 5, 2018
    ▪ Comment period extended on December 13, 2018
    ▪ Comment period extended January 11, 2019
    ▪ Comment period ended January 28, 2019
  o The Board will be engaging in rulemaking to establish the standard for determining joint-employer status under the National Labor Relations Act.
Equal Employment Opportunity Commission:

- Amendments to Regulations Under the Americans with Disabilities Act (RIN 3046-AB10)
  - NPRM targeted for January 2020
  - This rule amends the regulations to implement the equal employment provisions of the Americans with Disabilities Act (ADA) to address the interaction between title I of the ADA and wellness programs, which had been published as a final rule on May 17, 2016, (81 FR 31125) and completed in the fall 2016 agenda as RIN 3046-AB01. On August 22, 2017, the U.S. District Court for the District of Columbia ordered the Equal Employment Opportunity Commission (EEOC) to reconsider its May 17, 2016, final rule on employer-sponsored wellness plans under the ADA. See AARP v. EEOC, 267 F. Supp. 3d 14 (D.D.C. 2017). In accordance with the court’s ruling, the EEOC rescinded portions of its ADA wellness rule on December 20, 2018, (83 FR 65296). EEOC staff is now developing an NPRM to address wellness programs under the ADA in response to the court's ruling.

- Amendments to Regulations Under the Genetic Information Nondiscrimination Act of 2008 (RIN 3046-AB11)
  - NPRM targeted for January 2020
  - This rule amends the regulations to address wellness programs under the Genetic Information Nondiscrimination Act of 2008 (GINA), which had been published as a final rule on May 17, 2016, (81 FR 31143) and completed in the fall 2016 agenda as RIN 3046-AB02. On August 22, 2017, the U.S. District Court for the District of Columbia ordered the Equal Employment Opportunity Commission (EEOC) to reconsider its May 17, 2016, final rule on employer-sponsored wellness plans under GINA. See AARP v. EEOC, 267 F. Supp. 3d 14 (D.D.C. 2017). In accordance with the court’s ruling, the EEOC rescinded portions of its GINA wellness rule on December 20, 2018, (83 FR 65296). EEOC staff is now developing an NPRM to address wellness programs under GINA in response to the court's ruling.

  - NPRM targeted for December 2019
    - End of comment period anticipated for February 2020
  - The U.S. Equal Employment Opportunity Commission (EEOC) enforces federal employment discrimination laws (the federal EEO laws) including Title VII of the Civil Rights Act, the Equal Pay Act, the Age Discrimination in Employment Act, sections 501 and 505 of the Rehabilitation Act, Title I of the Americans with Disabilities Act, and Title II of the Genetics Information Nondiscrimination Act. These amendments explain the EEOC's interpretation of when an entity qualifies as a joint employer based on the definitions of the statutory terms "employee" and/or "employer" under the federal EEO laws.
Education Department:

Office of Civil Rights:

• Title IX Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (RIN: 1870-AA14)
  o Final action targeted for November 2019 (this date was missed)
    ▪ Final rule sent to OMB for review on November 4, 2019
    ▪ OIRA meetings scheduled through January 29, 2019
  o On November 29, 2018, Education Secretary Betsy DeVos issued a notice of proposed rulemaking to clarify and modify the obligations of recipients of federal financial assistance in redressing sex discrimination, including complaints of sexual misconduct, and the procedures by which they must do so.

Department of Homeland Security:

USCIS:

• Strengthening the H-1B Nonimmigrant Visa Classification Program (RIN: 1615-AC13)
  o NPRM targeted for December 2019
    ▪ This target date has been pushed back three times (originally October 2018, then January 2019, and then August 2019)
  o USCIS plans to issue an NPRM to revise the definition of “specialty occupation” and revise the definition of “employment” and “employer-employee relationship.” The agenda states that DHS’s purpose for proposing these changes is to “increase focus on obtaining the best and the brightest foreign nationals via the H-1B program,” to “better protect U.S. workers and wages,” and to “to ensure employers pay appropriate wages to H-1B visa holders.”

