Legal Matters®

Employment
spring 2020

New federal overtime laws taken effect


©alphaspirit

As an employer, you should know that the federal Fair Labor Standards Act (FLSA) requires workers to be paid a federal minimum wage and that wage workers and certain "non-exempt" salaried workers who work more than 40 hours in a week receive overtime pay at one and a half times their normal rate for each extra hour.

During the Obama administration, the U.S. Department of Labor proposed new regulations to double the minimum salary level under which salaried "white collar" workers (in other words, managers and professionals) would be entitled to overtime pay from $23,000 a year to $47,000. (The threshold hadn't been raised since 1975.) The proposed regulations also presented a new test designed to stop employers from misclassifying workers as "managers" exempt from overtime laws when they really weren't. The goal was to extend overtime protections to more than four million new workers. But the proposed regulations caused an uproar in the business community. Lawsuits suggested the Labor Department didn't have the authority to make the change, and the regulations were never implemented.

The Labor Department under President Trump worked on its own version of new overtime rules, which took effect Jan. 1. Because the changes could impact how your company assigns duties and approaches hiring and payroll management, it's important to be aware of what the new rules say.

Under the new rules, salaried executive, administrative and professional employees must be paid at least $684 a week, or $35,568 per year, to be exempt from overtime, significantly less than the Obama-era proposal, but still an increase. Up to 10 percent of that may come from nondiscretionary bonuses (bonuses based on a set of objective criteria), incentive payments and commissions, as long as those payments are received at least once a year.

The new rules define "executive," "administrative" and "professional" employees exempt from overtime:

- An "executive" employee is someone whose main responsibility is managing the company or one of its departments. He or she also

continued on page 3

'Service charges' can create problems for employers


©Wavebreakmedia

State and federal wage and hour laws allow employers to pay a sub-minimum wage (commonly known as a "tip credit") to service workers, such as servers, bartenders, bellhops and parking valets, but only if those workers are spending most of their time on tip-generating work and making enough in tips to bring them over the minimum wage. Violation of these laws can result in lawsuits and fines. Some employers may try to make things more efficient by automatically adding a "service charge" to customers' tabs. But any employer that does this had better be sure all the proceeds are going to actual service workers, or the employer could land in hot water.

This happened to a catering hall operator in California. The employer added a 21-percent charge to every food and beverage tab and labeled it a "service charge," but didn't pass the money on to service workers. Instead, it kept part of the charge and doled out the rest to managers and other nonservice employees, presumably under the assumption that because it wasn't labeled a "tip" or "gratuity," customers would tip the server separately.

One of the servers took the company to court, asserting that customers wrongly assumed the service charge was going to bartenders and waitstaff, resulting in service personnel getting stiffed. She alleged that this violated California labor laws.

The employer argued in response that a service charge can never amount to a gratuity. A trial judge dismissed the worker's claim.

The California Court of Appeals reversed. The court said California's tip law was meant to ensure that service workers, not employers and nonservice workers, received the gratuities customers intended them to receive and the employer's practice undermined this. It also noted that any reasonable customer would see the service charge and assume it was a built-in tip for their server or bartender.

This case was decided under California law, so talk to an employment attorney to review your policies according to the law where you live.

Employer's mistaken belief leads to discrimination claim


©stockaso

Federal law and most states forbid employers from discriminating against workers based on disability, meaning it's illegal to fire, demote or refuse to hire someone because of their disability if they can do the job with reasonable accommodations. Generally, a worker claiming disability discrimination needs to show "animus." That means they need to show an employer's decision was based on prejudicial attitudes or ill will towards people with disabilities. But a recent California case should serve as warning to employers that courts may punish them for sloppiness, too, even if there was no intent to discriminate.

In that case, a sales rep for a large drug company developed an eye condition and could no longer drive to visit clients. He went on medical leave and asked to be moved to a position that didn't require driving. His request apparently got caught up in corporate bureaucracy, and over the next six months the employee sent numerous emails to HR and applied for a number of internal positions, but heard nothing in response. A temp in the benefits department then mistakenly determined that he had transitioned from short-term to long-term and could no longer work at all and, misreading a company policy, notified him he was terminated. At no point had the employee requested long-term disability benefits. After desperately and unsuccessfully trying to correct the situation, he filed suit alleging disability discrimination.

The employer tried to get the case thrown out, arguing that the employee had no legal claim. After all, the employer argued, it showed no "animus" (discriminatory intent), and the temp miscategorized him in good faith, albeit mistakenly. A trial judge agreed, but the California Court of Appeal reversed the decision. The court decided that even without ill intent, the employee shouldn't have to pay for the temp's mistake.

Courts may punish employers for sloppiness, even if there was no intent to discriminate.

