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FLORIDA
EMPLOYMENT LAW LETTER

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SEVERANCE AGREEMENTS

11th Circuit clarifies scope of nonwaivable FMLA rights

by Andrew L. Rodman
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

It's fairly common to offer severance pay at the time of an employee's separation from employment in exchange for her execution of a general release. However, you must remember that not all claims can be released. Recently, the U.S. 11th Circuit Court of Appeals (whose rulings apply to all Florida employers) ruled on the permissible scope of a release covering claims arising under the Family and Medical Leave Act (FMLA).

'Ultimatum' and execution of severance agreement

Hartford Fire Insurance Company employed Blanche Paylor as a long-term disability analyst. Between January 2008 and September 2009, Paylor took 390 hours of FMLA leave. In late August or early September 2009, she requested additional FMLA leave. Hartford acknowledged her request in an e-mail dated September 4, 2009.

On September 11, before Paylor took the recently requested FMLA leave, Hartford reviewed her performance. As part of the review, Paylor's supervisor presented her with a performance warning that criticized the quality of her work and explained what she would have to do if she wanted to keep her job.

On September 16, Paylor again met with her supervisor and was given an ultimatum: Agree to the conditions of a performance improvement plan (PIP), or accept a one-time offer of 13 weeks of severance pay in exchange for signing a severance agreement containing a release of claims. Paylor signed the severance agreement on September 17, 2009.

Lawsuit and challenge to release's validity

Even though she signed the severance agreement, Paylor sued Hartford, alleging it had interfered with her FMLA rights and retaliated against her for exercising them. Predictably, Hartford argued that she couldn't proceed with her FMLA claims because she waived her FMLA rights when she signed the severance agreement.

The trial court agreed with Hartford and granted its request for dismissal before trial. Paylor appealed to the 11th Circuit, arguing that she could proceed on her FMLA claims because the severance agreement contained an impermissible waiver of *prospective* FMLA rights.

Prospective claims aren't based on past conduct

Before 2009, the FMLA regulations stated that "employees cannot waive,

nor may employers induce employees to waive, their rights under the FMLA." That language, while seemingly clear and unambiguous, created a split in the courts. Some courts held that the prohibition against FMLA waivers pertained to prospective, *but not retrospective,* rights, and other courts held that the prohibition against FMLA waivers pertained to both prospective and retrospective rights.

In an effort to provide clarity on the issue, the U.S. Department of Labor (DOL) amended the FMLA regulations, effective January 2009, to state that "employees cannot waive, nor may employers induce employees to waive, their prospective FMLA rights," but "this does not prevent the settlement or release of FMLA claims by employees based on past employer conduct."

So, for purposes of Paylor's FMLA claims, the issue turned on whether Hartford asked her to waive prospective or retrospective claims. Paylor argued that the word "prospective" includes an employee's "unexercised" right to take FMLA leave, such as the leave she requested but hadn't yet taken before her separation from employment.

The 11th Circuit disagreed with Paylor's definition of the word "prospective," calling it "too expansive." According to the court, the "better interpretation" is that a prospective waiver is a release of something that hasn't yet occurred. For example, an employer cannot "offer all new employees a one-time cash payment in exchange for a waiver of any future FMLA claims" because that waiver would be prospective.

The 11th Circuit held that Paylor's FMLA claims arose out of past conduct—namely, Hartford's ultimatum that she accept the PIP or sign the severance agreement and resign. According to the court, "In signing the agreement and accepting her severance benefits, Paylor settled claims 'based on past employer conduct,'" so she released those claims. The 11th Circuit therefore affirmed the lower court's decision dismissing her FMLA claims. *Paylor v. Hartford Fire Insurance Company* (11th Cir., April 8, 2014).

Takeaway

A severance agreement containing a general release of claims remains an effective tool for achieving finality and peace of mind when you're parting ways with an employee. However, you must be cognizant of the fact that some claims, including prospective FMLA rights, cannot be released. Before presenting an employee with a severance agreement, consult with employment counsel to make sure the agreement's release provisions don't purport to release nonwaivable rights.

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HEALTH INSURANCE

What do final ACA 'play or pay' regulations mean for employers?

In yet another unexpected turn, the Obama administration recently released final regulations making further changes to the implementation of the Affordable Care Act's (ACA) employer responsibility section (also commonly referred to as the "play or pay" provision). Under this particular part of the ACA, employers with 50 or more employees face penalties if they don't offer health insurance coverage or if the coverage they offer is insufficient.

