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NAHAD Issue Alert

Regulations Brief

Small businesses like NAHAD members are often unable to follow all of the regulatory changes created by the federal government. This issue brief will highlight some of the important regulations that were created, withdrawn, or updated that could affect they way your business operates. Additionally, prospect of the Presidency changing hands in November creates the prospect of new regulations and rules affecting small businesses. Under the current administration, according to the Treasury Department, eight regulations have been cut for every new regulation created. Below we highlight some of the main regulatory changes affecting small businesses during the Trump administration.

Department of Labor

Overtime rule

The overtime rule replaces an Obama era proposed regulation requiring employers to pay any non-exempt employee making under $47,476 overtime pay. Most business groups supported the Department of Labor's decision to withdrawal from their previous proposed rule "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," commonly referred to as the Overtime Rule, to increase overtime rates from $23,660 to $47,476 because it would have disproportionately increased costs for small business owners. Financially, small businesses would not have been able to comply with a $913 weekly salary which would have resulted in moving some employees to hourly positions and reducing opportunities for advancement for others due to restrictions on time worked for employees. The 2016 rule would have created a disincentive for workers looking to build a future in a number of affected industries.

The newly adopted Trump administration rule increased the overtime rate to $35,308 per year ($679 per week) from $23,660 per year ($455). Most small businesses agree that the $35,308 salary is a manageable cost increase. Luckily, this rule, having been first proposed in 2004, is now considered settled law, and relitigating this rule under a possible Biden administration is unlikely.

Joint-employer definition

The Trump administration's join-employer definition replaced a problematic NLRB pending decision on the rule. The Obama administration for the purposes of encouraging union formation released an ambiguous rule on what constitutes a "joint-employer". On January 13, 2020, the Department of Labor (DOL) issued its Final Rule on joint employer status under the Fair Labor Standards Act (FLSA). The Final Rule provides detailed information on when two or more companies share responsibility over a group of employees, commonly known as joint employment. The Final Rule is a four-factor analysis to determine if an employer is directly or indirectly acting as a joint employer. This test asks if the impending joint employer:

- Hires or let's go employees
- Supervises the employee's work schedule or work conditions to a certain degree
- Determines the employee's rate and method of payment
- Maintains the employee's employment records

The DOL explained that determining joint employment "will depend on all the facts in a particular case, and the appropriate weight to give each factor will vary depending on the circumstances." Additionally, the DOL made clear that other factors may be relevant for particular cases.

On September 8, 2020, the U.S. District Court ruled that there were some drafting issues with the final rule and directed DOL to re-write the rule to fix these errors. DOL has 60-days appeal the decision, if it does not it will have to re-issue the rule, possibly under President Biden which would be unlikely to offer the same rule to businesses.

Federal Hours of Service Regulation Changes

The Federal Motor Carrier Safety Administration finalized a rule that would update current Hours of Service regulations and will go into effect on September 29, 2020 to help alleviate some of the driver shortage. The rules will help short-haul shippers such as distributors by making the rules more realistic for the industry. The finalized rules would:

- Changes the short-haul exemption to certain commercial drivers by lengthening the on-duty period from 12 hours to 14 hours and extending the distance limit from 100 airmiles to 150 airmiles.
- Modifies the adverse driving conditions exception by extending by 2 hours the maximum window during which driving is permitted.
- Gives increased flexibility for the 30-minute break rule by tying the break requirement to 8 hours of driving time without an interruption for at least 30 minutes. This change allows the break to be satisfied by a driver using on-duty, non-driving activity, rather than off duty.
- Modifies the sleeper berth exception to allow drivers to split their 10-hours off duty into two periods: one period of at least 7 consecutive hours in the sleeper berth and the other period of not less than 2 consecutive hours, either off duty or in the sleeper berth. Neither period would count against the driver's 14-hour driving window.
- Allows one off-duty break of at least 30 minutes, but not more than 3 hours, that would pause a driver's 14-hour driving window, provided the driver takes 10 consecutive hours off duty at the end of the work shift.

This set of regulations is a good first step to helping small businesses bring in more drivers, but additional changes are needed and can be seen coming based on other changes by the Department of Transportation.

Environmental Protection Agency

Pre-proposal for a Rulemaking Effort on Cleaner Trucks Initiative

On January 6, 2020, the EPA signed an Advanced Notice of Proposed Rule (ANPR) for the Cleaner Trucks Initiative (CTI). The Cleaner Truck Initiative would require new emission standards for oxides of nitrogen (NOx) and other heavy-duty engine pollutants. A standard that was last updated in 2001 to lower ozone contributing emissions.

