THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER
HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES
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DOL'S OVERTIME RULE FACES UNCERTAIN FUTURE - NOW WHAT?

As initially reported in the *National Law Review*, the Department of Labor's recent attempts to amend the Fair Labor Standards Act by issuing new regulations are on hold. So, what does that exactly mean for employers?

As background, the Fair Labor Standards Act has three basic requirements for all employers with respect to all its employees: (1) require all employees to track the hours worked during the workweek; (2) pay at least the current minimum wage to all employees, which went up to $9.30 in Colorado on January 1, 2017; and (3) pay the employee at his/her overtime rate (*i.e.,* 1 ½ times the employee's regular rate) if the employee works more than 40 hours in a workweek. An employer can claim that certain employees are exempt from this overtime rule if the employer can establish that the employee: (1) meets one of the FLSA's duty-basis tests; and (2) pays the employee on a salary basis that exceeds the current minimum salary threshold, which has been at $455 per workweek since 2004.

Recently, the Department of Labor, the federal administrative agency charged with enforcing the Act, established final rules that would have moved that salary amount to $913 per workweek. These same rules provided that the Department would automatically raise that amount every three years. In response, 21 states filed a joint lawsuit in Texas attempting to block the implementation of those final rules.

As most readers probably heard, on November 22, 2016, about a week before the final rules would have become effective, the Texas Court issued a nationwide preliminary injunction blocking the DOL from implementing the final rule's changes. This means that, while the preliminary injunction is in effect, employers are only required to pay an employee the $455 per workweek amount. While the court's preliminary injunction is a strong indicator that the court will ultimately determine the final regulations are unlawful, the underlying merits of the lawsuit and the constitutionality of the final regulations have yet to be decided.

On December 1, 2016, the DOL filed a notice of appeal regarding the injunction in the Texas case to the U.S. Court of Appeals. A recent ruling from the Court regarding the briefing

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schedule makes it seem unlikely that the Court will rule on the case prior to President-elect Trump's inauguration. But with this matter, certainly anything is possible.

So, in short, now what? Well, that's an awfully good question. While employers that already implemented changes based on the belief that the rule would become effective "can," lawfully, reverse those decisions, making those changes could have significant effects on employee morale because most employees probably would not welcome that change. For those employers that did not implement changes based on the expected new rule, we recommend taking a wait-and-see approach. After all, the Court of Appeals could affirm the ruling, which would make it very unlikely that the rules would become effective, or that the Trump administration could try to reverse or modify the changes the DOL attempted to implement in the final regulations. In an August 2016 interview, then-candidate Trump said that he wasn't necessarily opposed to the increased salary amount, but he thought there should be a "carve out" for small businesses; he did not identify what he considered to be a "small business."

Practical Tip: At this point, employers aren't legally required to do anything different than they have been doing. We recommend that employers wait until either the Court makes its ruling or President-elect Trump's DOL announces its position regarding the lawsuit (it could withdraw from being involved; though pro-employee groups have said they would pick up the case), and/or whether it will withdraw, amend, etc., its final rules. We'll endeavor to keep you posted on any upcoming developments.

THE FLUCTUATING WORKWEEK COMPENSATION METHOD: WILL IT WORK FOR MY COMPANY?

With many employers facing uncertainty with respect to the DOL's changes to the FLSA, many organizations looked for alternative compensation methods. One such method is the "fluctuating workweek method." So, what is this method? And will it work for your organization?

The Basics. In short, under this method, the employer pays a nonexempt employee a fixed salary that is intended to cover the employee's pay regardless of how many hours the employee works. Of course, because the employee is nonexempt, the employee must receive additional compensation if the employee works more than 40 hours in a workweek. But because the salary covers "all hours worked," including those over 40, the employer only needs to compensate the employee for those overtime hours at a .5 rate, instead of at a rate of 1.5 times the employee's regular rate.

For example, let's say Spacely Sprockets pays George, the widget maker, a salary of $500 per week, and one week he worked 50 hours. If George was like most employees in that his salary only covered the first 40 hours of work (*i.e.*, he was *not* compensated via the fluctuating workweek method), George would receive $687.50 for the week. (500 + (500 / 40 (*i.e.,* $12.50) x 10 x 1.5 (*i.e.,* $187.50)). If, on the other hand, George was paid via the fluctuating workweek method, his compensation would only be $550 for the workweek (500 + (500 / 50) (*i.e.,* $10.00) x 10 x .5 (*i.e.*, $50)). Thus, Spacely Sprockets saves nearly $140 for the workweek.

Another example would be if George worked 60 hours in a workweek. His

compensation for this workweek under the fluctuating workweek method would be $666.67 (500 + (500 / 60) (*i.e.,* $8.33) x 20 x .5 (*i.e.*, $166.66)), instead of, under the normal compensation method, $875.00 (500 + (500 / 40 (*i.e.,* $12.50) x 20 x 1.5 (*i.e.,* $375.00)). Thus, Spacely Sprockets saves nearly $210 for the workweek. But while there are many financial benefits to this method, it does come with a number of potential pitfalls.