The play-or-pay provision was originally supposed to take effect January 1, 2014, but last summer, the administration delayed its implementation until 2015. The new final regulations provide a further delay for certain employers, address a number of questions and issues that arose from the proposed play-or-pay rules issued in January 2013, and provide various other clarifications.

Delay for small employers

The biggest news item to emerge from the new final regulations was the administration's announcement that it is delaying implementation of the play-or-pay provision for certain small employers until 2016. The relief is provided for all of 2015 and, for any noncalendar-year plans that begin in 2015, the portion of the 2015 plan year that falls in 2016.

Employers are eligible for the transition relief if they meet certain conditions.

Limited workforce size. An employer must employ on average at least 50 full-time employees (including full-time equivalent employees (FTEs)) but fewer than 100 full-time employees (including FTEs) on business days in 2014.

Maintenance of workforce and hours. From February 9, 2014, through December 31, 2014, an employer may not reduce the size of its workforce or its employees' overall hours of service to fall within the employee range discussed above (i.e., 50 to 99 employees). However, employers could reduce their workforce size or overall hours of service for "bona fide business reasons" and still be eligible for the transition relief.

Maintenance of previously offered health coverage. During a "coverage maintenance period," an employer also can't eliminate or significantly reduce the health coverage (if any) it offered as of February 9, 2014.

Certification of eligibility. Finally, employers must certify on a prescribed form that they meet the eligibility requirements.

Relief for large employers

Larger employers with 100 or more employees still will have to contend with possible penalties under the play-or-pay provision in 2015, but the regulations do provide them with some relief. The final regulations phase in the percentage of full-time employees to which such employers need to offer coverage to avoid penalties (from 70 percent in 2015 to 95 percent in 2016 and beyond).

More transitional relief

The final regulations also extend to 2015 a few transitional rules that originally were to apply to 2014 in the proposed regulations.

Initial compliance. For the 2015 calendar year, an employer may determine its status as an applicable large employer by referencing a period of at least six consecutive calendar months (chosen by the employer) during the 2014 calendar year (instead of the complete 2014 calendar year). For example, an employer may determine whether it is an applicable large employer for 2015 by determining whether it employed an average of 50 full-time employees (including FTEs) on business days during any consecutive six-month period in 2014.

> **You should make planning for the play-or-pay provision a priority.**

Noncalendar-year plans. Generally, employers with noncalendar-year plans (plans that don't start on January 1) will be able to begin complying with the play-or-pay provision at the start of their plan years in 2015 rather than on January 1, 2015.

Dependent coverage. The requirement that employers offer coverage to the dependents of their full-time employees won't apply in 2015 to employers that are taking steps to arrange for such coverage to start in 2016.

Stability periods. Plans preparing for 2015 in 2014 may use a measurement period of six months even when that period is linked to a stability period (in which variable-hour employees must be offered coverage) of up to 12 months. More specifically, for purposes of stability periods beginning in 2015, employers may adopt a transition measurement period that is less than 12 months but no less than six consecutive months. Such a period must begin no later than July 1, 2014, and must end no earlier than 90 days before the first day of the plan year beginning on or after January 1, 2015.

Other clarifications and next steps

The final regulations also clarify quite a few issues, including whether various types of employees are considered full-time. For example, the regulations address employee categories such as volunteers, educational employees, seasonal employees, individuals in student work-study programs, and adjunct faculty.

AGENCY ACTION

Agencies offer information on use of background checks. The Equal Employment Opportunity Commission (EEOC) and the Federal Trade Commission (FTC) have copublished two documents explaining how the agencies' respective laws apply to background checks performed for employment purposes. The agencies emphasize that employers need written permission from applicants before getting background reports about them from companies in the business of compiling background information. They also reaffirm that it's illegal to discriminate based on a person's race, color, national origin, sex, religion, age (40 or older), disability, or genetic information.

EEOC issues guides on religious dress in workplace. The EEOC has issued two new technical assistance publications addressing workplace rights and responsibilities with respect to religious dress and grooming under Title VII of the Civil Rights Act of 1964. The guide, titled "Religious Garb and Grooming in the Workplace: Rights and Responsibilities," and an accompanying fact sheet provide advice for employers and employees. Employers covered by Title VII must make exceptions to usual rules or preferences to permit applicants and employees to follow religiously mandated dress and grooming practices unless doing so would pose an undue hardship to the operation of the employer's business. When an exception is made as a religious accommodation, the employer may still refuse to allow exceptions sought by employees for secular reasons.

