Ogletree Deakins

The Employment Law AUTHORITY

Today's Hot Topics in Labor & Employment Law

May/June 2016

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Storm Clouds and Silver Linings for Employers

An Analysis of the DOL's Final FLSA Part 541 Regulations

The minimum salary threshold to qualify for the executive, administrative, and professional exemptions to the Fair Labor Standards Act (FLSA) will more than double on December 1, 2016, from $23,660 per year to $47,476 per year. This is the most notable—but not the only—change to the FLSA exemption requirements under the final Part 541 regulations that the U.S. Department of Labor (DOL) released on May 18, 2016. Another noteworthy provision in the final rule automatically adjusts the required salary amount every three years beginning on January 1, 2020.

This article analyzes the final regulations and compares them to what the DOL's Wage and Hour Division (WHD) had proposed. Although the final regulations do offer a few silver linings for employers, they still will create a storm of controversy because their implementation will impose significant costs and challenges, particularly in certain market sectors and geographic regions.

Minimum Salary Threshold

Under the final regulations, the new minimum salary for the executive, administrative, and professional exemptions will increase from $455 per week, or $23,660 per year, to $913 per week, or $47,476 per year. This means that employees who do not receive the new minimum salary level when the final regulations become effective on December 1, 2016, will not qualify for any of these three exemptions from the FLSA's overtime compensation requirements, regardless of their job duties. Nonexempt employees must be paid overtime compensation when they work more than 40 hours in a workweek, and the Obama administration estimates that the new salary threshold will make 4.2

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Workplace Strategies Blows Through the Windy City

Firm's Sold-Out Seminar Featured Over 70 Sessions and 175 Speakers

Ogletree Deakins' annual labor and employment law seminar, Workplace Strategies, was held in Chicago in early May and provided attendees with a remarkable amount of information to take back to their workplaces. This year's program was attended by more than 1,000 guests and speakers.

There were many highlights at the program including: insights on the parallels between the sports world and the workplace by ESPN senior writer and legal analyst Lester Munson; a discussion about national security challenges and their impact on the workplace by U.S. State Department Presidential Envoy Julia Nesheiwat, Ph.D.; an election update by former congressmen Ray LaHood and Charlie Gonzalez; a "Policymaker Perspective" presentation by NLRB Philip Miscimarra; and our first-ever "TED"-style talks on change in the legal landscape, demographics, and cultural and social norms.

Workplace Strategies has a history of giving back to the local community. This year, Ogletree Deakins donated $30,000 to Kids Off The Block, a Chicago-based nonprofit organization dedicated to helping at-risk youth. The firm also presented the organization's founder, Diane Latiker, with the Homer Deakins Service Award.

Workplace Strategies moderator Joe Beachboard announced that the 2017 program will be held in San Diego from May 3-6. To guarantee your spot, visit www.ogletreedeakins.com. ■

OSHA Issues New Electronic Recordkeeping Requirements

by Melissa A. Bailey and Shontell Powell (Washington, D.C.)

The Occupational Safety and Health Administration (OSHA) has amended its recordkeeping regulation, 29 CFR Part 1904, to require many employers to submit OSHA 300 Logs, OSHA 301 forms, and OSHA 300A summaries to the agency electronically. The amendments also include provisions designed to prevent employers from retaliating against employees for reporting work-related injuries or illnesses.

To abate alleged violations of these provisions, OSHA may order employers to remove discipline from employees' files, reinstate employees, or pay them back pay. The changes will allow OSHA and other stakeholders—including labor unions and plaintiffs' attorneys—to access injury and illness data and also create a new cause of action for employees who allege retaliation.

Electronic Submission of Injury and Illness Data

Every establishment with 250 or more employees will be required to submit OSHA 300 Logs, 301 Forms, and 300A summaries electronically every year by uploading them into a database maintained by OSHA. An "establishment" is a single physical location where work is performed. For construction and similar operations where employees do not work at a single location, the establishment is typically the main or branch office, a terminal, or a similar location.

OSHA will post the OSHA 300 Logs and 301 Forms for each establishment on its website. OSHA will redact the names of employees and other identifying information before posting. The electronic system will allow OSHA, as well as any member of the public, to access the injury and illness data of any establishment that must report electronically.

