

2016 Labor and Employment Law Update

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Agenda

- FLSA: Salary basis changes
- LGBT rights in the workplace
- Private settlements of W&H claims
- Temporary employees and IC's
- Defend Trade Secrets Act

Changes to the FLSA

- The DOL has implemented changes to the Fair Labor Standards Act (FLSA) that will make approximately 4.2 million more Americans eligible to receive time-and-a-half overtime wages.
- The Final Rule goes into effect December 1, 2016.

The Current State of the Law

- The FLSA currently exempts workers from overtime pay if they receive a minimum fixed salary of \$455 per week or more than **\$23,660 per year**, and the employee holds a position with **duties** designated by the U.S. Labor Department as appropriate for exempt status.

The Current State of the Law, contd.

- This means that the employee is paid that set salary for each pay period regardless of the number of hours worked.
- The law further requires that employees may be exempt from overtime pay if they meet certain duties tests. The five exemption categories include "executive, administrative, professional (subdivided into learned professional and creative professional), and certain computer and outside sales" duties.

FLSA Changes, contd.

- The Final Rule raised the salary threshold for overtime pay to \$47,476 annually for a full-time worker. This means that workers who earn less than \$913 a week – \$47,476 a year – have to be paid overtime even if they meet the job duties exemption.
- This will dramatically impact the lives of workers, as well as hundreds of thousands of organizations and employers.

SHRM's Response

- The Society for Human Resource Management (SHRM) argued that the change will "affect nearly every employer in every industry and sector," but also "disproportionately affect the nonprofit and service sector industries, as well as certain geographic areas of the country" SHRM also warned that many in this sector may not yet be aware of these impending changes.
- Fortunately, there is still some time left to prepare....

FLSA Changes: Strategies

- To know how the change will impact you, it is essential to determine whether you currently have accurately classified your employees as exempt and non-exempt. Then determine the number of exempt employees who are currently earning less than the proposed threshold of \$47,476.

Strategies, contd.

- If you have classified employees as exempt and who currently make less than \$47,476 a year, it would be wise to prepare for rising costs that will likely arrive with this change.
- Compensation budgets will likely take a hit from increased overtime pay or from increasing salaries so that employees can keep their exempt status.

Strategies, contd.

- Many employers have started to reconsider hours, compensation and benefit packages.
- Some employers have announced plans, to move salaried workers into the hourly pay category, pay salaried workers more, or pass the increased costs on to customers.

Strategies, contd.

- This is the perfect time to ensure that all employees are properly classified. It is also important to be transparent about any potential changes.
- For example, if team members are moved from salaried to hourly positions, sufficient warning and explanation will be essential to maintaining high morale.

Strategies, contd.

- Employers may use **nondiscretionary bonus**, incentive, and/or commission payments to satisfy up to 10 percent of the required annual salary under the salary basis test (\$91.30 per week); however, these requirements must be met quarterly.
- The total annual compensation requirements for highly compensated employees subject to minimal duties test is increased to **\$134,004** (90th percentile).

Strategies, contd.

- Prepare for the foregoing salary and compensation levels to be automatically updated **every three years.**
- The update is to maintain a threshold equal to the **40th percentile** of weekly earnings of full-time salaried workers in the lowest-wage Census Region.

Strategies, contd.

- Audit all currently exempt positions to determine whether they will meet the new salary requirements (as well as the unchanged duties tests).
- Clearly communicate any compensation and classification changes to affected employees in advance.
- Train employees whose positions were converted from exempt to non-exempt on time-keeping and overtime procedures.

Strategies, contd.

- Begin analyzing and adjusting budgets and pay practices and put measures in place to effectuate the salary and compensation level changes that will be automatically enacted every three years pursuant to Final Rule.
- Don't forget to consider gender-based pay equality requirement and other potential discrimination issues when adjusting salaries.

What is YOUR company (or YOUR clients) doing to prepare for the FLSA changes during the remaining less than 6 months?

Protecting LGBT Workers

- Ongoing legislative efforts to amend Title VII to prohibit LGBT bias in employment have been unsuccessful.
- Private employers are often uncertain as to what's protected by federal law (and what's not) and sometimes take alternative avenues for promoting LGBT workplace rights.

LGBT, contd.

- Employers should evaluate the coverage of LGBT anti-discrimination provisions for all of their locations.
- Virtually all of the Fortune 500 companies and many smaller employers have opted for purposes of their nondiscrimination policies simply to provide broad coverage preventing LGBT discrimination as a matter of policy, regardless of the legal obligations.