If you're concerned that your own internal procedures leave you vulnerable to mistakes that could result in lawsuits, you should consult with a labor and employment attorney to help you address such vulnerabilities.

Employer can't shorten statute of limitations for bias suits

A "statute of limitations" is a law that sets a deadline for filing a lawsuit. For example, if you're bringing a personal injury case, depending on your state, you have a certain number of years after the date of the incident to bring your case. A lot of employers try to guard against the risk of lawsuits by having their workers sign contracts under which, should they decide to try and bring the employer to court over an alleged wrong in the workplace, they have a much shorter time to bring the case than the law would otherwise provide. If you're thinking of implementing such contracts, talk to an employment lawyer first, because it might not protect you the way you expect.

This happened recently in Michigan. Barbrie Logan applied for a job as a cook at the MGM Grand Casino in Detroit and, as part of the application, agreed to a six-month limitation period for any lawsuit arising from her employment that she might potentially file. Ultimately, she left her job and sued the MGM Grand for sex discrimination in federal court under Title VII of the Civil Rights Act. She didn't file her suit within six months of the alleged discrimination, and the employer got the case thrown out, pointing to the limitation period in her employment application.

But Logan appealed the case, arguing that the reduced limitation period was unenforceable in Title VII cases. A federal appeals court agreed with her and ordered that her suit be reinstated. Specifically, the court said that the 300-day statute of limitations in the federal law is a "substantive right" granted by Congress that cannot be shortened by contract ahead of time.

There may be other situations where this type of contract is void too. Talk to an attorney to learn more.

We welcome your referrals.

We value all of our clients. While we are a busy firm, we welcome your referrals. We promise to provide first-class service to anyone that you refer to our firm. If you have already referred clients to our firm, thank you!

What you should know about new federal overtime rules

continued from page 1

must regularly direct the work of at least two full-time employees and have either authority over hiring, firing and promotions or significant input into such decisions.

- An "administrative" employee is someone who does office work related to general business operations and/or customers. To be exempt, an administrative employee's work must involve decision-making and independent judgment on significant matters.
- A "learned professional" is someone whose work requires advanced knowledge in a field of "science or learning" and involves the constant exercise of discretion and judgment.

You should contact an employment attorney versed in all the ins and outs of the new regulations to help you evaluate your workforce, including which workers you currently classify as "exempt" from overtime requirements, to make sure they still qualify. For workers who do not qualify, you need to decide whether to give them a raise so they qualify as exempt or to reclassify them as "non-exempt" and pay them overtime. There are other issues to consider as well. If you reclassify workers as non-exempt, will they see it as a demotion, impacting morale in your workplace? Might you consider hiring more workers instead of paying overtime to existing workers who didn't previously qualify? And if you do this, do you run the risk of expanding your workforce to the point that you're subject to the Affordable Care Act and the Family and Medical Leave Act, when you previously were not? Obviously there's no one-size-fits-all approach. That's why it's so important to talk to an employment lawyer where you live to discuss the decisions you will need to make regarding your organization.


©alphaspirit

'Hairstyle discrimination' potential trap for employers

Every employer wants their workers to represent the company well. This often means requiring that they maintain a "professional look." And each employer has his or her own idea of what constitutes "neat, clean and professional."

But employers' notions of what constitutes an appropriate "look" for the workplace can also be based on implicit biases embedded in their own culture, which is often the majority culture, and may be seen as a proxy for discrimination.

Nowhere is this truer than with hairstyles, particularly hairstyles associated with African American culture, such as dreadlocks, Afros, cornrows and twists. In fact, Dove, the maker of personal-care products, conducted a study of more than 2,000 women in the corporate world and found that African Americans were 50 percent more likely than white women to be sent home from work because of their hairstyles, and another 80 percent felt pressured to change their hairstyles. Black women also were 30 percent more likely than white women to report being given a formal grooming policy to review during the hiring or orientation process. In most cases, these hairstyles were worn in a groomed manner that only came across as "unprofessional" due to stereotyping or bias.

In response, New York, California and New Jersey passed laws outlawing workplace discrimination or grooming guidelines based on traits historically associated with race, including hair texture and hairstyles. At least a half-dozen other states and localities have such laws in the works too. Such laws allow workers to take employers to court over grooming or appearance policies that ban, limit or restrict natural hair or hairstyles associated with a certain culture. But even in places that haven't passed such laws, a worker might still be able to sustain a traditional workplace discrimination claim if they can prove a negative employment action (being fired, demoted, denied a promotion or turned down for a job) related to their appearance is rooted in racial, ethnic or religious bias.


©alphaspirit

If you're concerned about your own workplace policies, check in with an employment attorney to make sure you're doing things right.