OSHA releases bulletin on injury recording requirements for temps. The Occupational Safety and Health Administration (OSHA) has released a new educational resource focusing on requirements for recording injuries and illnesses of temporary workers. The bulletin explains the requirements for both the staffing agency and the host employer and addresses how to identify who is responsible for recording work-related injuries and illnesses of temporary workers on the OSHA 300 log. OSHA launched its Temporary Worker Initiative to raise awareness and compliance with requirements that temporary workers receive the same training and protections that existing workers receive.

OSHA orders $257,000 fine in whistleblower case. OSHA has ordered DISH Network to pay a former employee $157,024 in back wages and $100,000 in compensatory damages after an investigation found that the Colorado-based company violated the antiretaliation provisions of the Sarbanes-Oxley Act by blacklisting the former employee after he reported a vendor for submitting fraudulent invoices and testifying at a deposition. The former employee complained to OSHA in 2011 that he had been blacklisted three times after leaving DISH. ✤

WORKPLACE TRENDS

Poll finds many CFOs unconcerned about Boomer retirements. Sixty-three percent of financial executives participating in a survey by staffing firm Robert Half said they're unconcerned about a wave of Baby Boomer retirements in spite of figures from the U.S. Bureau of Labor Statistics (BLS) that show one-fifth of the U.S. workforce has passed or is nearing retirement age. Thirty-one percent of CFOs interviewed said they were worried about losing Boomers to retirement in the next couple of years. Among CFOs who are worried about losing Boomers, executives most commonly cited leadership (39%) and legacy knowledge (23%) as the greatest potential losses to their organization. The survey was developed by Robert Half and conducted by an independent research firm. Results were based on interviews with more than 2,100 CFOs from a random sample of companies in more than 20 of the largest U.S. markets.

Survey shows little continuous recruiting despite extended job vacancies. A survey from CareerBuilder has found that just 38% of employers recruit throughout the year for positions that may open up later despite loss of revenue resulting from extended vacancies. Among a subset of employers that currently have open positions for which they can't find qualified candidates, a vacancy often will take months to fill. Eighty-three percent of employers that reported having unfilled slots said vacancies remain open for two months or longer on average. Twenty-two percent said vacancies go unfilled for six months or more on average. The national survey was conducted online by Harris Poll from November 6 to December 2, 2013, and included a representative sample of 2,201 hiring managers and HR professionals across industries and company sizes.

Poll shows half of workers expecting raise in 2014. A global poll from Monster shows that 51% of respondents are expecting a pay raise this year even though recent studies indicate actual salary increase budgets for companies are still below prerecession levels. Monster analyzed the survey results by gender and found that female and male respondents were almost identically optimistic about getting a raise in 2014—51% of women and 50% of men answered in the affirmative. Monster asked visitors to its website whether they expected a raise in 2014 and received over 3,585 responses. Canadian respondents were the most optimistic, with 57% believing they will get a raise. U.S. respondents were slightly more positive than average, with 54% believing they would get a raise this year. Respondents in France were the least optimistic, with 71% saying they don't expect a raise. ✤

You should review these new final regulations and make planning for the play-or-pay provision a priority. Additionally, you should be watching for more ACA-related guidance. ✤

PREGNANCY DISCRIMINATION

Florida Supreme Court rules pregnancy discrimination is prohibited under Florida law

by Tom Harper
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In a 6-1 decision released on April 17, the Florida Supreme Court resolved the split among Florida courts over whether pregnancy discrimination falls within the prohibition against "sex" discrimination under the Florida Civil Rights Act (FLCRA). The court's majority opinion, written for five of the seven justices, was authored by Justice Barbara Pariente. One of your editors, Andy Rodman, with Stearns, Weaver, Miller, Weissler, Alhadeff & Sitterson, P.A., in Miami, was among the lawyers who argued this case before the court on behalf of the employer last fall.

Background

Peguy Delva claimed her employer, The Continental Group, Inc., took adverse actions against her after she revealed to her supervisor that she was pregnant. She alleged that Continental engaged in increased scrutiny of her work and refused to allow her to change shifts in violation of Florida law. The trial court dismissed her subsequent lawsuit, and an appeals court agreed, ruling that the FLCRA's prohibition against sex discrimination doesn't include pregnancy discrimination. The case eventually reached the Florida Supreme Court.