The revised regulation also requires establishments in industries listed in Appendix A that have 20 or more employees to submit OSHA 300A summaries electronically. Appendix A is lengthy and includes broad categories such as construction (NAICS 23), manufacturing (NAICS 31-33), utilities (NAICS 22), and agriculture (NAICS 11).

The new electronic submission requirements will be phased in. Covered employers will be required to submit electronically beginning next year. Specifically, on July 1, 2017, employers must electronically submit their 300A summaries for covered establishments. On July 1, 2018, employers must electronically submit their 300 Logs, 301 Forms, and 300A summaries for covered establishments. Beginning in 2019, the deadline will change from July 1 of each year to March 2 of each year. The final rule anticipates that states with their own OSHA plans will implement systems that meet these deadlines.

Anti-Retaliation Provisions

OSHA also included anti-retaliation provisions in the revised regulation. These provisions require employers to take the following steps:

- Establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness.
- Inform each employee of the procedure for reporting work-related injuries and illnesses.
- Inform each employee that: 1) employees have the right to report work-related injuries and illnesses; and 2) employers are prohibited from discharging or in any manner discriminating against employees for reporting work-related injuries or illness.
- Refrain from discharging or in any manner discriminating against any employee for reporting a work-related injury or illness.

The provisions apply to all employers, regardless of whether they are required to report to OSHA electronically.

The provisions, which will take effect August 10, 2016, give employees a new way to allege that their employers have retaliated against them. Rather than filing a Section 11(c) complaint, an employee may now file a complaint with OSHA compliance personnel. An OSHA Compliance Safety and Health Officer will investigate and determine whether the employer violated the anti-retaliation provisions. To abate the violation, OSHA could require employers to remove discipline from an employee's file, reinstate an employee, or pay an employee back pay.

Employers may contest alleged violations. Appeals would be heard by an administrative law judge, and any decision could be appealed to the Occupational Safety and Health Review Commission.

OSHA claims these provisions are necessary to ensure that the records submitted by the employer are accurate: If employees do not report injuries and illnesses because they fear retaliation, then the data submitted by an employer would not be accurate. ■

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Joseph L. Beachboard

Managing Editor
Stephanie A. Henry

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Additional Information
To request further information or to comment on an article, please call Stephanie Henry at (310) 217-0130. For additional copies or address changes, contact Marilu Oliver at (404) 870-1755.

Ogletree Deakins State Round-Up

California

California Governor Jerry Brown recently signed legislation that will increase the wage replacement rate under the Paid Family Leave program for California workers from its current level of 55 percent to 60 or 70 percent (depending on the worker's income). AB 908 also eliminates the seven-day waiting period for receiving benefits (beginning in 2018).

Colorado

On June 1, Colorado Governor John Hickenlooper signed into law Colorado's Pregnant Workers Fairness Act. The Act, which becomes effective on August 10, 2016, amends the Colorado Anti-Discrimination Act (CADA) and requires employers to accommodate medical conditions and limitations stemming from pregnancy that may not separately qualify as disabilities under the Americans with Disabilities Act (ADA).

Connecticut

On June 1, Connecticut Governor Dannel Malloy signed into law a "ban-the-box" statute, which will take effect on January 1, 2017. The law, "An Act Concerning Fair Chance Employment," Public Act No. 16-83, prohibits covered employers from inquiring about a prospective employee's prior arrests, criminal charges, or convictions on an initial employment application.

Maryland

Governor Larry Hogan recently approved sweeping revisions to Maryland's existing equal pay law. The new law will take effect on October 1, 2016. With the passage of the Equal Pay for Equal Work Act, Maryland joins California and New York in expanding pay equity protections. The Act significantly amends the current statute, Md. Code, Labor and Employment, §3-301, et seq. and expands both the scope of the law and its remedies.

Massachusetts

The First Circuit Court of Appeals recently issued a decision affirming federal preemption of the Massachusetts independent contractor statute for businesses that qualify as motor carriers under the Federal Aviation Administration Authorization Act. This means that motor carriers, including many delivery businesses, may be able to classify their drivers as independent contractors with a reduced risk of violating state law. *Massachusetts Delivery Association v. Healey*, No. 15-1908 (May 11, 2016).

