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UPDATES AND BEST PRACTICES

Businesses, employers, and employees face constant changes in statutes, regulations, and laws. Staying current on these changes is vital to the effective operation of business and to safeguard rights and interests.

This newsletter provides quarterly updates and reminders of best practices for businesses located or operating in the state of Utah.

Kathryn J. Steffey
ksteffey@SHutah.law
Office: 801.413.1600

James W. Stewart
jstewart@SHutah.law
Office: 801.413.1600
Mobile: 801.628.3488

Clayton H. Preece
cpreece@SHutah.law
Office: 801.413.1600
Mobile: 801.367.5755

SMITH HARTVIGSEN PLLC
ATTORNEYS AT LAW

IN THIS ISSUE

NEW FLSA OVERTIME REGULATIONS EFFECTIVE DECEMBER 1, 2016 FOR EMPLOYERS

By: James W. Stewart

On May 18, 2016, the Department of Labor ("DOL") announced a new final rule which adds regulations to the Fair Labor Standards Act ("FLSA"). These new regulations set new standards for which employees will be "exempt" from the FLSA and thus not eligible for overtime pay. *These regulations will be effective December 1, 2016*, and will apply to *nearly all employers, including non-profits.* These new regulations have changed: (1) the white collar exemptions for executive, administrative, and professional workers by dramatically increasing the salary amount these employees must make before they can be considered "exempt" from overtime pay under the FLSA; and (2) substantially increasing the amount a highly compensated employee must be paid before such an employee can be considered "exempt" from overtime pay under the FLSA.

In general, a salaried white collar employee is currently entitled to time and a half overtime pay for all hours the employee works over the standard 40 hour work week, unless such an employee meets the exemption tests. Currently, the executive, administrative and professional white collar workers are exempt from overtime pay (employers do not need to pay overtime) if the employee qualifies under three tests:

1. *The Salary Basis Test.* The white collar employee must receive a fixed salary every week that is not subject to change due to variations in the quality or quantity of work;

2. *Minimum Salary Test.* The white collar employee must receive a minimum salary, currently set at $455 per week, $23,660 annually; and

3. *Job Duties Test.* The employee perform work that primarily involves executive, administrative, and/or professional duties as defined by FLSA regulations.

By 2016, the current annual salary amount, $23,660, or $455 a week, was less than the federal poverty level.

A "highly compensated" employee is currently considered "exempt" from overtime pay if the employee makes a minimum of $100,000 annually, and meets any other requirement imposed by the FLSA.

Specific Changes and Impact of the New 2016 FLSA Regulations

The new minimum salary test. Effective December 1, 2016, the minimum salary for any employee from overtime jumps to $47,478 annually ($913 a week). (This amount is equal to the 40th percentile of full-time salaried workers in the lowest-wage Census Region of the U.S., currently the South). As of December 1, 2016, any salaried employee not meeting this new minimum must either:

a. be converted into an hourly paid employee ("non-exempt"), have their hours tracked by the employer, and be paid overtime for all hours worked over 40 in a standard work week (be sure and check the law in your state, since the FLSA does not prevent a state from requiring overtime greater than that required under the FLSA); *OR*

b. be given a pay raise to meet the minimum salary required under the new FLSA regulations.

Be aware that not all compensation paid to an employee can be counted toward the $47,478 annual minimum. Incentive pay, non-discretionary bonuses, and commissions can be counted toward the minimum, up to 10% of the new salary minimum, if they are paid to the employee quarterly or more frequently. Also, the new regulations also allow for a catch up payment each quarter, if the catch up payment is paid within one pay period after the quarter ends. Certain types of compensation cannot be counted toward the $47,478 minimum, such as employer retirement contributions, fringe benefit payments, and lodging.

To avoid inflation devaluing the actual value of the new minimum salary, the new regulations require that the minimum salary will be updated every three years, starting on January 1, 2020. Such automatic increases will be posted by the DOL 150 days in advance, starting on August 1, 2019.

Increased Amount Required for Highly Compensated Individuals Exemption

The new 2016 overtime regulations (final rule) sets the highly compensated level equal to the 90th percentile of earnings of full-time salaried workers natonally ($134,004 annually). To be an exempt highly compensated employee, such employee must also receive at least the new standard salary amount of $913 per week on a salary or fee basis and pass a minimal duties test. If the highly compensated individual meets the above standards, then the employer does not need to pay the employee overtime. This new amount required for highly compensated individuals will also be automatically adjusted by January 1, 2020, and every three years thereafter.