California has also been working on their own state rule for trucking emissions. The California Air Resources Board (CARB) has started proposing regulations required by California emissions reduction goals to reduce emissions from trucks in the state. California's changes include moving delivery fleets to zero emission vehicles. The recent proposal would reduce greenhouse gas and petroleum use:

Year	Goal
2030	40 percent reduction in greenhouse gases 50 percent reduction in petroleum use
2050	80 percent reduction in GHGs

California will require manufacturers to begin selling zero emission trucks in 2024 and require 50 percent of all sales of straight trucks to be zero emission. The proposed regulation also includes reporting requirements on businesses relating to number of miles driven and number of shipments. These potential changes will require distributors to look at future fleet purchases to include zero-emission vehicles in California.

NAHAD does not expect the EPA's rule to be as aggressive as the zero-emission rule, but they are working closely with California on CTI. The EPA is currently reviewing comments on the ANPR for how this will impact businesses.

Expedited environmental reviews of infrastructure projects

President Trump on June 4, 2020, signed an executive order directing agencies to invoke emergency powers to expedite the review and permitting of infrastructure projects. The order affects the following laws:

- The Clean Water Act (CWA): CWA authorizes the Army Corps of Engineers to issue nationwide permits for categories of discharges that are similar in nature and will have minimal adverse environmental effects when performed separately or cumulatively. Under regulations, the Corps may expedite permit applications in a "situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship."
- National Environmental Policy Act (NEPA): NEPA requires an assessment of potential environmental impacts before approving federal actions. Part of the law states that "where emergency circumstances make it necessary to take an action with significant environmental impact," "alternative arrangements" may be appropriate.
- The Endangered Species Act (ESA): ESA requires agencies to work with the U.S. Fish & Wildlife Service to ensure that their actions do not hurt protected species or habitats. But regulations state that "alternative procedures may be implemented in lieu of consultations in "situations involving acts of God, disasters, casualties, national defense or securities emergencies, etc."

In addition, agencies are required to submit lists of pending projects on their purview that should be considered for fast-tracking. Fast tracking of infrastructure projects is another positive action to speed up approval and stimulate industries that are involved in building and supplying these projects.

Treasury Department

Paycheck Protection Program Regulations

This year the Small Business Administration and Treasury Department released guidance to update the Paycheck Protection Program rules following Congressional passage of the Paycheck Protection Program Flexibility Act. So far the SBA and Treasury have clarified that:

- New loans made after June 5 will have a maturity date of five years, already existing loans can be converted to the five-year loan maturity if both the bank and the lender agree to do so.
- Loan deferment is changed from 6-months, businesses now have 10-months to apply for loan forgiveness before any payments are due. If a business applies for forgiveness earlier, deferment ends when SBA pays the forgiven portion of the loan to the bank or determines that no forgiveness is allowed. Interest will accumulate during this time.
- Any business taking a loan prior to June 5 can retain the 8-week covered period instead of switching to the new 24-week covered period.
- The Flexibility Act changes the 75% payroll cost requirement to 60%, in order to get full forgiveness a borrower must spend 60% of the loan amount on payroll costs. If a borrower spends less than 60% on payroll costs their forgiveness is decreased by a proportional amount so that payroll costs equal 60% of the total amount forgiven.

In addition, another interim final rule relating to forgiveness of PPP loans after passage of the Paycheck Protection Program Flexibility Act clarifies important parts of the law. This new rule provides many needed updates on the treatment of certain payroll expenses and the minimum ratio of payroll to non-payroll expenses. This new interim final rule builds on the changes that were included in last week's IFR.

Some of the important changes include limits on owner-employee forgiveness, increases in the cap for employees making over $100,000 per year and clarification on non-payroll expenses. Borrowers whose loans were created prior to June 5, 2020 can choose to use the new 24-week covered period or the original 8-week covered period. The updated IFR and application clarify borrowers are eligible for forgiveness on:

1. Payroll costs including salary, wages, and tips, up to $100,000 of annualized per employee (for 24 weeks, a maximum of $46,154 per individual, or for 8-weeks, a maximum of $15,385 per individual) as well as covered benefits for employees (but not owners), including health care expenses, retirement contributions, and state taxes imposed on employee payroll paid by the employer (such as unemployment insurance premiums);
2. Owner compensation replacement is calculated based on 2019 net profit with forgiveness limited to 8-weeks' worth (8/52) of 2019 net profit (up to $15,385) for an 8-week covered period or 2.5 months' worth (2.5/12) of 2019 net profit (up to $20,833) for a 24-week covered period. This limit excludes any sick leave or family leave taken under the Families First Coronavirus Response Act (FFCRA);
3. Interest payments on mortgages in place before February 15, 2020, this is calculated in the same manner as the payments are deductible on Form 1040 Schedule C (business mortgage payments);

4. Rent payments on lease agreements in place before February 15, 2020, this is calculated in the same manner as the payments are deductible on Form 1040 Schedule C (business rent payments); and
5. utility payments under service agreements dated before February 15, 2020 to the extent they are deductible on Form 1040 Schedule C (business utility payments).

