
EMPLOYMENT LAW UPDATES WHAT'S NEW?

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- Employment Law and Litigation
- Business Law
 - Transactional
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- Estate Planning and Estate Administration
- Real Estate Law
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FLSA Final Rule – Not So Final

- Initial Effective Date: December 1, 2016
- Minimum salary necessary to qualify as an exempt executive, administrative, professional or computer employee is \$913 per week or \$47,476 annually
 - This was more than double the prior threshold of \$455 per week

FLSA Final Rule – Not So Final

- Texas federal court issued an injunction on the FLSA Final Rule on November 22, 2016
 - *State of Nevada v. United States Dep't of Labor*, No. 4:16-CV-00731 (E.D. Tex.)
- DOL appealed to the Fifth Circuit in late December 2016

FLSA Final Rule – Not So Final

- Trump administration – to brief or not to brief?
- Sen. Lamar Alexander: "That was a bad rule." "So I would urge you to show us how to write a good overtime regulation."
- Alexander Acosta (DOL Chief) - \$33,000 minimum salary rather than over \$47,000

Working Families Flexibility Act

- Proposed amendment to FLSA which would allow private-sector companies to offer employees who are eligible for overtime the choice between being paid in cash for hours they work above 40 or accruing an hour and a half of paid time off
 - Must clear a major hurdle in the US Senate

Working Families Flexibility Act

- Ability to accrue up to 160 hours of "comp time" for hours worked beyond 40 in a week
- Voluntary agreement of employees, in writing
- Employees would be able to change their mind at any point, cash out their unused time off and return to a cash compensation structure for overtime.
- Employers can stop offering comp time as an option at any point as long as they give workers 30 days' notice of the change.

Working Families Flexibility Act

- If employees' accrued time goes unused at the end of any given year - 30 days to reimburse employees in cash for that time
- In order to qualify, employees would have had to work at least 1,000 hours (25 continuous 40-hour workweeks) in a 12-month period before they agree to any comp time arrangement.
- Union employees - any comp time policy an employer seeks to enact would be subject to collective bargaining
- If enacted, the law would be in place for five years, at which point Congress would have to reauthorize it.

Working Families Flexibility Act: Details

- Employers cannot incentivize employees to take comp time during periods of the year when businesses aren't as busy.
- Employers can't “directly or indirectly intimidate, threaten or coerce” employees to get them to choose the comp time option or to force them to use the time they have accrued – voluntary
- Employers must permit workers to use their paid time off “within a reasonable period” after an employee makes a request as long as the use of that comp time “does not unduly disrupt the operations of the employer”.

Working Families Flexibility Act: Downfalls

- Payroll check modification – amount of compensatory time hours earned, and whether they were paid out or banked
- Not conducive to long-term planning – decisions on comp time made on a month-to-month basis
- Long-term budgets for overtime pay difficult since employees can opt out of comp time plan with a month's notice
- Employers to decide whether a comp time off request should be denied if it 'unduly disrupts the operations' - employee may disagree with this determination = potential retaliation claim

Trump Budget - Paid Family Leave

- Trump allocated \$20 billion in his proposed budget toward a new national paid leave program.
 - No details, but the concept would be to provide up to six weeks of paid leave for new parents through states' unemployment insurance agencies.
- The budget also includes a line item for \$13 billion in new unemployment insurance revenue, suggesting that states may need to increase unemployment insurance taxes.

Fair Pay and Safe Workplaces Executive Order

- “Blacklisting Rule” – Obama Executive Order rolled back
- Required federal contractors to disclose alleged labor violations for the prior three years and to give wage statements detailing pay and hours of employees and independent contractors
- Through a review procedure, Congress rolled back this rule in the early days of the Trump administration.

You Can't Always Get What You Want

- *Meade v. AT&T*, No. 15-6362 (6th Cir. Aug. 2, 2016)
- Sixth Circuit drew the line between reasonable and unreasonable requests for accommodations made by disabled employees under the ADA. According to the court, while an employee may want a permanent light-duty position, the ADA does not require employers to create such a position.
- Obligations under the ADA met by offering Plaintiff resources to view and apply for vacant positions as they became available. At that point, the burden fell on Plaintiff to request the position, and Employer had no obligation to further reach out to Plaintiff regarding vacant positions.

You Can't Always Get What You Want

- *Meade v. AT&T*, No. 15-6362 (6th Cir. Aug. 2, 2016) - providing “reasonable accommodations” under the ADA:
 - 1) an employer is not obligated to continue employing an employee who cannot perform the essential functions of his job, with or without a reasonable accommodation, due to a permanent disability;
 - 2) a reasonable accommodation may include reassignment to a vacant position;
 - 3) ADA does not require an employer to create a new position to accommodate a disabled worker, or to extend a light-duty position in perpetuity; and
 - 4) if an employee is terminated as a result of his inability to perform the essential functions of his position, the company is not obligated to contact the former employee to make him aware of positions that become available at the company.

I-9 Compliance: Trump Cracking Down

- Trump's immigration agenda includes a plan to hire an additional 10,000 ICE officers
 - increase in workplace audits and site visits
 - may reinstitute raids of employers
- Push to require more employers to sign up for E-Verify
 - assists employers in determining whether an employee has work authorization
 - may open employers to new risks for discrimination claims by data mining the information submitted

I-9 Compliance: Best Practices

- Don't use an outdated form.
- Be consistent with every I-9 form.
- Don't use the I-9 as a screening tool.
- Make sure that the I-9 is completed immediately upon employment beginning.
- Don't treat international employees differently.
- Give employees the choice of what documents to present.

I-9 Compliance: Best Practices

- Don't ask for specific documents and don't over document.
- Make sure the form is completely filled out.
- Use common sense.
- Keep I-9s (and any copied documents) separate from personnel files and in compliance with retention rules.
- Implement regular training with HR employees and make sure that the way you have always done it is a complete and consistent practice of compliance.