

2017 Corporate Counsel Institute

Employment Law Update

12:30 p.m. - 1:30 p.m.

Presented by

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Employment Law Update

Four Key Issues:

- EEO-1
- The salary requirement for Exempt Status under the FLSA
- The DOL's Independent Contractor Administrator's Interpretation ("A.I.")
- Joint Employment Rules
- Leave as Accommodation for Disability
- Preventing Workplace Harassment

EEO-1 Requirements: Update

- The new EEO-1 requirements for 2017 would have required:
 - W-2 pay data
 - Hours worked
 - The usual race, ethnicity, and sex of workers by the EEOC's 10 job categories
- *Indefinitely stayed by the Office of Management and Budget*

EEO-1 Requirements: Update

- Who must file:
 - Companies with 100 or more employees
 - Companies with 50 or more employees and subject to federal affirmative action:
 - Federal contract/subcontract of \$50,000 or more
 - Serve as a depository of Government funds
 - Financial institution that issues/pays on U.S. Savings Bonds

EEO-1 Requirements: Update

- Requires a workforce snapshot:
 - A payroll period in October, November, or December 2017
 - Employers must report the number of total employees
 - In each of the EEOC's 10 job categories
 - By race, ethnicity, sex

EEO-1 Requirements: Update

- When must the 2017 EEO-1 be filed:
 - No later than March 31, 2018
 - NOTE: No EEO-1 filed in 2017
 - All previous EEO-1 filers will receive a Notification Letter with instructions
 - Check www.eeoc.gov/eo1survey

EEO-1 Requirements Update

- With whom to file:
 - The Joint Reporting Committee
 - (EEOC and OFCCP are the members)
- How to file:
 - Via the EEO-1 Online filing system

Salary Basis Requirement: Update

- The proposed new required salary for “exempt” status: \$47,476
- Would have resulted in:
 - Increased salary for many to maintain “exempt” status, or
 - Re-classification as “non-exempt” and overtime pay for many others

Salary Basis Requirement: Update

- The proposed regulation is gone
- Texas federal court litigation:
 - Issued a “stay” just days before the December 1, 2016, effective date
 - DOL continued to defend its authority, but not the new regulation
 - In August 2017, the district court ruled that the DOL had exceeded its authority and struck down the regulation

Salary Basis Requirement: Update

- DOL Secretary Acosta has said:
 - DOL will seek to set a new salary threshold between the current \$23,660 and the proposed \$47,476
 - DOL sought public comment in summer 2017

The Practical Effects for Employers

- **Status quo**

- Exempt status:

- Exempt duties, and
 - Annual salary of \$23,660 (weekly of \$455)

- Non-exempt status:

- No less than minimum wage (state or federal)
 - OT after 40 hours of work in a workweek
 - Track all hours worked

- Stay tuned.

The Independent Contractor

A.I.: Update

- Administrator's Interpretation (July, 2015):
 - Almost no individual is an “independent contractor”
 - Does the worker's managerial skill affect the worker's opportunity for profit or loss?
 - How does the worker's relative investment compare to the company's investment?

The Independent Contractor A.I.: Update

- Withdrawn by the DOL in June 2017
- Signals a step back from the DOL's expansive interpretation of "employee" versus "independent contractor"
- But no new DOL guidance

The Practical Effects for Employers

- Many state and federal agencies impose penalties for misclassification of workers
- Still a case-by-case factual analysis
- Central theme is “control”
- Written agreement is helpful, but not determinative

Joint Employer Doctrine: Update

- DOL A.I. 2016:
 - New standards for “joint employment” under the FLSA
 - Defines “joint employment” expansively
 - Result: Employees of two businesses in a business relationship could be “joint employees” of both companies

Joint Employer Doctrine: Update

- Potential examples:
 - Contractor-Subcontractor
 - Franchisor-Franchisee
 - User-Supplier
 - Lessor-Lessee
 - Parent-Subsidiary
 - Predecessor-Successor

Joint Employer Doctrine: Update

- A.I. withdrawn by the DOL in June 2017
- Signals a step back from the DOL's expansive interpretation of "joint employment"
- But no new DOL guidance

Joint Employer Doctrine: Update

- NLRB's *Browning-Ferris* decision still stands
 - Found “joint employer” status based on the right to exert “indirect control” (even if not exercised) over the “essential terms and conditions of employment”
 - Overruled longstanding precedent requiring “direct and immediate” control

Joint Employer Doctrine: Update

- *Browning-Ferris* is on appeal to the U.S. Court of Appeals for the District of Columbia Circuit
- The case may need to go to the U.S. Supreme Court
- The NLRB may overturn the decision if/when a Republican majority of Pres. Trump appointees takes over

Leave of Absence as Disability Accommodation

Disability Leave of Absence: What Amount is Reasonable?