General Impact of the New 2016 FLSA Regulations

The DOL estimates that the new 2016 overtime regulations will cause 4.2 million workers who are currently exempt and not paid overtime, to directly become non-exempt and entitled to overtime pay. The DOL also projects that the new regulations will indirectly affect another 8.9 million employees by reducing the ambiguity of status: in other words, such 8.9 million employees should have been classified as non-exempt originally, based on their job duties. If these 13.1 million workers are affected as projected, it would change the exempt status of slightly less than 9% of the U.S. workforce. To put that in perspective, a proposed but not yet passed $15 minimum wage would affect close to one-third of the U.S. workforce.

What Should Employers Do Now?

Because the DOL's budget for Fiscal Year 2017 includes $277 million for wage and hour enforcement, an increase of $50 million from Fiscal Year 2016, the following suggestions should be considered by employers.

● Identify all exempt employees who must be reclassified under the new regulations by December 1, 2016, and get them reclassified.

● Determine how many hours these reclassified employees have worked and how the employer will track their hours when reclassified as non-exempt employees. Many employers may not be currently aware how may hours their exempt employees are working. Be careful to look at waiting time, meal and rest periods, travel time, training time, and any other "hidden overtime." Such calculations will allow the employer to project what the real cost of reclassifying an exempt employee as non-exempt (and paying overtime) will be.

Have a plan to precisely track hours worked by any worker whose classification changes.

● Determine whether it makes sense to raise the salary of certain exempt employee to the new minimum, by carefully weighing the cost against what the employer will really pay if that employee is reclassified as "non-exempt" and overtime has to be paid. If an employee constantly works substantially more than 40 hours a week, paying him or her overtime may be much more expensive than simply raising the salary to the new minimum and keeping the employee "exempt" from overtime. On the other hand, if an employee never works over 40 hours per week, then the employer will never have to pay overtime anyway even if the employee is reclassified as "non-exempt." Furthermore, it is legally permissible to re-do hourly rates going forward if that is what has to be done to contain costs to stay in business.

● Make sure you have a practical plan to precisely track hours worked by any worker who is reclassified from "exempt" to "non-exempt," since there are serious penalties for failing to carefully track all hours worked by non-exempt employees. Remember that not only obvious hours worked must be tracked, but lunch breaks and other breaks must be tracked. Any time worked off the clock, if an employer is aware of it or allows it to happen, must also be paid for if the employee is "non-exempt."

● Think carefully about the impact on morale that reclassifying an employee from "exempt" to "non-exempt" may cause. Employees that are exempt may view being reclassified as non-exempt as a step down to a lower status. Explain and point out to such employees that such changes should not result in a decrease in pay, and are required by law.

● Consider whether or not you have to shift certain job functions and assignments to avoid undue overtime payments. Adjustments to salaries and hourly rates may also have to be adjusted.

● Consider structuring certain jobs that have fluctuating overtime as agreements with straight hourly rates regardless of hours worked, and then if overtime is worked, you have already paid the hourly rates for overtime hours, and you then owe half time instead of time and a half for hours worked over 40 per week. These agreements can be tricky, so counsel should be consulted so they are carefully drafted, since they cannot be implemented in all situations.

● Use the time before December 1, 2016 as a golden opportunity to review all your job classifications, to see whether they are properly classified. Some reports estimate that as many as 80% of employers are in violation of some of the FLSA rules, including classification of employees, at any given time. With stepped up audits and investigations with the increased DOL budget, a company could avoid significant penalties, fines and liability if they would get their classifications done correctly. In particular, many companies classify people as "independent contractors" when they are not, but are actually functional employees. Being caught for such misclassification has serious tax, overtime, unemployment premium, and other consequences. Another frequent problem area is employers improperly classifying employees as "exempt" under the administrative white collar exception. Any employee classified as an exempt "administrative" employee should be double checked to see if they really meet the classification standards for the administrative exemption under the FLSA regulations.

● Overall, realize that many of the FLSA regulations can be complex. An employer should consult experienced employment counsel before it is caught in a DOL audit, or an employee sues. It is much cheaper to fix the problem before it occurs. A stitch in time saves nine.

● If the new minimum salaries are cost prohibitive, you may have to consider staff changes or consolidations.

> Various industries have special exemptions, so you should consult with employment counsel to see if there is another way to solve your potential problem.

● If you are a retailer, you may still have other exemptions that will keep certain employees "exempt." There are other specialized exemptions for various industries that are not eliminated by the new 2016 overtime rules, so you should consider consulting with employment counsel to see if there is another way to solve your potential problem. For example, there are special exemptions for teachers from overtime rules, as well as many others that are too numerous to discuss in detail in this article.