After noting that at least 30 state and federal courts in Florida have reached different decisions, the supreme court said the issue was one of pure interpretation of the law. Section 760.10 of the FLCRA reads:

> It is an unlawful employment practice for an employer: . . . to discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

The question before the court was whether the term "sex" in the FLCRA includes pregnancy. The court found that it had the right to decide that question anew, without being bound by decisions from other Florida courts.

Here's news: Sex and getting pregnant are related

The court began by noting that it was guided by the stated purpose of the FLCRA. Florida lawmakers provided in Section 760.01(3) that "the Florida Civil Rights Act shall be construed according to the fair import of its terms and shall be liberally

construed to further the general purposes stated in this section and the special purposes in the particular provision involved."

The court also looked to a decision from the Massachusetts Supreme Court, which had answered the same question based on a similar Massachusetts law. The Massachusetts court noted, "Pregnancy is a condition unique to women, and the ability to become pregnant is a primary characteristic of the female sex. Thus[,] any classification which relies on pregnancy as the determinative criteri[on] is a distinction based on sex."

The Florida Supreme Court "embraced" that "commonsense reasoning." The Florida court went on to conclude, "Indeed, the capacity to become pregnant is one of the most significant and obvious distinctions between the female and male sexes. For this reason, discrimination based on pregnancy is in fact discrimination based on sex because it is discrimination [based on] a natural condition unique to only one sex and that arises, 'because of [an] individual's sex.'"

Continental pointed out that when the U.S. Supreme Court ruled that Title VII didn't apply to discrimination based on pregnancy, Congress responded by amending Title VII with the Pregnancy Discrimination Act of 1978 (PDA). Since the Florida Legislature hadn't likewise amended the FLCRA to add the term "pregnancy," some courts have concluded that lawmakers' failure to act showed that pregnancy wasn't covered under the FLCRA. The Florida Supreme Court rejected that argument, finding it was unnecessary to ascribe any meaning to the legislature's inaction since the language in the FLCRA that calls for a liberal reading of the law is enough to support the conclusion that pregnancy is covered under the FLCRA.

The court went out of its way to state that its ruling has nothing to do with the underlying merits of Delva's case. Rather, the court's ruling merely addresses the narrow issue of whether the FLCRA prohibits pregnancy discrimination. The case will be sent back down to the trial court, where the parties will now battle over its merits. *Peguy Delva v. The Continental Group, Inc.,* Case Number SC12-2315 (April 17, 2014).

Bottom line

This decision makes it clear that employees have a state-law cause of action for pregnancy discrimination in Florida. Although federal law has prohibited discrimination on the basis of pregnancy since 1978, the FLCRA provides for damages that can exceed those available under federal law. Suing under Florida law also can make it more difficult to have the case transferred to federal court, where it can be easier for an employer to get the claims dismissed.

This case could create a slippery slope. One premise underlying the court's decision was its finding that pregnancy is covered under the FLCRA because it's "sex-based." What about other sex-based traits? For example, if an employer terminates a male employee who is undergoing treatment for prostate cancer, will he have a claim for sex discrimination (in addition to disability discrimination)? Only time will tell how broadly applicable the court's decision will be.

If you would like to read the court's 10-page decision, send an e-mail to Tom Harper at tom@employmentlawflorida.com. ✤

LEGISLATIVE UPDATE

Florida's 2014 legislative session: some proposed labor and employment bills

by Jeff Slanker and Rob Sniffen
Sniffen & Spellman, P.A.

Every March, the Florida Legislature convenes in Tallahassee for 60 days to consider and vote on proposed bills that would affect Florida's future if they're enacted into law. Every year, a host of those proposed bills address the labor and employment landscape in Florida. Let's look at some of the key pieces of labor and employment legislation that were debated during this year's legislative session, which is just wrapping up.

Bills under consideration

House Bill (HB) 163, titled the "Helen Gordon Davis Fair Pay Protection Act," seeks to require employers that have contracts for good or services with the state to comply with antidiscrimination and affirmative action requirements ensuring that women receive pay equal to what men earn for similar work. The Florida

UNION ACTIVITY

Unions praise college football ruling. The United Steelworkers (USW) and the AFL-CIO issued statements of support shortly after a ruling from a National Labor Relations Board (NLRB) regional director saying that scholarship football players at Northwestern University meet the definition of "employee" and are therefore eligible to form a union. "This ruling is a tremendous victory, not just for the athletes at Northwestern, but ultimately for all college athletes, many of whom generate tens of millions of dollars each year for their institutions, yet still are in constant danger of being out on the street with one accident or injury," USW International President Leo W. Gerard said after the March 26 ruling. AFL-CIO President Richard Trumka called the decision "great news" and said it "affirms the basic principle that people who work hard deserve fair treatment." Northwestern University announced it would appeal the ruling, which applies only to private universities since the National Labor Relations Act (NLRA) doesn't cover public universities.

