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# 2016 Employment Law Seminar

Presented by GKH Employment Law attorney  
**Jeffrey J. Worley**

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# Changes to the Salaried Exemption

- How concerned are you about the DOL's changes to the FLSA?
  - A lot, my company is very concerned as to how we are going to compensate employees and track hours.
  - A bit, but not overly concerned. We do not have many exempt employees.
  - Not concerned.
  - Who is the DOL and what is the FLSA???

# Changes to the Salaried Exemption

- Current Salary Basis: \$23,660
- Proposed Salary Basis: \$50,440

No proposed exemptions, adjustments for company size or other regional economic factors.

# Annual Indexing

- Annual increase of the salary floor for inflation
- Proposed: 40<sup>th</sup> percentile of weekly earnings for fulltime salaried workers or tied to the Consumer Price Index
- 40<sup>th</sup> percentile in 2013 = \$47,892; in 2016 = \$50,440
- Employers will have 120 days to comply with salary increases each year

# Timeline

Big question: WHEN?

Likely May – June

How much time to comply?

Likely 120 days after regulations go into effect

# Considerations for Employers

- Increase salaries or treat employees as hourly overtime eligible
- Considerable lack of flexibility for both employers and employees
- Track all hours worked by former exempt employees: including all time worked from home, checking email, etc.

# Is Congress Covered?

Congressional staffers may not be covered under the final regulations.



# Mobile Devices

Marty owns We Build It, a company that builds things. One of Marty's hourly employees, Chuck, routinely checks his email in the evening when he is at home. Chuck will often send responses that are many paragraphs long. Marty is concerned that is should pay Chuck for the time spent emailing outside of work. Marty should:

- Tell Chuck to stop checking emails at home and to only work when he is at the office. If Chuck continues, Marty should pay him, but also discipline him for his failure to follow a directive.
- Tell Chuck that he appreciates his email inputs and that he should feel free to do so, but putting Chuck on notice that Marty isn't going to pay him.
- Tell Chuck if he sends emails after work, he should record his time and Marty will compensate him.
- Ignore the situation and always delete Chuck's emails in the morning.

# Mobile Devices and Non-Exempt

New DOL regulations regarding employee use of mobile devices outside of work expected late 2016

- De minimis use likely not compensable
- Employers should have a specific policy in place for use of mobile devices
  - Directing employees to not use for work purposes while on the clock
  - Time Spent performing work must be reported and compensated

# Break Time

We Build It has a policy that employees can take a 10 minute break in the morning and one in the afternoon. Marty clocked his employees' morning break yesterday and it was 18 minutes long. Marty can:

- Refuse to pay his employees for the 8 minutes of additional break time.
- Tell his employees that they can only take a 2 minute afternoon break.
- Write up his employees for taking a break in excess of 10 minutes.

# Break Time

- Break times of less than 20 consecutive minutes are compensable
- Unpaid breaks:
  - Longer than 20 minutes
  - No work performed, *i.e.* no answering phones, checking email, etc.
  - Employee should be free to leave premises and engage in personal business

# Travel Time

- Typical day to day travel from home to work and work to home is not work time
- Travel to a special one day assignment in another city is work time (employer may deduct amount of time the employee generally commutes to work)
- Travel as part of the days work, travel from job site to job site is work time
- Travel away from home community-if it is in the normal work day it is work time-if outside of the normal workday actual travel time is generally not work time

# Trainings

- Mandatory trainings and trainings that happen during the normal work day are work time
- Classes that an employee takes outside of work and not required by the employer, even if it may benefit the employer is generally not work time

# Overtime

- Overtime can be limited to only time worked
  - PTO, paid holidays, sick days or other paid days off is not time worked
  - Ensure that this is understood by your employees by including this as part of your overtime policy

# Independent Contractors

Marty hires an independent contractor to work for We Build It – to assist in building things. Jane, the independent contractor, brings her own tools and sets her schedule. Jane is also subject to an independent contractor agreement which specifies that We Build It will not provide workers compensation insurance and that she will receive a 10-99 at the end of the year. Jane is always guaranteed a set rate of compensation regardless of whether We Build It makes a profit or not. Jane has been working for We Build It for the past three years almost exclusively.