UTAH'S NEW POST-EMPLOYMENT RESTRICTIONS ACT

By: Clayton H. Preece

Utah Code Annotated § 34-51-101 *et seq.*, titled as the "Post-Employment Restrictions Act," creates new requirements and liability for employers with non-compete agreements. Understanding and taking proactive measures to comply with the new statute is important for all employers located in or doing business in the state of Utah.

The Post-Employment Restrictions Act drastically changes noncompete agreements or covenants not to compete. These changes include the codification of a time limit as well as specific provisions for damages.

First, the Post-Employment Restrictions Act defines a "noncompete agreement" as "an agreement, written or oral, between an employer and employee under which the employee agrees that the employee, either alone or as an employee of another person, will not compete with the employer in providing products, processes, or services that are similar to the employer's products, processes, or services." Utah Code Ann. § 34-51-102(1)(a). By its terms, the Post-Employment Restrictions Act specifically does not apply to nonsolicitation agreements, nondisclosure agreements, or confidentiality agreements, Utah Code Ann. § 34-51-102(1)(b), so those types of agreements remain unchanged by the language of the statute itself.

Next, the Post-Employment Restrictions Act provides that for any noncompete agreement entered into after May 10, 2016, the length of such an agreement may not be "for a period of more than one year from the day on which the employee is no longer employed by the employer." Utah Code Ann. § 34-51-201. It is unclear whether courts will find that the limitations of Post-Employment Restrictions Act apply to agreements entered into before that date. Specifically, it is unclear as to whether courts will view the one year limit established in the Post-Employment Restrictions Act as a new benchmark for what constitutes a reasonable time limit under the common law.

The length of a noncompete agreement entered into after May 10, 2016, may not be "for a period of more than one year from the day on which the employee is no longer employed by the employer." Utah Code Ann. § 34-51-201.

For this reason, it is important to note that the provisions of the Post-Employment Restrictions Act are "in addition to any requirements imposed under the common law." This means that for a noncompete agreement to be valid, it must meet both the requirements set forth in the statute as well as the requirements that have been adopted by Utah's courts. (This post focuses only on the requirements created by the Post-Employment Restrictions Act, common law requirements may be found in opinions issued by Utah's courts, for example, *see Allen v. Rose Park Pharmacy*, 237 P.2d 823 (Utah 1951)). It is possible that a court could find that the one year limit is what is reasonable under the common law, and apply the limitation to a noncompete agreement entered into prior to May 10, 2016.

Until there is further guidance from the courts or legislature, the safest practice will be to operate under the assumption that courts will limit noncompete agreements to one year after the employee leaves employment. There may be circumstances where it is advantageous to attempt to enforce a noncompete agreement entered into prior to May 10, 2016 for more than one year. Such circumstances should be discussed and evaluated with legal counsel.

Exemptions

Notably, the Post-Employment Restrictions Act includes several exemptions. First the Post-Employment Restrictions Act does not prohibit a severance agreement that includes a non-compete agreement, if it is mutually negotiated in good faith. Neither does it prohibit a noncompete agreement arising out of the sale of a business. While no Utah court has yet ruled on the extent of these exemptions, the language of the statute indicates that such noncompete agreements must still meet the requirements of the common law, but in these specific contexts may be extended for longer than one year. These exemptions will become clearer as courts have the opportunity to define the contours of the exceptions in their opinions. Employers should carefully ensure that any noncompete agreements which may be exempt from the one year limit, clearly fulfill all common law requirements, and should consult with legal counsel regarding the enforceability and risks of such agreements.

Liability

Finally, the Post-Employment Restrictions Act creates liability for employers that "seek to enforce" a noncompete agreement either through arbitration or a civil action, and the noncompete agreement is found to be unenforceable. The liability for the employer includes "(1) costs associated with the arbitration; (2) attorney fees and court costs; and (3) actual damages." Utah Code Ann. § 34-51-301. Under the language of the Post-Employment Restrictions Act, such liability is only created if the employer seeks to enforce a non-compete agreement. As such, to avoid liability, an employer with an unenforceable noncompete agreement, may choose not to seek enforcement through arbitration or a lawsuit. This should shield the employer from any liability, but it is best to notify the employee in writing that the company will not be seeking to enforce the noncompete agreement.

Liability for the employer now includes "(1) costs associated with the arbitration; (2) attorney fees and court costs; and (3) actual damages." Utah Code Ann. § 34-51-301.