Employers must make reasonable accommodations for known physical and mental limitations of otherwise qualified employees or applicants unless the employer can demonstrate the accommodation would impose an undue hardship on the operation of its business.

Disability Leave of Absence: What Amount is Reasonable?

- Issue: After using all of the FMLA's 12 workweeks of job-protected leave, how much more leave is reasonable for an employer to provide to an employee who continues to be medically unable to return to work?

Disability Leave of Absence: What Amount is Reasonable?

- The usual answer:
 - Some additional amount is almost always reasonable
 - Do a case-by-case analysis to determine how much

Disability Leave of Absence: What Amount is Reasonable?

- But, a panel of 3 judges from the 7th Circuit Court of Appeals recently said:
 - After all FMLA leave, 2-3 months of more leave is not reasonable
 - “An employee who needs long-term medical leave cannot work and thus is not a ‘qualified individual’ under the ADA”

The Practical Effects for Employers

- **WARNING:** Most courts and the EEOC have ruled differently
- The 7th Circuit covers only Wisconsin, Illinois and Indiana, not Iowa
- Watch for an appeal of this case (*Severson v. Heartland Woodcraft Inc.*)
- Continue a case-by-case analysis to determine what is reasonable

Preventing Harassment: Tips from the EEOC

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EEOC Report

- The EEOC assembled a “Select Task Force on the Study of Harassment in the Workplace”
- 18 month study of harassment in the workplace
- Report available at:
https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf

EEOC Report

- Goal to gain insight on how to prevent harassment in the workplace
 - Study not confined to legally actionable behavior
 - Included study of behaviors which might set the stage for unlawful harassment

EEOC Report – Key Findings

- Harassment is a persistent problem that often goes unreported
- Compelling business case for prevention
- Leadership and accountability are critical to prevention
- **Compliance training must change**

“[Compliance training] is not training to change your mind. It’s training to keep your job.”

-Jonathan A. Segal, Select Task Force Member

Compliance Training Recommendations

- Regular basis, repeated, dynamic
- Not limited to legal definition of harassment
- Tailored to realities of the specific workplace
- Clarify what is NOT harassment
- Educate about rights and responsibilities

Compliance Training Recommendations

- Focus on middle-management and front-line supervisors
 - How to respond to harassment they observe or of which they have knowledge or information
 - How to foster an environment where harassment is not tolerated

“If I had limited assets to improve the climate of any organization, I would invest ninety-five percent of them in middle managers. These are the people who make the difference in the day-to-day lives of organizations and people. When we train middle managers, we don’t just train them about how to spot and address problem behavior—we teach them empirically sound things to do and say when an employee seeks them out to discuss a problem.”

-Task Force Witness

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Compliance Training

“to do list”

- Reconsider the frequency, timing, and methods of training
- Trainers should be qualified, live, and interactive
- Obtain feedback immediately after the training and follow-up regarding retention/effect on behavior

Workplace Civility Training

- Title VII is not a workplace civility code
- Incivility can spiral into harassing behaviors
- Productivity benefit of reducing “bullying” and conflict in the workplace

The Price of Incivility

Of workers on the receiving end of uncivil behavior,

- 47% decreased time spent at work
- 80% lost work time worrying about an incident
- 63% lost work time avoiding the offender
- 66% said performance declined
- 78% said commitment to employer declined
- 12% reported leaving job because of uncivil treatment
- 25% admitted to taking their frustration out on customers

Harvard Business Review article available at:

<https://hbr.org/2013/01/the-price-of-incivility>

Workplace Civility “to do list”

- Consider a Respectful Work Environment Policy or other civility measures
- Equip leaders and employees with the tools to identify and defuse workplace incivility
- Incorporate civility in performance evaluations

Presenter



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