Is Jane an independent contractor?



# Independent Contractors

## Economic Realities Test

- Is the worker economically dependent on the employer or is the worker in business for him/herself?

# Economic Realities Factors

- (A) The extent to which the work performed is an integral part of the employer's business;
- (B) The worker's opportunity for profit or loss depending on his or her managerial skill;
- (C) The extent of the relative investments of the employer and the worker;
- (D) Whether the work performed requires special skills and initiative;
- (E) The permanency of the relationship; and
- (F) The degree of control exercised or retained by the employer.

**No one factor is determinative**



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# Medical Marijuana

With the passage of the law legalizing medical marijuana, Marty will have to:

- Provide chill zones, where stoned employees can relax and provide snacks for stoned employees who get hungry.
- Do nothing, employers can still enforce their zero tolerance drug policy.
- Provide employees with the opportunity to use marijuana while at work, so long as the employee can continue to do the work.
- Allow employees to use medical marijuana outside of work, but hold employees to standards of performance.

# Medical Marijuana

- Effective May 17, 2016
- Legalizes marijuana use for certain enumerated reasons
- Requires a prescription
- No employment discrimination or retaliation for medical use of marijuana
- Employer not required to provide an accommodation for use on the employer's premises
- Permits disciplinary action for employee who is under the influence while at work or whose performance falls below "the standard of care normally accepted" for the position
- Prohibits employees from performing some jobs that are safety sensitive

# Questions that Remain

- What are the ADA implications for medical marijuana – marijuana still illegal under federal law?
- How will the law be interpreted under the PHRA?
- What about DOT licensed drivers? Employers not required to take any action violating federal law.
- What are the implications for drug testing in the workplace?

# EEOC Enforcement

- Has my company reviewed and revised our handbook as it relates to accommodations provided to pregnant employees?
- Has my company reviewed our handbook's equal employment opportunity statement as it relates to sexual orientation and gender identity?

# EEOC Enforcement

EEOC has ruled that adverse employment action on basis of sexual orientation or gender identity is equivalent to gender discrimination under Title VII

Falls under failure to conform to gender stereotypes

# Examples of LGBT Discrimination

From the EEOC:

[https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm)

- Failing to hire an applicant because she is a transgender woman.
- Firing an employee because he is planning or has made a gender transition.
- Denying an employee equal access to a common restroom corresponding to the employee's gender identity.
- Harassing an employee because of a gender transition, such as by intentionally and persistently failing to use the name and gender pronoun that correspond to the gender identity with which the employee identifies, and which the employee has communicated to management and employees.
- Denying an employee a promotion because he is gay or straight.



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# Title VII

- There is no Supreme Court decision as the EEOC's interpretation of Title VII
- Currently no explicit federal or state protection
- Likely some carve outs for religious organizations but not for privately/family held small businesses

# Pregnancy

- Pregnant employees must be provided similar accommodations that employer provides to similarly situated employees
- Including light duty for workers compensation covered injuries
- Financial implications cannot be considered
- Employer, however, cannot place restrictions on a pregnant employee even if employer believes in the employee's best interest

# NLRB

Marty has noticed a decline in employee morale-the receptionist tells people to have an ok day, because that's as good as it will get, supervisors are constantly using the frowny face emoji in their emails, etc. Marty is concerned that this could have an adverse effect on workplace productivity and customer relations. Marty decides he needs a policy to promote a positive working environment.

Employees are expected to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships with internal and external customers, clients, co-workers and management.

Is this policy legal?

# NLRB

- An employer cannot have a policy requiring employees to always be positive.
- Employees must be able to freely discuss among themselves the terms and conditions of their employment - that includes negative aspects.

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# QUESTIONS & ANSWERS

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