

Employment Law Update

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Two Topics

- New Federal Overtime Rules and Maine Update
- Using Social Media in Hiring Decisions



New Federal Overtime Rules

The basics:

- Fair Labor Standards Act
 - Covers almost all employers
 - Mandates minimum wages and overtime (OT)
 - OT = 1 ½ regular rate of pay for all hours worked over 40 hours in a workweek
 - Many exemptions, including:
 - Bona fide executive, administrative, and professional employees
 - Highly compensated employees

New Federal Overtime Rules

The basics:

- **Executive Exemption**
 - Compensated on a salary basis at least \$455/wk
 - Primary duty must be management
 - Customarily and regularly direct the work of at least 2 or more FTEs
 - Authority to hire and fire, or weight given to suggestions to hire, fire, advance, promote, or change status of other employees

New Federal Overtime Rules

The basics:

- **Administrative Exemption**
 - Compensated on a salary or fee basis at least \$455/wk
 - Primary duty is office or non-manual work related to management or general business of employer or employer's customers
 - Exercise of discretion and independent judgment concerning “matters of significance”

New Federal Overtime Rules

The basics:

- **Professional Exemption**
 - Compensated on a salary or fee basis at least \$455/wk
 - Primary duty is work requiring advanced knowledge in field of science or learning customarily acquired by prolonged course of specialized intellectual instruction

New Federal Overtime Rules

The basics:

- Highly Compensated Employees
 - Perform office or non-manual work
 - Customarily and regularly perform at least one of the duties of an exempt executive, administrative, or professional employee
 - Total annual compensation \$100,000 or more
 - At least \$455 per week on a salary or fee basis

New Federal Overtime Rules

The basics:

- **Salary basis:**
 - Salary requirements don't apply to outside sales, teachers, lawyers, or physicians
 - "Salary basis": Regularly receives predetermined amount of compensation. Amount can't be reduced based on quantity or quality of work.

New Federal Overtime Rules

May 2016 Regulations

- Increases standard salary level at the 40th percentile of earnings of FT salaried workers in lowest-wage Census Region
 - From \$455/wk to \$913/wk
 - Annually: \$23,660 to \$47,476
- Sets total annual compensation for highly compensated employees at 90th percentile of FT salaried workers
 - From \$100,000 to \$134,004 per year
- Levels updated every 3 years
- Effective December 1, 2016

New Federal Overtime Rules

Court Challenge

- Sept. 19: 21 states and others sued the U.S. DoL claiming new rules exceeded authority under FLSA and infringed on state budgets. Asked for preliminary injunction.
- Nov. 22: Court granted temporary nationwide injunction.
- Dec. 1: U.S. DoL appealed
- Appeal still pending
- Regulatory freeze – 60 days

New Federal Overtime Rules

Where we are today

- Injunction currently in effect
- This means the new federal overtime laws don't apply right now
- If the injunction is lifted, the rules will take effect, maybe retroactively to December 1
- Trump Administration or Congress could overturn or modify the new rules

New Federal Overtime Rules

What should employers do?

- Employers that have already implemented changes to comply with the new rules: roll back or stay with changes until litigation is settled?
 - Can't withhold wages
- Employers that have not made changes based on injunction: stay the course?
- Risk of retroactive effective date
- Be ready in case rules go into effect
- Have clear communications with employees

Maine Overtime Update

Don't forget Maine law:

- Very similar to federal OT laws:
 - 1 1/2 times regular pay for all hours actually worked over 40 hours in that week
 - Maine and federal OT laws define affected employees differently, but federal and Maine OT laws largely overlap



Maine Overtime Update

Don't forget Maine law:

- One major difference: salary test for salaried executive, administrative, and professional workers
- Maine minimum wage increases could bring more of these workers under Maine OT laws who would otherwise be exempt under federal law
 - Maine salary test: Greater of rate established by U.S. DoL and 3000 multiplied by Maine hourly minimum wage
 - Jan.7 - Maine min. wage: \$9/hr (3000 x \$9 = **\$27,000**)
 - Current federal OT salary limit: \$23,660
 - Weekly: \$455 to \$519.24

Using Social Media in Hiring

5 Dos and Don'ts for Maine Employers



Using Social Media in Hiring

What might it include?

- Googling a candidate's name and finding social media hits
- Asking a candidate to provide a LinkedIn address in a resume
- Reviewing a candidate's Facebook or LinkedIn profile
- Friending a candidate
- Asking a candidate to friend the employer or HR

Using Social Media in Hiring

Like all hiring activities, checking social media carries risks:

- Lawsuits
- EEOC/MHRC actions
- Reliable and valid information?
- Scaring away candidates

Do employers need to avoid using social media in hiring? No, but employers need to be careful.

Dos and Don'ts for Maine Employers: #1

2015 Maine Statute (26 M.R.S. §§ 615-619)

Don't:

- Ask candidates to share passwords to accounts
- Ask candidates to access accounts in presence of employer
- Require candidates to provide account information
- Require candidates to “friend” or add employer or agent of employer as a contact
- Ask candidates to change privacy settings

Doesn't apply to: publically available information, required candidate screenings, or investigations of employee misconduct or unlawful acts.

Dos and Don'ts for Maine Employers: #2

- **Do:** Have a policy and procedure, and follow it.
- Describe how checks will be conducted:
 - Treat all candidates equally
 - Which sites
 - What will be reviewed
 - Who conducts the search
 - When the search will be conducted

Dos and Don'ts for Maine Employers: #3

Do: Lawful research of candidates in a targeted way

- Don't look for information you can't elicit in an interview
 - A court or EEOC/MHRC may assume that you are aware of that person's protected characteristics (e.g., pregnancy, religion, sexual orientation, disability) once you look at a social media account
- Conduct the same search for every candidate
 - Recommended: wait until after meeting the candidate to conduct a social media search
 - Save information that causes you to doubt the candidate's suitability

Dos and Don'ts for Maine Employers: #4

- **Do:** Have someone other than the hiring manager conduct the search and provide a report
 - Insulate the hiring manager from protected classification information
 - Give the searcher strict guidelines to follow
 - If you use a third-party to conduct the search, you may need to comply with the Fair Credit Reporting Act

Dos and Don'ts for Maine Employers: #5

- **Do:** Be careful before using social media information to make a hiring decision
 - Treat the information the same as information you obtain from an interview, resume, or references
 - Consider the context of the information. Is it part of a larger picture? Is the information reliable?

Questions?

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