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Critical New Developments in Employment Law and Employee Benefits

May 20, 2016

The landscape of labor and employment law, as well as employee benefits law, is ever changing. This week has been a particularly active week, full of law changes and final rules or rulings that significantly impact employers.

NEW OVERTIME REGULATIONS DOUBLE MINIMUM SALARY FOR EXEMPT WORKERS

On Tuesday, the U.S. Department of Labor ("DOL") issued its **final rule** increasing the minimum salary for exempt executive, administrative, and professional ("white collar") employees from $23,660 a year to $47,476 a year. This equates to a weekly salary of $913.00. The minimum salary for "highly compensated" employees was increased from $100,000 a year to $134,004.00 a year. The figure for white collar workers represents a compromise of sorts between the DOL and the business community. Original indications were that the DOL would increase the minimum salary level to $50,440.00 per year. However, the salary threshold for highly compensated individuals is significantly greater than the $122,148.00 that had been anticipated.

The salary thresholds will be automatically updated every three (3) years, starting January 1, 2020.

This, too, seems to represent a compromise as the DOL had originally been considering annual adjustments to the minimum salary levels.

Employers may now use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the new minimum salary level.

The duties tests remain unchanged under the final rule.

Nationwide, over 4,000,000 salaried employees who are currently exempt from overtime will likely be affected by the new rule.

The new rule becomes effective December 1, 2016. During the next six months, employers should take steps to identify any currently exempt employees making less than $913.00 per week, and make plans to increase their salary or transition them to hourly pay with overtime. Other options include adjusting the amount of the employee's earnings to reallocate it between regular wages and overtime so that the total amount paid to the employee remains largely the same.

There will be a greater burden on employers to record and track the hours of salaried employees to ensure that they do not exceed forty (40) hours per week.

Employers should establish a monitoring program to ensure that employees don't lose their exemption when the salary amounts automatically increase. This is a good opportunity for employers to review job descriptions for exempt workers, and profit-sharing plans, commission structures, and bonus payments made to hourly workers to ensure compliance with FLSA overtime regulations.

For questions about overtime compliance, please contact Bill Mattix, (406) 252-3441.

NEW HHS RULE REQUIRES MEDICAL PROVIDERS TO DEVELOP A GRIEVANCE PROCEDURE AND POST NON-DISCRIMINATION NOTICES

Wednesday, the U.S. Department of Health and Human Services ("HHS") published its **final rule**, now found at 45 CFR Part 92, implementing 1557 of the Affordable Care Act. The rule prohibits discrimination based on race, color, national origin, age, disability, or sex – including pregnancy, gender identity and sex stereotyping – from being excluded from, denied benefits of, or be subjected to discrimination under, any healthcare program receiving federal financial assistance.

Healthcare providers and insurance companies who receive federal funding – including hospitals and doctors that participate in federal healthcare payor programs like Medicare and Medicaid – will be subject to existing enforcement mechanisms under Title VI, Title IX, Section 504 and the Age Discrimination Act of 1975. The HHS Office of Civil Rights ("OCR") is tasked with investigation of healthcare discrimination complaints, and victims of healthcare discrimination possess a private right of action to enforce the prohibition. The new rule becomes effective July 18, 2016.

The final rule requires covered entities with 15 or more employees to:

- Implement a grievance procedure;
- Identify a compliance coordinator;
- Provide appropriate auxiliary aids and services, including qualified interpreters for individuals with disabilities and information in alternate formats, free of charge and in a timely manner, when such aids and services are necessary to ensure an equal opportunity to participate to individuals with disabilities;
- Provide appropriate language assistance services, including translated documents and oral

interpretation, free of charge and in a timely manner, when such services are necessary to provide meaningful access to individuals with limited English proficiency;
- Notify beneficiaries, enrollees, applicants, and members of the public that the covered entity does not discriminate on the basis of race, color, national origin, sex, age, or disability in its health programs and activities, and of the availability of assistive services;
- Notify individuals how to obtain interpretive and language services;
- Provide contact information for a responsible employee designated by the employer to investigate grievances of healthcare discrimination; and
- Notify individuals how to file a grievance, and how to file a discrimination complaint with OCR.

Covered entities with fewer than 15 employees are not required to implement a formal grievance procedure or identify a compliance coordinator, but they still have the obligation to take reasonable steps to provide meaningful access to individuals with limited English proficiency or disabilities, and distribute the required notices.

For questions about how this rule affects your organization, please contact Stewart Kirkpatrick, (406) 252-3441, or Kristy Buckley, (406) 556-1430.