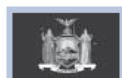
Minnesota

The Minnesota Court of Appeals recently held that an employee's participation in a voluntary HR complaint process may toll the running of the Minnesota Human Rights Act's one-year statute of limitations. As a result, the clock is not necessarily running on an employee's statutory state law claim of discrimination while the parties are engaged in a voluntary dispute resolution process. *Peterson v. City of Minneapolis*, No. A15-1711 (May 2, 2016).

New Jersey

Bills have been introduced in the New Jersey General Assembly and Senate to enact the "New Jersey Schedules That Work Act." The bills would grant employees the right to request that their employer change the number of hours they work, their actual work hours, and their work location.

New York



On May 6, the New York City Commission on Human Rights issued guidance that defines what constitutes pregnancy discrimination under the New York City Human Rights Law. The guidance provides clear examples of when and how employers should make accommodations for employees based on pregnancy, childbirth, or related medical conditions.

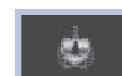
Pennsylvania

On May 17, Pennsylvania's Medical Marijuana Act went into effect. The Act legalizes the prescription and use of medical marijuana by persons with a "serious medical condition" in the Commonwealth of Pennsylvania. Only persons with a specified "serious medical condition" may be prescribed or use medical marijuana, and recreational use of marijuana remains unlawful.

Texas

The Austin City Council recently passed its own "ban-the-box" law, the Fair Chance Hiring Ordinance, which took effect on April 4, 2016. The final version of the ordinance was released on April 12, 2016. It prohibits covered employers from inquiring about an individual's criminal history, including running background checks, until after a conditional offer of employment has been made.

Vermont



On May 3, Governor Peter Shumlin signed into law a "ban-the-box" statute, which will take effect on July 1, 2017. The law will prohibit covered employers from inquiring about information pertaining to an individual's criminal history record on an initial employment application. The law does, however, allow an employer to inquire about an applicant's criminal history record (i) during a job interview or (ii) once the applicant has been deemed otherwise qualified for the position.

Wisconsin

Effective July 1, 2016, Wisconsin law will require covered employers to provide eligible employees with up to 6 weeks of unpaid leave in a 12-month period to undergo and recover from bone marrow or organ donation procedures. Previously, only employees of the Wisconsin state government were entitled to leave for such donations.

For more information on these state-specific rulings or developments, visit www.ogletreedeakins.com/our-insights.

NLRB Decision Analyzes Employer's Motive for Hiring Replacement Workers

*by James H. Fowles and Harold P. Coxson**

On May 31, a divided National Labor Relations Board (NLRB) issued a very significant decision in *American Baptist Homes of the West d/b/a Piedmont Gardens*, increasing the impact of an employer's motive in deciding whether the permanent replacement of economic strikers is lawful. Given this new focus on the employer's motive, the floodgates to second-guessing employers' motivations in retaining permanent replacement workers for economic strikers are now open.

Under the logic used by the Board, the NLRB conceivably could now find a discriminatory employer motivation in virtually every replacement strike and use it as a reason to order immediate reinstatement of economic strikers with full back pay and the dismissal of replacement workers. This stands to chill the hiring of replacement workers, thus reducing an employer's ability to maintain its operations during an economic strike.

With this outcome, the Board has eviscerated a completely legal economic tool that Congress and the Supreme Court of the United States have granted to employers. A very serious practical effect of the case could be not only to discourage employers from hiring long-term replacement workers as a valid strike tactic, but also to embolden unions to take employees out on economic strikes more frequently.

The *Piedmont Gardens* decision (issued by two Board members over the lengthy dissent of Member Philip Miscimarra) in effect overrules well-established Board precedent (*Hot Shoppes, Inc.*, 146 NLRB 802 (1964)) that an employer's motivation in retaining replacement workers is immaterial. The decision also undercuts one of the Supreme Court's longest-established Board precedents in *Mackay Radio,* 304 U.S. 333 (1938), which authorizes employers to hire replacement workers "at will" and "with impunity" in economic strikes and allows the replacement workers to continue working long-term without automatic dismissal, while offering the returning economic strikers placement on a future preferential rehire list should jobs become available. Under *Mackay Radio*, an employer has the right to replace striking workers "at will" during an economic strike and, thus, can replace them without scrutiny into the employer's motivation regarding hiring long-term replacement workers. After *Piedmont Gardens*, this right is—for all practical purposes—nonexistent in cases before the Board.

* James Fowles is a shareholder in the Columbia office of Ogletree Deakins. Harold P. Coxson is a shareholder in the firm's Washington, D.C. offices. Both attorneys represent management in labor and employment-related matters.