LGBT, contd.

- At a minimum, you should include a provision stating that the employer doesn't discriminate on "any other basis protected by law" as a catch-all provision.
- In terms of employee education relating to diversity and inclusion, companies should ensure that all of their employees are familiar with the company's EEO, anti-discrimination and anti-harassment policies.

Done waiting for ENDA

- The Employment Non-Discrimination Act ("ENDA") has been proposed in every Congress (except 1) since 1994, but has not passed.
- ENDA would definitively protect LGBT employees from workplace discrimination.
- EEOC has now signaled that it will no longer wait for passage of ENDA and is using the gender prong of Title VII to pursue these cases.

The EEOC's "new" approach to Title VII

- On March 1, 2016, the EEOC issued a Fact Sheet outlining its recent Title VII litigation related to LGBT discrimination.
- The Fact Sheet pointed out that, since its current Strategic Enforcement Plan ("SEP") was issued in 2012, the EEOC has considered LGBT individuals as covered under the gender provisions of Title VII.

The EEOC's “new” approach to Title VII

- Consistent with the SEP, the EEOC established an LGBT working group to target these cases.
- Most recently, the EEOC has brought two cases against employers for sexual orientation discrimination.
- EEOC had previously brought several cases regarding transgender discrimination.

EEOC v. Scott Medical **(filed March 1, 2016)**

- Charging party = Dale Baxley; alleges that his employer harassed him because of his sexual orientation.
 - Use of epithets and stereo-typing statements by his immediate supervisor.
- EEOC alleges that the employer failed to take adequate action to stop the harassment after Baxley complained, resulting in constructive discharge.
 - Injunctive relief, back pay, compensatory damages and punitive damages.

EEOC v. Pallet Companies d/b/a IFCO Systems (filed March 1, 2016)

- Charging party = Yolanda Boone; alleges that employer terminated after she used the employee hotline to complain about sexual orientation harassment.
 - Use of vulgar language and hand gestures by Boone's immediate supervisor.
- EEOC alleges the harassment violated Title VII and the termination was unlawful retaliation.
 - Injunctive relief, back pay, compensatory damages and punitive damages .

The Roadmap

- *EEOC v. Boh Bros. Constr. Co., LLC*
 - Landmark 5th Circuit case, decided in 2013.
 - Same-sex sexual harassment case based on the theory that an individual could be harassed for failing to conform with gender-based stereotypes.
 - supervisor harassed employee for not being "manly enough"
 - Jury verdict = \$451K (reduced to \$301K).
 - This is the roadmap by which the EEOC now pursues LGBT cases under Title VII.

Recent Outcomes

- *EEOC v. Deluxe Financial Services*
 - Filed June 4, 2015; settled January 20, 2016.
 - Transgender employee not permitted to use women's restroom and harassed by supervisors and co-workers.
 - Employer paid \$115K in damages and is now subject to a 3-year, multi-faceted, consent decree (impacting medical benefits, workplace policies and extensive employee training).

Recent Outcomes

- EEOC v. Lakeland Eye Clinic, P.A.
 - Filed Sept. 24, 2014; settled April 9, 2015
 - Transgender employee terminated because she was transitioning.
 - Employer paid \$150K and is now subject to a 2-year consent decree.

New EEOC Guidance

- EEOC Guidance now states that "the EEOC interprets and enforces Title VII's prohibition on sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation" and enforces these protections "regardless of any contrary state or local laws".

The EEOC's new practice is reflected in the numbers

- 2015 – EEOC processed 1,412 complaints of LGBT-related discrimination.
 - 28% more than in 2014
- EEOC resolved 1,135 of these complaints, resulting in monetary relief for employees of \$3.3 million dollars.
 - 34% more resolutions, paying employees 51% more \$ than in 2014
 - Tip of the iceberg = jury verdicts and confidential settlements not included!

LGBT, contd.

- Further efforts relating to diversity and inclusion in the workplace depend on the size of the employer, but the most effective diversity and inclusiveness efforts are ones in which top company management demonstrates a commitment to and interest in those efforts.

LGBT, contd.

- Education and training that doesn't sound "preachy" and which demonstrates the benefits to the employer and the workforce of diversity and inclusiveness are the most effective presentations.

Do Local Laws Provide LGBT Protection?