First, employees compensated under the fluctuating workweek method must receive their salary, even if they work less than 40 hours in a workweek. So, let's say that due to a slowdown in business, George only worked 36 hours one workweek. The fluctuating workweek method would still require Spacely to pay George his full salary even though his hours dipped below 40 this week. So, in our example, George would receive his $500 salary, even though he is a nonexempt employee and worked less than 40 hours in the workweek.

Second, organizations employing this method must constantly evaluate whether the employee receives at least the current minimum wage for every hour worked, which is a requirement under this method. For example, if George worked 70 hours in a workweek, his "hourly rate" would dip to $7.14 (500 / 70), which is below the minimum wage rate, as is the $8.33 rate in Colorado as of January 1. This shortfall requires the organization to provide George additional compensation to the point where George receives at least the minimum wage amount.

Third, courts typically require that the employee's actual work hours fluctuate above and below 40, depending on the jurisdiction where the employee works, so, this compensation method may not be lawful when the individual always works over 40 hours in a workweek.

Fourth, the FLSA's regulations greatly restrict an employer's ability to deduct from an employee's salary, which is particularly true with fluctuating workweek employees. Thus, employers may not deduct from salary for an employee's absence after the employee has exhausted his or her leave bank or when the employee doesn't return the employer's equipment after employment ends, or on account of other circumstances.

Fifth, the FLSA's regulations prohibit organizations from paying "extra" compensation to an employee being paid under this compensation method. That said, a recent case, *Lalli v. General Nutrition Ctrs., Inc.*, held that an employer can pay a fluctuating workweek employee a bonus tied to productivity, but not a bonus related to time spent working or directly to hours worked, which includes a prohibition on paying fluctuating workweek employees any shift premiums.

Finally, the fluctuating workweek method requires the employer to provide a "clear understanding" of how this compensation method works, preferably made in writing to the employee.

Certainly, the fluctuating workweek method comes with many pitfalls, but it can work well for some employers. For example, if the nature of your business is such that demand varies widely during certain times of the year, this method may help you even out costs over time and make labor costs more predictable during the year. Additionally, because this method results in a lower regular rate of pay during weeks with large numbers of hours worked, this method reduces the impact of big spikes in overtime pay during especially busy weeks. Finally, this compensation

method provides employers another way of compensating employees.

Practical Tip: As you can see, the fluctuating workweek is not for everyone, nor is it a universal fix for unpredictable overtime costs. But for certain organizations, this compensation method provides not only certainty, but it may reduce overall compensation costs.

START 2017 RIGHT WITH A COMPANY CHECKUP

This year brought with it several new laws that may impact your company's Employee Handbook and practices. So, it's critical for companies to ensure your Handbook and practices reflect these new laws.

First, starting January 1, 2017, Colorado employees have the right to obtain a copy of their personnel files once per year and once after employment ends. Only certain documents and information are not considered part of the "personnel file" under this law: (1) documents or records required to be placed or maintained in a separate file from the regular personnel file by federal or state law or rule; (2) documents or records pertaining to confidential reports from previous employers of the employee; (3) an active criminal investigation, an active disciplinary investigation by the employer, or an active investigation by a regulatory agency; and (4) any information in a document or record that identifies any person who made a confidential accusation against the employee who requests his or her personnel file. Further, any other record "used to determine the employee's qualifications for employment, promotion, additional compensation, or employment termination or other disciplinary action" is considered part of the employee's "personnel file." Ensure your Handbook provision covering personnel files reflects this new requirement.

Second, another new Colorado law requires employers to accommodate pregnant employees and applicants. This requirement applies to "health conditions related to pregnancy or physical recovery from childbirth," unless the accommodation causes an undue hardship for the employer. Importantly, employers cannot require an affected employee or applicant to accept any accommodation that she has not requested, including a leave of absence, or that is not necessary to perform the essential functions of the position. Nor may an employer deny any employment opportunity to an affected employee or applicant because of her need for an accommodation.

Third, for federal contractors, Executive Order 13706 will go into effect on January 1, 2017, which covers new federal contracts and contracts that come to an end on or after this date. Under this Executive Order, certain federal contractors must provide sick leave benefits at a rate of one hour of sick time off for every 30 hours an employee works. Covered contracts include construction contracts covered by the Davis-Bacon Act; service contracts covered by the Service Contract Act; concessions contracts; and contracts related to offering services to federal employees and their dependants in connection with federal property or lands. With very limited exceptions, any employee whose work is connected to the covered federal contract is entitled to this sick leave benefit, regardless whether the employee is classified as exempt or nonexempt under the Fair Labor Standards Act. If your company is a covered federal contractor, ensure your Employee Handbook reflects this new requirement.

Practical Tip: Unfortunately for employers, new laws seem to be passed or changed on a more frequent basis. We recommend that employers set up a yearly review of their Handbooks, practices and policies to ensure that nothing "sneaks through the cracks."