Facts of the Case

American Baptist Homes of the West operates a continuous care facility in Oakland, California. A unit of approximately 100 nonprofessional healthcare employees in various departments has been represented by Service Employees International Union (SEIU), United Healthcare Workers-West since March of 2007.

Their collective bargaining agreement was set to expire on April 30, 2010, and negotiations for a new agreement began in February of 2010. Union picketing began on May 25, 2010 and the union received strike authorization from employees in mid-June. With the parties still far apart on significant terms and conditions of the agreement, the union notified American Baptist Homes that it intended to strike, effective August 2, 2010. At the same time, the union, on behalf of all employees, made an unconditional offer for strikers to return to work on August 8, 2010.

American Baptist Homes engaged a staffing agency at great expense and approximately 80 workers went out on strike. When contacted by the union's lawyer before the strike ended regarding whether the company intended to lock out the striking employees, a company spokesperson stated that it intended to permanently replace them "to teach the strikers and the Union a lesson" and to avoid future strikes. In subsequent testimony, another company spokesperson stated that it was the company's desire to have replacement workers available in the event that the strike continued or that future strikes arose and costs soared to maintain business operations. The union ended the strike on August 7, 2010 without having convinced the company to accept its demands; 44 of the returning strikers were permanently replaced and not rehired.

The general counsel issued a complaint alleging violations of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (NLRA), asserting that the employer's motivation in hiring replacement workers constituted an "independent unlawful purpose" within the meaning of *Hot Shoppes, Inc.* However, citing *Hot Shoppes* and *Mackay Radio*, an NLRB administrative law judge (ALJ) dismissed the complaint and ruled that the employer's statements did not constitute an "independent unlawful purpose," which is established only when the hiring of replacement workers is "unrelated to or extraneous to the strike itself." Here, the Board's ALJ ruled, the employer's statement regarding "teaching the strikers [and the union] a lesson" and avoiding future strikes was related to the strike itself.

The Majority's Decision

A two-member Board majority overturned the ALJ's decision and ruled that the employer's statements evidenced an "independent unlawful purpose" for hiring replacement workers within the meaning of *Hot Shoppes, Inc.*, even though these statements were directly related to the strike at issue. The decision found that the statements in question revealed that an unlawful anti-union retaliatory purpose was the motivation for the hiring of permanent replacement workers, and, in effect, reads the "independent" requirement right out of the standard.

The Board's decision opens the door to future scrutiny of employers' motivations in deciding to hire permanent replacement workers and disregards the Supreme Court's admonition in *Mackay Radio*, and its own precedent in *Hot Shoppes, Inc.*, that an employer may hire permanent replacement workers for economic strikers "at will" and "with impunity," and that the employer's motivation is "irrelevant" and should not be subject to scrutiny so long as there is not an "independent unlawful purpose" for the

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An Update on the New Persuader Activity Reporting Requirements

Long-Term or Multi-Year Agreements Between Employers and Advisors Now Exempt From Rule

In accordance with the U.S. Department of Labor's (DOL) recent public announcement regarding the implementation of its new "persuader activity" rule, all engagements entered into prior to July 1, 2016—including long-term or multi-year agreements for labor relations services to be performed after July 1—will not be subject to the reporting and disclosure requirements of the new rule. Services for "direct" persuader activities previously reportable under the old rule will continue to be reportable.

Prior to the new regulations, employers and consultants were only required to report agreements where the advisors (including consultants and lawyers) communicated *directly with the employer's employees* to "persuade" the employees with regard to union organizing. Communications with management were not reportable under the Labor-Management Reporting and Disclosure Act's (LMRDA) "advice exemption" where the consultant or lawyer did not communicate directly with employees but rendered advice to the employer that the employer was free to accept or reject.

Recently, the DOL finalized new regulations, which will require employers and consultants to report and disclose direct or indirect communications that have the objective of persuading employees with regard to union organizing—including what was formerly considered exempt "advice"—exclusively to management. As such, the new regulations substantially undercut the "advice exemption."

The new regulations would require employers and advisors (including consultants, lawyers, and law firms) to report standard labor relations advice and services that they provide to employers. The implementation date for administration and enforcement of the new regulations is July 1, 2016.