• Removing H-4 Dependent Spouses From the Class of Aliens Eligible for Employment Authorization (RIN: 1615-AC15)
  o NPRM targeted for March 2020
    ▪ Previously targeted for February 2018, June 2018, November 2018, May 2019
    ▪ NPRM was sent to OIRA on February 20, 2019 for final review and is still pending.
  o On February 25, 2015, DHS published a final rule extending eligibility for employment authorization to certain H-4 dependent spouses of H-1B nonimmigrants who are seeking employment-based lawful permanent resident status. DHS is publishing this notice of proposed rulemaking to amend that 2015 final rule. DHS is proposing to remove from its regulations certain H-4 spouses of H-1B nonimmigrants as a class of aliens eligible for employment authorization.

• Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements (RIN 1615-AC18)
NPRM issued on November 14, 2019
  - Not previously listed in Regulatory Agenda
  - Proposes to adjust certain immigration and naturalization benefit request fees charged by the USCIS.

- Strengthening the L-1 Nonimmigrant Classification (RIN 1615-AC45)
  - NPRM targeted for September 2020
    - Not previously listed in Regulatory Agenda
  - In order to improve the integrity of the L-1 program, the Department of Homeland Security will propose to revise the definition of specialized knowledge, to clarify the definition of employment and employer-employee relationship, and to ensure employers pay appropriate wages to L-1 visa holders.

- Enhancing the Integrity of the Unlawful Presence Inadmissibility Provisions (RIN 1615-AC46)
  - NPRM targeted for September 2020
    - Not previously listed in Regulatory Agenda
  - USCIS is proposing regulations to describe how unlawful presence accrues, which may include or expand upon certain current agency policies, including whether certain failures to abide by the conditions of admission as a nonimmigrant can result in accrual of unlawful presence.

ICE:

- Establishing a Maximum Period of Authorized Stay for Students, Exchange Visitors and Media Representatives (RIN: 1653-AA78)
  - NPRM targeted for February 2020
    - Previously targeted for September 2019
  - ICE will propose to modify the period of authorized stay for certain categories of nonimmigrants traveling to the United States by eliminating the availability of "duration of status" and by providing a maximum period of authorized stay with options for extensions for each applicable visa category.

- Practical Training Reform (RIN 1653-AA76)
  - NPRM targeted for August 2020
    - Previously a long-term action item
  - ICE will propose this rule to improve protections of U.S. workers who may be negatively impacted by employment of nonimmigrant students on F and M visas. The rule is a comprehensive reform of practical training options intended to reduce fraud and abuse.
  - Currently, the OPT program permits foreign nationals who graduated from a U.S. university the ability to apply to receive up to 12 months of OPT employment authorization before completing their academic studies (pre-completion) and/or after completing their academic studies (post-completion). In March 2016, the Obama administration issued a final rule that extended OPT work authorization
in STEM fields (STEM OPT) for an additional 24 months (36 months total) post-graduation and expanded vetting requirements to include a formal training plan that specifies learning objectives.

- Rhetoric from the administration and certain leaders on Capitol Hill labeling some universities as “visa mills” had many in the higher ed community worried that potential reforms could seek to eliminate the STEM extension, shorten the work authorization period, or make the reporting requirements so onerous that the program is virtually impossible to use.

**Treasury:**

**IRS:**
  - NPRM targeted for June 2020
    - Previously targeted for December 2019
  - This contains proposed regulations on the excise tax on high-cost employer-sponsored health coverage under section 4980(I) for taxable years beginning after 2021, enacted by the Affordable Care Act.

- Unrelated Business Taxable Income Separately Computed for Each Trade or Business Activity ([RIN: 1545-BO79](https://www.reginfo.gov/Notices/RIN/1545-BO79))
  - NPRM targeted for December 2019
    - No previous action but published in previous agendas
  - This document will address how unrelated business taxable income within the meaning of section 512 should be calculated under section 512(a)(6) in the case of an entity described in section 511(a)(2) or (b)(2) with more than one unrelated trade or business.