Recommended Best Practices for Employers Under the Post-Employment Restrictions Act

- **For all New Agreements**: Have a lawyer review your company's noncompete agreement to ensure that it complies with the new requirements and discuss with your attorney which new employees should actually have a non-compete agreement, making sure that the common law requirements are also satisfied. Also include a mutual attorney fee and cost provision in any noncompete agreement. Under the new law, employees are given the right to recover attorney's fees, however, this right is not given, by the Act, to employers. Including a mutual attorney fee provision in the agreement will allow employers to recover attorney's fees if they successfully defend their agreement.

- **For All Agreements in Place Prior to May 10, 2016**: While they may still be enforceable, the safest option may be to replace the existing agreement with one that meets the new provisions. Note that any new agreement will need to meet all of the statutory and common law requirements.

- **When an Employee Leaves**: Carefully weigh whether it is worth trying to enforce the noncompete agreement with that particular employee. The advantage in restricting competition may not be worth the risk. If you have a noncompete agreement that you believe is not enforceable, do not seek to enforce it and provide written notice to the employee that the noncompete agreement will not be enforced. This should help to shield the employer from liability for damages or attorneys' fees.

- **If You Have Questions**: Seek legal counsel to answer any specific questions relating to your noncompete agreement. Paying for a review of your agreements may not only allow you to enforce it later, but may also save you thousands of dollars in attorneys' fees and damages.

THE EMPLOYER'S 10 COMMANDMENTS FOR FIRING AN EMPLOYEE

By: James W. Stewart

One situation that often results in litigation or liability for an employer is when it becomes necessary to fire or terminate an employee. The following 10 Commandments provide employers with general best practices for firing an employee. Employers should consult with legal counsel regarding specific questions relating to terminating an employee.

1 When you first hire employees, classify the employee in writing as an "at-will" employee (in the employment application, employee handbook, and offer letter), because this will usually make it much easier if you later have to fire them. Never promise an employee long term job security unless absolutely necessary because you may be legally held to your promise, even if it is oral.

2 Document, Document, Document all performance problems in writing, because a document in writing and dated at the time it occurred is much more believable to a jury or judge than an oral claim later that you correctly remember a performance problem. A juror will likely wonder why you are now claiming it was important if you didn't even take the time to write it down and put it in the employee's personnel file. Document in writing carefully the reasons for termination and give the employee the writing in the termination meeting—this document will be a key document if the employee brings a lawsuit. Make sure that performance evaluations are documented in writing and are carried out by tactful but truthful evaluation, not carried out with "grade inflation" to try and avoid hurting an employee's feelings—your supervisors must be carefully trained so they will do accurate evaluations. You need accurate written evaluations in order to base discipline and termination decisions on them.

3 Never terminate an employee immediately or when you are mad. Wait until you cool down, investigate things carefully, and first talk it over with another supervisor or owner. If you feel the employee needs to be immediately removed from the workplace, then suspend the employee while the conduct is investigated. If the employee is "exempt," remember to suspend with pay to avoid accidentally turning the employee into a "nonexempt" employee. Even if the employee is "nonexempt," suspension with pay during the investigation will be viewed by a jury more favorably than a suspension without pay when the investigation hasn't been conducted yet.

4 Before terminating an employee, carefully review all the company policies regarding termination, and make sure the person(s) taking part in the termination are following them. If you don't have termination policies, get some good advice about how to create them, and then carefully train any supervisor or manager that may take part in any firing to make the policies are followed.

5 Carefully investigate the facts behind the reasons that are being used to justify the termination, including interviewing any witnesses to the facts and reviewing all relevant documents. The truth is not always what it appears to be on the surface or what a supervisor believes.

6 If you have a good human resource person, involve him or her in any firing decision, since this will help weed out potential illegal firings. If you believe the termination might be "tricky" or "difficult," or you are uncertain about it, call a competent employment attorney and run through the situation before pulling the trigger. This small expense is much better than a later lawsuit that may cost several thousand times the cost of briefly consulting an attorney before the termination. Most employee lawsuits are caused by terminations, so this is the most cost effective time to get advice.

7 When making the termination decision and when actually informing the employee, it is much better to have at least two people involved. Two minds make better decisions than one mind, two people help avoid the "he said, she said" standoff about what really occurred at the employee termination meeting, and a jury is more likely to believe the employer if two or more people carefully considered the facts and concluded the termination was justified.

8 Make the termination decision based on job performance criteria, not something unrelated to job performance.

9 Make consistent termination decisions for similar situations, or you risk running afoul of the discrimination laws. Involving a person that has a long term institutional memory of past terminations help keeps terminations consistent.