However, according to recent public statements from the DOL (including an email confirmation to the U.S. Chamber of Commerce) multi-year arrangements entered into between employers and labor relations consultants (including lawyers) before July 1 for labor relations services to be performed in the indefinite future are not reportable. Persuader services previously covered—such as a consultant's or lawyer's persuader communications directly with employees that were reportable under the old rule—will continue to be reportable.

Three separate legal challenges to the rule are pending on motions for declaratory and injunctive relief before federal district courts in Little Rock, Arkansas, Minneapolis, Minnesota, and Lubbock, Texas. Those challenges are based on the LMRDA's "advice exemption," which is eviscerated by the new rule, as well as the effect of the rule on the attorney-client privilege. According to these challenges, the rule violates the First and Fifth Amendments to the U.S. Constitution. Decisions in those lawsuits are expected prior to July 1, 2016, which is the date the new rule is scheduled to be implemented.

In anticipation of the effective date and before the July 1 window closes, employers may want to enter into new, long-term agreements, covering representation in current and future organizing campaigns and other labor relations services. ■

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hiring of replacement workers unrelated to the strike itself. The Board ordered the employer to reinstate all of the employees who had participated in the strike and were permanently replaced, with full back pay and interest, and to discharge the replacement workers.

Miscimarra's Dissent

In a lengthy dissent, Member Miscimarra disagreed with the majority's interpretation of what constitutes an "independent unlawful purpose," which, he argued, read "independent" out of the phrase entirely. The dissent noted that the balanced exercise of economic warfare, such as strikes and lockouts, is usually motivated by the lawful purpose of inflicting economic harm by and on both sides, sometimes with devastating consequences for employers, employees, and unions. The Board's decision upsets that balance by inviting a search in every future case to divine an employer's motivation in hiring permanent replacement workers for economic strikers.

The dissent predicts that due to the potential financial liability for employers of having their motivations for retaining permanent replacement workers subject to Board scrutiny, this decision will discourage employers from engaging permanent replacement workers in economic strikes, thus weakening employers' defenses to such strikes and emboldening unions to engage in greater strike activity.

The dissent concludes by noting that Congress made the decision to affirmatively protect certain economic weapons authorized in the NLRA, and that the Board is not free to rearrange the balance of those weapons and ignore *Mackay Radio*, *Hot Shoppes*, and other federal court and NLRB precedent protecting that balance.

Key Takeaways

Following the decision in *Piedmont Gardens*, employers should expect the NLRB and charging parties to search aggressively for any stray statements that might suggest an unlawful discriminatory or retaliatory motive for the hiring of long-term replacement workers for economic strikers even where the employer's motivation is, in fact, entirely lawful. The reason most employers retain long-term replacement workers is for the sole purpose of attempting to stay in business during a strike when it's difficult to find temporary replacements willing to cross a picket line to accept short-term employment, rather than "teaching striking employees a lesson" or "preventing future strikes." Before *Piedmont Gardens*, an employer's motivation for hiring long-term replacement workers was "immaterial." Now employers may have to justify legitimate business operational reasons for their decision.

New to the Firm

Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Nathan Allen (Atlanta); Corey Thrush (Cleveland); Stephanie Manning (Dallas); Cole Wist (Denver); Joseph Hess (Detroit (Metro)); Sara Scott (Houston); Danielle Claxton (Los Angeles); Zachary Hoyt and Lisa Lewis (Memphis); Joseph Campbell and Eric Hobbs (Milwaukee); Casey Parker (Nashville); Ashley Hileman and Cory Ridenour (Pittsburgh); Jennifer Cotner (Raleigh); Jeffrey Newhouse (Richmond); David Abella, Harold Jones, Jared Palmer, and Michael Wilson, Jr. (San Francisco); Sonja Fritts (Seattle); Joshua Owings (St. Louis); and Kathleen Massing (Tampa).

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million more employees eligible for overtime compensation if their salaries are not increased to meet the new minimum.

Although this new salary threshold is slightly more than double the current minimum salary level, the new standard actually is lower than the $970 per week figure that had been projected when the WHD issued its proposed Part 541 regulations in 2015. The WHD had stated in the proposed regulations that it planned to set the new threshold to correspond to the 40th percentile of weekly earnings for full-time salaried workers in the United States based on statistics maintained by the U.S. Bureau of Labor Statistics (BLS). That proposed approach was the subject of much criticism, including the fact that it did not take into account pay differentials among various regions of the country.