VW workers file suit over UAW challenge to union election. The National Right to Work Foundation is backing a lawsuit filed by five employees at Volkswagen's (VW) Chattanooga, Tennessee, facility. The suit is aimed at blocking what the foundation calls "collusion between the company and the United Auto Workers (UAW)" should the NLRB order a new unionization election at the plant. After the union came up short in a February vote, UAW officials filed objections with the NLRB seeking to overturn the election results. A statement from the foundation said its suit relies on precedent upheld by a federal appeals court that a casino company's assistance to union officials during a card-check campaign could constitute "thing[s] of value" under the Labor Management Relations Act (LMRA). Under that law, employers are prohibited from handing over "any money or other thing of value" to union officials.

Union renews call for armed TSA workers. The American Federation of Government Employees (AFGE) issued a statement in March in response to the Transportation Security Administration's (TSA) review of the November 1 shooting death of a TSA officer at Los Angeles International Airport (LAX). "Ever since Transportation Security Officer Gerardo Hernandez was killed while on duty at LAX last November, AFGE has advocated that TSA create an armed uniformed law enforcement unit within the agency to provide the best possible security for our Transportation Security Officers at the airport checkpoints," AFGE President J. David Cox Sr. said, adding that the TSA's report "justifies our call for armed law enforcement officers at security checkpoints." ✤

Commission on Human Relations, which enforces the provisions of the Florida Civil Rights Act (FLCRA), would be tasked with much of the law's enforcement. This bill is out of committee but has yet to be voted on by the House of Representatives.

HB 385 seeks to raise Florida's minimum wage to $10.10 per hour. While efforts to increase the minimum wage have been ramping up on both the federal level and in many states, HB 385 doesn't appear to be gaining much traction this session. Florida's current minimum wage is $7.93 per hour, and the rate is adjusted annually based on inflation. This bill is out of committee but has yet to be voted on by the House of Representatives.

HB 505 addresses how employers can and cannot use background checks when making employment decisions. Under the bill, employers are prohibited from inquiring into applicants' criminal history on an initial job application. Rather, applicants must be screened to determine if they are qualified for the job before criminal history background checks may be conducted. This bill is out of committee but has yet to be voted on by the House of Representatives.

Senate Bill (SB) 324 would prohibit employers from considering job applicants' credit history when determining the compensation, terms, and conditions of employment. Employers' use of background checks for deciding whether to hire or fire individuals has been a recent topic of some concern for the Equal Employment Opportunity Commission (EEOC). If you rely on background checks when making employment decisions, exercise caution. SB 324 provides employees and applicants who are victims of discrimination based on their credit history to file a claim under which they may recover monetary damages against the employer or prospective employer. This bill is out of committee but has yet to be voted on by the Senate.

SB 444 revises the penalties and certain other requirements of stop-work orders issued under the Workers' Compensation Act. Stop-work orders issued by the state of Florida require businesses to cease all operations if they don't maintain appropriate workers' compensation coverage for their employees. This bill has passed and will be sent to the governor for signature.

In addition to those bills, the Florida Legislature is considering legislation that would reform local government pension and retirement plans; amend the law addressing background screening of Florida public school employees, including employees of Florida's Virtual Instruction School; and provide for causes of action by county ordinance to recover unpaid or underpaid wages.

Bills that haven't made the cut

As the legislative session has progressed, some major bills haven't made it out of the committees to which they were assigned, and some bills are already moot. In a surprising twist, **HB 239,** titled the "Florida Competitive Workforce Act," stalled and was abandoned. The bill would have prohibited employment discrimination based on sexual orientation and gender identity or expression.

Currently, neither the FLCRA nor Title VII and its subsequent amendments identify sexual orientation and gender expression as characteristics protected from employment discrimination. Nevertheless, there has been movement on both the federal and state level in recent years to designate sexual orientation and gender identity expression as protected categories. We anticipate that similar bills will be introduced in the coming years as gender identity and sexual orientation issues continue to dominate public discussion. Despite enjoying support from business interests in Florida and both Democrat and Republican lawmakers, HB 239 won't see a vote this year.