- Yes, both the Pittsburgh City Code and the Allegheny Ordinance provide protections.
- And, more importantly, plaintiff's lawyers are starting to use it...

Does YOUR company (or YOUR clients) go above and beyond the legal minimum?

Second Circuit Knocks Out Private FLSA Settlement

- Federal courts have been paying closer attention to the terms of FLSA settlements and have increasingly declined to approve them.
- Some parties have tried to avoid a judicial KO by entering private settlements and filing a simple stipulation of dismissal with prejudice.

Private Settlement, contd.

- The Second Circuit recently landed a knockout punch to this tactic when, on an issue of first impression among circuit courts, it ruled that a former employee and a restaurant may not stipulate to dismissal of an FLSA action with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A) without court or Department of Labor approval of the underlying private settlement. *Cheeks v. Freeport Pancake House*, (2nd Cir. 2015).

How does YOUR company (or YOUR clients) handle employee wage and hour complaints?

Third Circuit Opens New Avenue of Liability for Temporary Employees

- When it comes to using temporary employees, the set-up is all too familiar.
- An employer engages a staffing firm, which hires, pays, and places temps to meet the employer's needs.
- The employer's costs are fixed and payable to the staffing firm, and all of the liability risks that are part and parcel to the employment relationship remain with the staffing firm. Or do they?

Faush vs. Tuesday Morning, Inc.

- Tuesday Morning, a retail store, engaged a staffing firm to provide workers to unload shipments of merchandise, stock store shelves, and set up product displays.
- Upon arriving to begin work, Mr. Faush, an African American, and two other minority temporary workers, were allegedly ordered to work in the back of the store cleaning up trash.

Faush, contd.

- When Mr. Faush complained about the assignment, he was purportedly told by the store manager that the minority temps were not allowed to work the floor due to concerns about theft. Mr. Faush was terminated.
- Pointing to its engagement of a staffing firm, the company denied that it was liable to Faush because he was not an employee.

Faush, contd.

- The Third Circuit reversed the District Court, holding that because the company indirectly paid Faush's wages, had the power to demand replacement workers, gave assignments and directly supervised temporary workers, provided all necessary job-specific training and equipment, and dictated the number of hours worked, a reasonable jury could find that Tuesday Morning was Faush's employer (and a joint employer along with the temporary agency).

Faush, contd.

- The Third Circuit examined the following factors to determine whether Tuesday Morning could be held liable to Mr. Faush as a "joint" employer: the skill required to do the job, the location of the work, the right of the company to assign additional projects, the duration of the relationship, the method of payment and the provision of employee benefits.

Faush Takeaways...

- First, the fact that a worker is provided through a staffing firm isn't a "get out of jail free card".
- Second, employers that use staffing agencies should carefully review their contracts and ensure that those agreements provide protection from liability. Including adequate indemnity language will help to ensure that the financial impact of any claim filed by a temporary employee is reduced or eliminated altogether, even if joint employer liability is established.

Independent Contractors

- On July 15, 2015, the DOL issued new interpretation that the traditional "economic realities" criteria should be applied to determine employee status.
- Having an independent contractor agreement and issuing a 1099 are not factors considered to meet the criteria.
- The DOL emphasized that the employment relationship is very broad.

**What can YOUR company (or
YOUR clients) do to mitigate
against joint employer liability?**

What about IC liability?

Federal Defend Trade Secrets Act of 2016

- Creates a new federal civil cause of action for trade secret theft.
- Amends the Economic Espionage Act of 1996 that criminalized certain kinds of trade secret theft.
- Provides for *ex-parte* seizure proceeding to prevent dissemination of misappropriated trade secrets (available in extraordinary circumstances).
- Requires employers to notify employees about whistleblower immunity provision, allowing immunity for trade secret disclosure to the government or attorney in an anti-retaliation lawsuit.

What Can You Do To Protect Trade Secrets?

- Identify and communicate to employees your trade secret categories (formulas, manufacturing techniques, strategies, customer deals).
- Require employees to sign Confidentiality Agreements (non-solicitation of customers/employees and, in some cases, non-compete).
- Update agreements and policies based on the Defend Trade Secrets Act of 2016, including whistleblower immunity language.

What Can You Do To Protect Trade Secrets? contd.

- Restrict trade secrets to a small number of employees.
- Use performance reviews and handbook update meetings as times to remind employees of their confidentiality obligations.
- Counsel employees at time of departure – robust exit interviews.

QUESTIONS?

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