When the DOL issued its proposed regulations, the 40th percentile figure for all salaried workers nationally was $921 per week, which equated to $47,892 per year. Notably, the final rule sets the new minimum annual salary at $416 less than this amount. The DOL had anticipated using first quarter 2016 statistics to set the new threshold and had predicted that $970 per week, or $50,440 per year, would be the final number. The actual first quarter figure for 2016 was $972 per week, or $50,544 per year.

In the final rule, the WHD tied the salary figure to the 40th percentile of all salaried employees in the lowest-wage Census region, which is the South. This was intended to mute criticism that the proposed salary level would render too many bona fide exempt executive, administrative, and professional employees eligible for overtime. However, the bottom line for employers is that it still increases the threshold by more than 100 percent in a single stroke, and it still will be more difficult to implement. Furthermore, while some businesses may be able to adjust to the changes by raising prices, other businesses—particularly many small businesses, retailers, and non-profits—will be placed in a particularly challenging situation.

The DOL is implementing a time-limited non-enforcement policy for providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds. This non-enforcement policy will run from December 1, 2016, to March 17, 2019. While this should provide some relief for this single group of employers, it does not appear that the DOL intends to provide similar carve-outs to other service providers whose income streams are based on Medicaid-funding, grant-funding, or similar sources.

Effective Date of Final Rule

The final rule was published in the *Federal Register* on May 23, 2016, and will become effective on December 1, 2016. The DOL was required to provide at least 60 days between the publication date and the effective date, which would have been an extremely short time period to finalize plans and implement changes following the announcement of the new rule.

The December 1 effective date means that employers will have about six and one-half months to make changes, which should make the process more manageable and should be seen as a concession to the needs of a broad spectrum of employers. However, it also represents a rejection of employer requests that such a major leap in the new threshold be phased in over time.

Bonuses and Incentive Pay

For the first time, employers will be able to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level, as long as those payments are made on a quarterly or more frequent basis. The DOL had stated in the proposed regulations that it was considering such a move, and it sought comments as to whether to include such a provision in the final regulations. The fact that the DOL created such a provision, specifically included commissions, and also decided to include payments made on a quarterly or more frequent basis—as opposed to a monthly or more frequent basis—certainly does constitute a silver lining for employers.

From a practical standpoint, employers will need to become comfortable with how this new provision will work. Since it applies to 10 percent of the salary level, this means that up to $91.30 in nondiscretionary bonus and incentive payments per week, or $4,747.60 in nondiscretionary bonus and incentive payments per year, paid no less frequently than on a quarterly basis, can count toward meeting the $47,476 threshold. This also means that even if the employer can make use of the full 10 percent, the employee still will need to receive a salary of at least $821.70 per week, or $42,728.40 per year.

The regulations also allow employers to make a catch-up payment at the end of a quarter to make up any shortfall in the nondiscretionary 10 percent portion of the salary amount. If, by the last pay period of the quarter, the sum of the employee's actual weekly salary, plus received nondiscretionary bonus, incentive, and commission payments, does not equal $11,869 (i.e., 13 times the weekly minimum of $913), an employer may make one final payment to reach the $11,869 level no later than the next pay period after the end of the quarter. Any such final payment made after the end of the 13-week period may count only toward the prior quarter's salary amount and not toward the salary amount in the quarter it was paid.

Employers should note that although nondiscretionary bonuses, commissions, and other incentive payments still will count toward the total compensation

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Ogletree Deakins' New Overtime Solutions Center

On May 18, 2016, the U.S. Department of Labor released its much-anticipated Part 541 overtime regulations. These regulations, which will take effect on December 1, 2016, make dramatic changes to the rules concerning which employees are exempt from the overtime provisions of the Fair Labor Standards Act (see detailed article on page 1 of this issue). To help clients prepare for these new rules, Ogletree Deakins has developed the Overtime Solutions Center on its website (www.ogletreedeakins.com/innovations) with key information that employers need to know about the new regulations. The Overtime Solutions Center includes up-to-date information on the new regulations, including blog posts, webinar recordings, and other helpful resources.

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requirements for the highly compensated employee exemption, they cannot count such payments toward the minimum salary requirement of $913 per week.