10 Be professional and humane in carrying out terminations, even if the employee gets upset. Even if the employee deserves to be terminated, the employee seldom sees it that way. Because being terminated is very difficult and has a huge impact on the employee, the employee is more likely to sue if the employer is rude, abrupt, indifferent etc. Many lawsuits are filed because of the manner in which an employer carries out the termination. Being terminated is bad enough for the employee, but being rude or demeaning when informing the employee will be perceived by the employee as humiliating and rubbing salt in the wound, creating the desire to "make the employer pay" for how it acted. The most likely situation for an employee to sue an employer is over a termination, so there is no reason to enrage the employee and increase your chances of being sued.

PRACTICE PROFILES

Kathryn J. Steffey

Kathryn J. Steffey is a partner at Smith Hartvigsen and has extensive experience in representing a diversity of clients in both state and federal courts. Kathryn has acted as lead counsel for local general contractors regarding multi-faceted construction contract disputes concerning both private and public projects. She has also defended local governments in actions concerning a variety of matters ranging from breach of contract to violation of civil rights to union contract disputes. Kathryn has also provided legal counsel and advice to governmental entities and private corporations regarding compliance with federal and state laws and regulations. In addition to appearing before the Tenth Circuit Court of Appeals, the United States District Court for the District of Utah, the Utah Supreme Court, the Utah Court of Appeals, and the state district courts located throughout Utah, she has also represented clients before state and local administrative agencies, including, but not limited to, the Utah Anti-Discrimination and Labor Division and Utah's Division of Occupational and Professional Licensing.

James W. Stewart

James W. Stewart is of counsel in the law firm of Smith Hartvigsen, PLLC. He is listed by his peers and *Utah Business Magazine* as one of the Legal Elite labor and employment attorneys in Utah. Mr. Stewart has also been listed by the nationwide *Chambers* business publications as one of Utah's key labor and employment attorneys. He represents national, regional, and Utah employers. Mr. Stewart advises employers in virtually all areas of employment law and labor law, and frequently defends employers in court litigation and arbitration in employment disputes at both the trial and appellate level. He has been the director of employment law continuing education programs for the Utah State Bar. Mr. Stewart frequently gives employment law seminars for business. He has written numerous employment law publications and is a former editor of the *Utah Employment Law Letter* and the *Brigham Young University Law Review*. Mr. Stewart has served as a founding member for the First American Inn of Court and has been a board member and president of the Utah Lawyers for the Arts. He earned a Bachelor's of Arts, magna cum laude, a Juris Doctorate, and a Master's in Business Administration from Brigham Young University. Mr. Stewart also served as a judicial clerk to the Honorable Stephanie Seymour, U.S. Federal Court of Appeals for the Tenth Circuit. In addition, Mr. Stewart has substantial experience providing transactional advice to businesses and represents businesses in other corporate and commercial litigation.

For regular updates and best practices relating to labor and employment law, subscribe to the Employment Law for Business Blog at https://employmentlawyerutah.com or subscribe to the twitter feed @UTemploylaw.

Clayton H. Preece

Clayton H. Preece is an associate in the law firm of Smith Hartvigsen, PLLC. He represents businesses and employers in a wide range of litigation matters including labor and employment. Mr. Preece assists both national and local businesses with their labor and employment concerns. Mr. Preece is an author and editor of the Employment Law for Business Blog. Additionally, Mr. Preece represents individuals, businesses, and governmental entities, relating to land use and zoning, construction litigation, commercial litigation, natural resources litigation, and corporate and business transactions. He also serves on the Utah State Bar's Unauthorized Practice of Law Committee and serves the community through the University of Utah's Street Law Clinic. Mr. Preece earned his Juris Doctorate from The George Washington University Law School in Washington, D.C. For his outstanding trial advocacy, Mr. Preece earned a position representing The George Washington University Law School in in the American Bar Association's Labor and Employment Trial Advocacy Competition. Mr. Preece also served for two terms as the Chair of the National Religious Freedom Moot Court Competition. Mr. Preece is a former editor of the *Federal Communications Law Journal*. Mr. Preece earned his Bachelor's in Arts from Utah Valley University, graduating summa cum laude and valedictorian, where he also was the editor in chief of the *Intersections Journal*.

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CONTACT US

Smith Hartvigsen, PLLC
175 South Main Street
Suite 300
Walker Center
Salt Lake City, Utah
801.413.1600
http://smithhartvigsen.com/

Kathryn J. Steffey
ksteffey@SHutah.law
Office: 801.413.1600

James W. Stewart
jstewart@SHutah.law
Office: 801.413.1600
Mobile: 801.628.3488

Clayton H. Preece
cpreece@SHutah.law
Office: 801.413.1600
Mobile: 801.367.5755

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