THE NEW EEO-1 AND I-9 FORMS

For employers with 100 or more employees who file EEO-1 reports, new EEO-1 reporting requirements appear to be on the horizon. Starting March 31, 2018 (*not* 2019), covered employers must file pay data on the EEO-1 form. This pay data will cover 2017 pay information. Note the EEO-1 filing deadline will move from September 30 to March 31.

After more than seven months of waiting, USCIS published a new I-9 form in November 2016. This new form replaces the I-9 form with the expiration date of March 31, 2016. The new form can be found here: https://www.uscis.gov/i-9. Employers must start using the new I-9 form no later than January 22, 2017.

NEW EEOC GUIDANCE ON NATIONAL ORIGIN DISCRIMINATION

On November 21, 2016, the EEOC both broadened and clarified its guidance on national origin discrimination, which the EEOC defines as "discrimination because an individual (or his or her ancestors) is from a certain place or has the physical, cultural, or linguistic characteristics of a particular national origin group," whether that national origin is real or perceived. The EEOC explains that a "certain place" could mean a country, a former country (*e.g.*, Yugoslavia), a geographic place that never was a country, such as Kurdistan, or an "ethnic group," defined as groups of people "sharing a common language, culture, ancestry, race, and/or other social characteristics." The EEOC provides as examples Hispanics and Arabs.

The Guidance also explains that the law prohibits discrimination based on the perception that someone is from a protected group. As an example, the EEOC says an employer that engages in discrimination on the basis of national origin when the employer makes an adverse action on the basis of its perception that an employee is from the Middle East or is of Arab ethnicity, regardless of how she identifies herself, or whether the employee is, in fact, from one or more Middle Eastern countries or ethnically Arab.

The new Guidance explains that discrimination includes ethnic slurs, ridicule, intimidation, drawings, physical violence or other offensive conduct based on a person's birthplace, ethnicity, culture, language, dress, or accent. But isolated comments about a coworker's accent or remarks that "foreigners are stealing American jobs" not rise to the level of illegal harassment.

The EEOC's position regarding "workplace language" requirements slightly shifted in this Guidance. The EEOC now states that language fluency requirements are permissible, provided fluency is required for the effective performance of the position. The EEOC repeated its long-held position that discriminatory preferences of coworkers, customers, or clients as the basis for adverse employment actions is illegal. For example, customers expressing displeasure with a customer service employee's accent or with a particular ethnic group is not a legal basis for terminating the employee.

Q&A

Q. *I know the new white collar exemption rules did not go into effect. But my company is still interested in controlling overtime costs, so we are considering changing our definition of a "workday." Are there any special rules we need to consider?*

A. Well, that depends. Is your organization covered by the Colorado Minimum Wage Order? The MWO covers employers in the following industries: (1) retail and service; (2) commercial support service; (3) food and beverage; and (4) health and medical. If you are in one of those industries, a workday can be "any consecutive twenty-four (24) hour period starting with the same hour each day *and the same hour as the beginning of the workweek*." So, if your company wanted to define a workday as starting at noon, but the workweek starts on Sunday at midnight, this definition of "workday" would not comply with the MWO requirement. In that scenario, the organization must start their workday at the same time as their workweek start (*i.e.,* midnight).

Q. *Should our company use social media to screen applicants for employment?*

A. This practice is certainly growing in popularity among employers. A 2014 study by Go-Gulf Web Technologies found that approximately 40% of employers used social media to prescreen applicants for employment. But as mom used to ask, "Would you jump off a bridge because all the other kids are doing it?" As with many questions we receive, the answer to whether employers should screen applicants through social media is "it all depends" on several factors.

First, no Colorado law prevents employers from reviewing the social media accounts of applicants or candidates for employment. But Colorado does not allow an employer to "suggest, request, or require that an employer or applicant disclose ... any username [or] password." C.R.S. Section 8-2-127. Therefore, any private or restricted social media site is off limits.

Second, what will you do with the information you receive? You may find information that is useful in evaluating professional qualifications. For example, professional sites such as LinkedIn are designed to present professional qualifications. But that is less so with sites such as Facebook or Twitter.

And all information is not created equal. In the Go-Gulf study, 24% of hiring managers found that applicants lied about their qualifications, and 30 % of applicants displayed poor communication skills. But 48% found information about applicants' drug or alcohol use. Colorado's Legal Off-Duty Activities Statute prohibits an employer from refusing to hire an applicant because s/he engages in a legal off-duty activity. So what will you do with that picture of the applicant playing beer pong on the weekend? Or engaging in any number of social, recreational, or political activities that run counter to your values?

So, employers should calculate the risk in deciding to screen social media and develop criteria for the search before conducting it. Limit the search to those areas of social media likely to reveal usable information, for example, information about education and prior work experience. And search those social media sites most likely to demonstrate the applicant's qualifications or lack thereof.