Indexing to Start in 2020

As was noted previously, the minimum salary threshold for the executive, administrative, and professional exemptions will be indexed every three years, with the first change to occur on January 1, 2020. The new salary threshold will be indexed to the 40th percentile of all salaried workers in whatever is the lowest-wage Census region. The DOL will post this figure and publish it in the *Federal Register* at least 150 days prior to the effective date, which means that employers will have approximately 5 months' notice of the new minimum salary threshold.

The White House has stated in a fact sheet that it expects the new salary level to rise to more than $51,000 per year when the first update occurs on January 1, 2020. If, however, this projection does not take into account the artificial increase in salary levels that will be forced onto employers as a result of the final regulations (i.e., employers will increase some employees' salaries to meet the new threshold and will convert many of its other lower salaried employees to hourly employees, thus removing them from the sample), then the new 40th percentile figure could be much higher than this projection.

In the proposed regulations, the WHD stated that it was planning to index the salary level annually, so the shift to three-year indexing should be of consolation to employers. The WHD also had stated in its proposal that it planned to index the salary level to either the 40th percentile of all salaried employees nationally or else to the Consumer Price Index for All Urban Consumers (CPI-U).

There are numerous problems associated with indexing, not the least of which will be legal challenges to the DOL's authority to engage in such a practice. The DOL's decision to engage in indexing every three years, instead of every year, may have been made for strategic reasons, as any courtroom efforts to enjoin or invalidate the indexing portion of the final regulations likely could be resolved within three years without affecting the remainder of the regulations.

Highly Compensated Employee Exemption

In addition to the executive, administrative, and professional exemptions, another exemption in Part 541 is the highly compensated employee (HCE) exemption. Besides meeting a minimal duties test, an HCE's total annual compensation under the current (i.e., 2004) regulations must be at least $100,000, of which at least $455 per week must be in the form of a salary. Under the final regulations, the new minimum total compensation threshold is $134,004, of which at least $913 per week must be in the form of a salary.

The DOL based the $134,004 figure on the 90th percentile of all salaried employees nationally and did not make any distinctions based on Census region. This is exactly what the DOL had proposed doing in the final regulations. The 90th percentile would annualize to $134,004 based on fourth quarter statistics for 2015. However, the 90th percentile figure actually decreased in the first quarter of 2016 and now would annualize to $131,196 using first quarter of 2016 figures. Thus, the new HCE number is arguably inflated.

HCE Total Compensation and Salary Level Indexing

The final rule also indexes the total compensation and salary level requirements for the HCE exemption every three years, consistent with the timing of the indexing of the minimum salary level for the executive, administrative, and professional exemptions. The total compensation level will track the 90th percentile of all employees nationally, and the salary level will be the same as the other exemptions.

No Changes to the Duties Test

The DOL did not make changes to the duties tests for any of the exemptions in the final regulations. In the proposed regulations, the DOL had solicited comments as to whether a percent of time test should have been added into the regulations similar to the test that exists in California. Employers should be pleased that the DOL heeded the comments and did not make any such changes to the duties tests or requirements to qualify for the exemptions.

Next Steps

In conjunction with the release of the final regulations, the DOL has created a final rule web page, which includes a number of fact sheets and guidance papers. Likely in anticipation of harsh pushback by certain groups of employers that will be hardest hit by the dramatic increase in the salary level, the DOL has included specific fact sheets and guidance for non-profit organizations, higher education institutions, and state and local governments.

Although the final regulations may be subject to challenges in Congress and in the courts, employers should not assume that these challenges will result in a delay of the December 1 effective date. Accordingly, employers need to start developing and finalizing their compliance and communication plans now, with implementation occurring no later than December 1.

This article was authored by Steven F. Pockrass and Alfred B. Robinson, Jr. Pockrass is a shareholder in the Indianapolis office of Ogletree Deakins and co-chair of the firm's Wage and Hour Practice Group. Robinson is a shareholder in the Washington, D.C. office and former acting Administrator of the WHD. ■

Court Holds HR Professionals Can Be Liable as "Employers" Under FMLA

by Kelly M. Cardin and John G. Stretton (Stamford)

A federal appellate court recently held that an HR manager could be held liable as an "employer" under the Family and Medical Leave Act (FMLA). In issuing its decision, the Second Circuit Court of Appeals also articulated standards for FMLA interference claims and association discrimination claims under the Americans with Disabilities Act (ADA). ***Graziadio v. Culinary Institute of America,*** *No. 15-888-cv, Second Circuit Court of Appeals (March 17, 2016).*

Factual Background

Cathleen Graziadio worked as a payroll administrator at the Culinary Institute of America. In June 2012, she took leave under the FMLA to care for her 17-year-old son who was hospitalized as a result of previously undiagnosed Type I diabetes. A few weeks later, Graziadio took additional leave when her 12-year-old son broke his leg.

