Handbook Hot Topics: Relying On FLSA Regs Amid Repeals

By **Gigi O'Hara and Jason Stitt** (May 14, 2025)

This article is part of a bimonthly column that discusses trending employee handbook issues. In this installment, we focus on how employee handbook policies' reliance on federal regulations may change in light of agencies being directed to repeal "unlawful regulations."

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Neutral. Uniform. Transparent. In the workplace, there is very little that provides more certainty in communicating an employer's rules, standards and expectations than an employee handbook. These handbooks are often prepared by relying on federal regulations as a source to set the very policies to which employees must adhere.

However, on Feb. 19, President Donald Trump issued Executive Order No. 14219, which instructed federal agencies to review the federal regulations within their purview and to identify classes of regulations, within 60 days, that overstep an agency's authority or stray from the underlying statute that they interpret, among other things.

On April 9, Trump issued a memorandum, titled "Directing the Repeal of Unlawful Regulations," which circled back to the executive order, saying that within 30 days of the executive order's review period ending, agencies should explain why any regulations that were identified as unlawful haven't been repealed.

The memorandum also emphasized that agencies can repeal regulations without the notice and opportunity for comment that are traditionally required for agency rulemaking where the regulations are "contrary to the public interest," and stated that "enforcing facially unlawful regulations is clearly contrary to the public interest."

Based on the deadlines in the executive order and the memorandum, Trump likely anticipates that the Code of Federal Regulations — which currently consists of a few hundred bound volumes and a few hundred thousand pages of small text — will be reduced to a short brochure by around May 20.

Because employers obviously want to comply with the law, they may be wondering what, if anything, may change if the regulations governing their workforce are revised or repealed.

Will employee handbook policies that are based on current regulations create an immediate risk of companywide liability if those regulations are repealed? For a number of reasons, the short answer is probably not.

Take, for instance, federal regulations interpreting the Fair Labor Standards Act. A handful of provisions within the FLSA expressly delegate some measure of authority to the U.S. Department of Labor to issue regulations that interpret particular statutory language.

For example, Title 29 of the U.S. Code, Section 213(a)(1), which codifies the FLSA's executive, administrative and professional exemptions, grants the DOL authority to "define[] and delimit[]" these exemptions.

The FLSA also gives the DOL authority to, for instance, identify occupations that are "particularly hazardous for the employment of children,"[1] require employers to obtain proof of an employee's age,[2] establish apprenticeship programs and exemptions applicable to apprentices,[3] and define and delimit the FLSA's "companionship services" exemption.[4]

Because these regulations flow directly from statutory delegations of authority, they presumably would enjoy some measure of safety from the executive order.

The bulk of wage and hour regulations, however, do not flow from express statutory delegations of authority, and a number of important wage and hour protections are contained within such regulations.

For example, an employee handbook may contain a policy about when employees should clock in and out. These policies were likely guided by federal regulations.

Rest periods of less than 20 minutes, for instance, are compensable, and employees who take them should probably remain clocked in.[5] Employees who are required to eat lunch at their desks or stay at their machines should also remain clocked in, while employees who are free to leave may clock out.[6] Additionally, a receptionist should remain clocked in while waiting for the phone to ring, even while doing a crossword puzzle.[7]

And we know all of this not because the FLSA's statutory text speaks of crossword puzzles, but because DOL regulations do. The examples of extra-statutory regulations that affect everyday workplace policies are numerous.

By way of further example, three regulations describe the circumstances under which an employer would know, or have reason to believe, that employees are working — and are thereby being "'suffered or permitted' to work" — and should therefore be compensated for such time.[8]

These regulations may drive employers to create policies that prohibit employees from, for instance, checking work emails after hours or eating lunch at their desks, both of which may create temptations to work off the clock.

It is unclear whether the regulations that are not expressly authorized by the FLSA will survive the executive order. One can imagine that the DOL may think that its own regulations are consistent with the best reading of the FLSA.

Furthermore, DOL regulations — apart from those expressly authorized by the FLSA — don't purport to be the law.

The regulations make it clear from the beginning, in Title 29 of the Code of Federal Regulations, Section 785.2, that the "ultimate decisions on interpretations of the [FLSA] are made by the courts," and that the regulations merely "seek to inform the public" of the positions that the DOL might take in enforcing the FLSA. The

regulations expressly invite employers and employees to view the regulations as a "practical guide."

Even if the DOL were to accept Trump's invitation to repeal all, or a significant number, of the regulations interpreting the FLSA, employers should be just fine maintaining handbook policies that are consistent with the existing regulations.

For example, if an employer wants to gratuitously pay employees for a 15-minute break or for doing crossword puzzles, nothing in the statutory text of the FLSA would prohibit the employer from doing so.

In almost all cases, DOL regulations are more employee-friendly than the plain text of the FLSA. As such, employers generally won't violate the FLSA by treating employees better than it requires.

Furthermore, the law that is expressed in DOL regulations is usually the law because courts — not DOL regulations — have said so.

Many DOL regulations actually cite the case law from which they are derived, and the cited cases generally found wide acceptance long before the DOL regulations were promulgated.

The U.S. Supreme Court's 1944 decision in Skidmore v. Swift & Co. recognized that a court may find a regulation persuasive and apply it, not because the court is required to, but rather because the court is persuaded that the regulation constitutes the best reading of the law.[9]

Over the years, courts have frequently applied this so-called Skidmore deference to the DOL's regulations interpreting the FLSA.[10]

Even if the DOL regulations that accurately stated well-established wage and hour law disappeared, the underlying law — while perhaps more difficult for employers to ascertain — would live on.

So what should employers do to prepare for May 20? At this time, very little.

However, if any regulations that interpret the FLSA are actually repealed in response to the executive order, employers should take the opportunity to evaluate, as a business decision, whether they would benefit from changing a policy that was based on a repealed regulation.

In undertaking that evaluation, however, employers must be mindful that a repealed regulation, regardless of its repeal, may have accurately stated the law.

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[1] 29 U.S.C. § 203(l).

[2] 29 U.S.C. § 212(d).

[3] 29 U.S.C. § 213(a)(7); 29 U.S.C. § 214.

[4] 29 U.S.C. § 213(a)(15). This statutory provision was cited in Loper Bright as an example of a statute that "'expressly delegate[s]' to an agency the authority to give meaning to a particular statutory term."

[5] 29 C.F.R. § 785.18.

[6] 29 C.F.R. § 785.19.

[7] 29 C.F.R. § 785.15.

[8] See 29 C.F.R. §§ 785.11, 785.12, 785.13.

[9] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[10] See, e.g., Hector Sanchez, Plaintiff, v. Republic Servs. Customer Res. Ctr. W. LLC, Defendant., No. CV-24-02499-PHX-KML, 2025 WL 1248931, at *4 (D. Ariz. Apr. 30, 2025); Karonka v. Asuka Blue Inv., LLC, No. 4:23-CV-02891, 2024 WL 4905985, at *3 (S.D. Tex. Nov. 27, 2024); Houtz v. Paxos Restaurants, No. 5:23-CV-00844-JMG, 2024 WL 4336738, at *3-5 (E.D. Pa. Sept. 27, 2024); Thompson v. Regions Sec. Servs., Inc., 67 F.4th 1301, 1309 (11th Cir. 2023); Barvinchak v. Indiana Reg'l Med. Ctr., No. CIV.A. 3:2006-69, 2007 WL 2903911, at **4-5 (W.D. Pa. Sept. 28, 2007).