EEOC ISSUES FINAL RULE ON EMPLOYER WELLNESS PLANS

On May 17, the Equal Employment Opportunity Commission published its final rules and additional guidance (all available **here**) delineating how workplace wellness programs contemplated by the Affordable Care Act can comply with existing anti-discrimination laws including the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act.

Under the new ADA rule, employers can offer employees incentives or discounts of up to 30% of the cost of "self-only" coverage to encourage employees to participate in wellness programs that ask them to respond to disability-related inquiries and/or undergo medical examinations. The new GINA rule allows a similar inducement to be offered to the employee's spouse, so that a couple can receive incentives of up to 60% of the cost of self-only coverage. Employers cannot collect information from an employee's children. Based on this guidance, employers should be able to design wellness programs without fear of violating federal regulations related to medical privacy or disability discrimination.

Employers with existing wellness plans should evaluate their plans to ensure they are in compliance. The new regulations become effective the first day of the first plan year that begins on or after January 1, 2017. For questions about whether your plan complies with the new regulations, or about implementing a wellness plan, please contact Kristy Buckley, (406) 556-1430.

SUPREME COURT'S BIRTH CONTROL RULING GIVES NO ANSWERS TO RELIGIOUS EMPLOYERS

On Monday, the United States Supreme

Court **decided** not to weigh in on the issue of whether the Affordable Care Act's contraceptive-coverage mandate violates the Religious Freedom Restoration Act by forcing religious nonprofits to apply for an accommodation.

Although the case was focused on the ACA, the legal issue was whether a regulation "substantially burdens" deeply held religious beliefs under the Religious Freedom Restoration Act. The Court asked the parties for additional briefing on the issue of "whether contraceptive coverage could be provided to petitioners' employees, through petitioners' insurance companies, without any such notice from petitioners." The government said such an accommodation would be possible, and the petitioners agreed that their religious beliefs were not burdened if they only had to contract for a plan that does not include coverage for some or all forms of contraception, even if their employees receive cost-free contraceptive coverage from the same insurance company.

Therefore, the Court reasoned that the parties needed an "opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage." The judgments on appeal were vacated.

The lower courts will be expected to rule on the following questions: (1) whether religious exercise has been substantially burdened; (2) whether the government has a compelling interest; and (3) whether the current regulations are the least restrictive means of serving that interest. Justices Sotomayor and Ginsburg issued a concurring opinion to emphatically stress that the U.S. Supreme Court's ruling does not address the merits of the cases and does not rule on any of the three issued listed above.

Since this case was consolidated with a number of cases (see below listing of consolidated cases), we will be watching several lower courts' activities to monitor the issue. It is noteworthy to understand that there is no pending consolidated case from either the 9th Circuit or the 8th Circuit, which are the jurisdictions for Montana and North Dakota. 10th Circuit results will impact Wyoming.

- Zubik v. Burwell (3rd Circuit)
- Priests for Life v. Burwell (D.C. Circuit)
- Southern Nazarene University v. Burwell (10th Circuit)
- Geneva College v. Burwell (3rd Circuit)
- Roman Catholic Archbishop of Washington v. Burwell (D.C. Circuit)
- East Texas Baptist University v. Burwell (5th Circuit)
- Little Sisters of the Poor Home for Aged v. Burwell (10th Circuit)

For questions about this decision or any other Affordable Care Act compliance issues, please contact Sarah Loble, (406) 449-4165, or Kristy Buckley, (406) 556-1430.

SUPREME COURT ALLOWS $4 MILLION AWARD OF ATTORNEY FEES AGAINST EEOC IN FAVOR OF EMPLOYER ACCUSED OF DISCRIMINATION

Yesterday, the United States Supreme Court unanimously **decided** that an award of attorney fees in

favor of CRST Van Expedited, Inc., was proper because it prevailed in its 10-year battle with the Equal Employment Opportunity Commission regarding alleged violations of Title VII of the Civil Rights Act. Title VII allows a court to award attorney fees to the prevailing party. In 2009, the Federal District Court for the District of Iowa dismissed all of the government's claims against CRST and awarded the company attorney fees of over $4 million. The EEOC appealed, and the 8th Circuit Court of Appeals reversed the award of attorney fees, reasoning that the discrimination claims were not decided "on the merits." The Supreme Court disagreed with the Court of Appeals. The Court reasoned that a defendant can recover fees expended in frivolous, unreasonable, or groundless Title VII litigation whenever the case is resolved in the defendant's favor, regardless of whether the dispute was resolved "on the merits."