When Graziadio failed to provide new documentation supporting her leave, the Culinary Institute fired her for job abandonment. Graziadio then filed suit against her former employer, claiming her employment was terminated in violation of the FMLA and ADA. She alleged retaliation and interference under the FMLA, and discrimination on the basis of her association with her son, who she claimed qualified as an "individual with a disability" under the ADA. Graziadio named both the Culinary Institute and the company's HR director, Shaynan Garrioch, as defendants in the case.

The trial judge granted summary judgment in favor of the defendants, finding that Graziadio failed to show that she was wrongfully denied FMLA leave and that her former employer's actions were retaliatory or discriminatory. Graziadio appealed this decision to the Second Circuit Court of Appeals.

Legal Analysis

The Second Circuit vacated the lower court's ruling dismissing Graziadio's FMLA claims. Importantly, the court clarified that an individual, such as an HR representative, can be held liable as an "employer" under the FMLA.

In reversing the district court, the Second Circuit applied the "economic-reality" test used to determine employer status under the Fair Labor Standards Act. The test, which focuses on the nature of the employment relationship, essentially asks whether an alleged employer possesses the power to control the individual in question. Specifically, the test focuses on whether the claimed "employer" had the power to hire and fire employees, controlled and supervised work schedules or employment conditions, set the rate and method of payment, and maintained employment records.

Applying this multi-factor test, the Second Circuit concluded that a jury could determine that Garrioch was Graziadio's employer. The court noted that Garrioch appeared to play a key role in Graziadio's discharge, as the company directed the issue of Graziadio's termination to Garrioch. The court further held that the evidence supported a finding that Garrioch exercised control over the terms and conditions of Graziadio's employment, specifically her FMLA leave. The evidence demonstrated that the company's HR department independently handled requests for FMLA leave.

While neither party put forth evidence concerning the rate or method of payment or the maintenance of records, both of which would likely have weighed against a finding that Garrioch was Graziadio's employer, the court nevertheless concluded that the "overarching question" was whether Garrioch controlled Graziadio's rights under the FMLA. The court concluded that there was sufficient evidence to find that Garrioch did possess that authority.

FMLA Interference Claim

Next, turning to the issue of FMLA interference, the Second Circuit formally adopted a standard for prima facie cases that it had applied in previous nonprecedential decisions. The court held that "to prevail on a claim of interference with her FMLA rights, a plaintiff must establish: 1) that she is an eligible employee under the FMLA; 2) that the defendant is an employer as defined by the FMLA; 3) that she was entitled to take leave under the FMLA; 4) that she gave notice to the defendant of her intention to take leave; and 5) that she was denied benefits to which she was entitled under the FMLA."

The court found that Graziadio had set forth sufficient evidence to satisfy the five elements of an FMLA interference case and could proceed on this claim.

Association Discrimination Claim

Finally, the court turned to Graziadio's associational discrimination claim. The court noted that there are three types of situations that give rise to such a claim: 1) "expense," in which an employee suffers an adverse action because of his or her association with a disabled person covered by the employer's insurance, which the employer believes will be costly; 2) "disability by association," in which the employer fears that the employee may contract or is genetically predisposed to develop the disability of the person with whom he or she is associated; and 3) "distraction," in which the employer fears that the employee will be inattentive at work due to the disability of the disabled person.

Because "Graziadio has not presented evidence that she was fired because her employer suspected distraction or concern for [her son] would cause her to perform her work inadequately," the court upheld the dismissal of her ADA claim.

> *"Employers and their HR professionals must be vigilant and responsive when dealing with FMLA requests."*

Practical Impact

Because *Graziadio* broadened the scope of FMLA claims in finding that individuals can be held liable as "employers" under the law, employers and their HR professionals must be vigilant and responsive when dealing with FMLA requests. Employers should also ensure that their HR professionals are well-versed in the requirements and protections of the FMLA to minimize the likelihood of any potential claims. ■