> **Despite enjoying support from both Democrat and Republican lawmakers, HB 239 won't see a vote.**

SB 220, which would have amended the FLCRA to include a prohibition on discrimination based on pregnancy, may now be moot given the Florida Supreme Court's recent decision in *Peguy Delva v. The Continental Group, Inc.* (For more on that decision, see the article on pg. 4.) Before the supreme court's ruling, there was a dispute in Florida over whether the FLCRA prohibited employers from taking adverse employment actions against employees based on their pregnancy status because pregnancy isn't explicitly listed in the Act as a protected characteristic. It appeared that SB 220 bill signaled that the legislature was poised to amend the FLCRA to ensure that pregnancy discrimination was forbidden regardless of the Florida Supreme Court's ruling.

Keep an eye on the legislature

Obviously, if any of the bills covered in this article are passed into law, workplace management in Florida will change dramatically. Keep a close eye on this year's proposed labor and employment legislation to ensure that your company has a head start on compliance. Workplace requirements could be very different come July 1, when any bills that are passed and signed into law would become the new standard in Florida.

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WAGE AND HOUR LAW

President orders revision of FLSA exemptions, expansion of overtime protection

In February, President Barack Obama issued an Executive Order that will increase the minimum wage for federal contractors to $10.10 per hour. Though most employers weren't immediately affected by this change, the order lends momentum to a broader effort to increase the federal minimum wage for all workers and has already influenced equivalent legislative action in at least one state, Connecticut.

One month later, perhaps signaling a trend of executive challenges to federal labor standards, the president issued a second executive action ordering the revision of the white-collar exemptions of the Fair Labor Standards Act (FLSA) and the expansion of overtime protection to more American workers.

Current state of white-collar exemptions

As tempting as it is to declare that the rules will change "just when we began to figure them out," let's be honest—few of us have really mastered the art of the FLSA exemption. The process is akin to an act of divination in which HR managers place one hand on a stack of federal regulations, place the other hand on the job description of the employee in question, and then consult the wisdom of a Magic 8 Ball to determine whether the worker qualifies for one of several white-collar exemptions. Reply hazy; try again.

In theory, the white-collar exemptions (also known as the administrative, professional, and executive exemptions) apply to employees who are paid at least $455 per week on a salary basis and whose primary duties involve high-level functions such as managerial or supervisory authority, advanced knowledge, imaginative or creative work, or the exercise of independent judgment and discretion on important business matters.

Yet because the minimum salary threshold hasn't been updated or adjusted since 2004, it's an admittedly easy minimum to reach and offers no real guidance to employers on the level of responsibility (and

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commensurate compensation) actually expected for an exempt "white-collar" position. Therefore, the exemption analysis falls back to a fact-specific assessment of the actual duties being performed by each individual worker. This analysis can be particularly difficult and burdensome to apply to blended positions such as retail management, where the exemption can turn on how many hours per week the employee spends doing each part of her job. Employers that guess incorrectly can find themselves liable for hefty penalties and back-pay settlements, particularly under the heavy enforcement strategy of the current administration.

So yes, change is needed—few employment law professionals would suggest that the FLSA regulations aren't without major flaws. However, the type of changes implied by the president's memorandum and related commentary could significantly alter the business landscape as workers who previously had been considered exempt and accustomed to that classification would now be eligible for overtime premium pay for every hour worked over 40 in a workweek. Employers would need to adjust accordingly, whether by hiring additional workers to reduce employee workloads, lowering wages or other benefits to make now nonexempt positions more affordable, or otherwise adapting for the increased costs for these workers. In addition, HR departments would need to reclassify many workers, a time-consuming, burdensome, and expensive task in itself.

What has changed?

Nothing has changed—yet. The memorandum simply directs the secretary of labor to propose revisions to modernize and streamline the existing overtime regulations. Though the president's directive is vague, the intent is clear—fewer employees will qualify for exemptions from overtime.

Possible regulatory revisions could include an increase to the minimum salary threshold for white-collar exemptions, further limits to or definitions of the types of activities considered exempt duties, and adoption of measurable requirements for the amount or percentage of work time that must be spent performing those duties.

Proposed revisions still must undergo the standard procedure of being drafted by the U.S. Department of Labor (DOL) and published for comment in the *Federal Register* and are likely to be met with considerable opposition and entangled by bureaucratic delay. Any change in the coming year is unlikely; however, you are advised to stay informed on the issue. ✤

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