This clarification allows forgiveness on most transportation utility costs we were previously requesting guidance on. In addition to these changes the IFR also allowed any refinanced EIDL loan to be included in meeting the 60% payroll threshold, however these proceeds are not forgiven.

SBA also released an EZ version of the forgiveness applications for small businesses that were able to maintain salaries and employment over the covered period or are self-employed individuals with no employees. This EZ application is for:

- Self-employed individuals and have no employees; or
- Did not reduce the salaries or wages of their employees by more than 25%, and did not reduce the number or hours of their employees; or
- Experienced reductions in business activity as a result of health directives related to COVID-19 and did not reduce the salaries or wages of their employees by more than 25%.

Overall this latest IFR and new EZ application helps to further clarify what expenses are forgiven and ensures businesses electing to use the 24-week covered period are able to seek forgiveness for the full loan amount. The PPP program provided a lifeline to many small businesses struggling with the COVID-19 crisis. These regulations helped to provide certainty for business owners using the program and applying for loan forgiveness.

Section 2704 regulations

Treasury Department has formally withdrawn the Section 2704 regulations on family business valuation. These regulations would have increased the death tax burden on family businesses.

Treasury's final report issued in accordance with the President's Executive Order 13789 lists Sec 2704 under proposed regulations to be withdrawn entirely:

After reviewing these comments, Treasury and the IRS now believe that the proposed regulations' approach to the problem of artificial valuation discounts is unworkable. In particular, Treasury and the IRS currently agree with commenters that taxpayers, their advisors, the IRS, and the courts would not, as a practical matter, be able to determine the value of an entity interest based on the fanciful assumption of a world where no legal authority exists.

In light of these concerns, Treasury and the IRS currently believe that these proposed ***regulations should be withdrawn in their entirety****. Treasury and the IRS plan to publish a withdrawal of the proposed regulations shortly in the Federal Register.*

Withdrawal of these regulations is a significant victory for small businesses ($18 Billion according to President Obama's FY13 Budget).

Regulations on estate tax exemption

This year the Treasury Department published Treasury Decision 9884 which make clear that the federal estate/gift/GST exemptions of $11.58 million per individual and $23.16 million per couple with spousal portability (new 2020 exemptions announced in Rev. Proc. 2019-44) can be fully utilized without taxpayers fearing a “claw back” if the exemptions revert back to pre-TCJA levels after current policy is scheduled to expire in December of 2025.

Family businesses planning for succession can now transfer up to the maximum exemption amounts until 2025 without fearing a large tax bill if the estate/gift/GST exemptions aren’t extended before 2026. If a taxpayer gifted $10 million in 2018 when the exemption was $11.18 million per individual and died in 2026 when the exemption reverted back to nearly $6 million per individual, there was a question as to whether that taxpayer would be required to pay a “claw back” 40% tax a portion of the amount already transferred tax free. The resolution of this issue provides more certainty for businesses working towards transitioning to the next generation of ownership. Many trade associations represent many large multi-generational family businesses and the resolution of this issue represents is one less hurdle family businesses must face in continuing on to the next generation of ownership. NAHAD was encouraged to see the Treasury Department prioritizing regulations important to family owned and operated businesses.

Department of Energy

Process rule

The Process Rule was created over 20 years ago to implement rules that are transparent, consistent, and data-driven with early and frequent input from experts and stakeholders. This process has helped decrease energy use and lower consumer utility bills, however future improvements to energy efficiency in some cases are either too expensive to be cost effective or beyond the capabilities of current technology. Recent updates to the Process Rule ensure that any future appliance standard amendments or new standards consider possibly diminishing returns is paramount to keeping private expenditures to a minimum. Modernizing the Process Rule makes the rulemaking process less burdensome and assists the agency in developing rules in a transparent, consistent, and data-driven manner. The new process rule streamlines the process for creating new energy efficiency rules to reduce unnecessary changes that increase product costs for consumers.