ERICKSON, THORPE & SWAINSTON, LTD.

NEVADA LAW BULLETIN

DOL Releases Final Overtime Rule: Are You Ready?

By Charity Felts. Esq.

The Department of Labor ("DOL") has released the much-anticipated Final Rule updating the regulations governing overtime exemptions under the Fair Labor Standards Act ("FLSA"). Here are the key provisions of the new regulation:

Salary Threshold. The Final Rule sets the salary threshold at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the south region), which is $913 per week or $47,476 annualized. This is up from the current salary level of $455 per week or $23,660 annualized.

Highly Compensated Employees. The total annual compensation requirement for highly compensated employees (HCE) is set at the 90th percentile of full-time salaried workers, which is $134,004. HCEs are still subject to a minimal duties test in addition to receiving at least the new standard salary amount of $913 per week.

Automatic Salary Threshold Updates. The Final Rule provides for an automatic update to the salary threshold every three years. The update is geared towards maintaining a salary threshold equal to the 40th percentile. The automatic update will also update the HCE salary threshold. Automatic updates will begin January 1, 2020.

Inclusion of Nondiscretionary Bonus Payments. Employers will be able to count nondiscretionary bonuses and incentive payments, including commissions, to satisfy up to 10 percent of the standard salary test. This can include nondiscretionary bonuses tied to productivity and profitability.

Noticeably absent from the new regulations is any change to the duties test. Though the Notice of Proposed Rulemaking released last July did not explicitly state that the DOL was going to make

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a change to the duties test, many guessed that such a change, to mimic California's approach that requires exempt employees spend more than 50% of their time engaged in exempt work, was possible. In fact, the Final Rule is not changing any of the job duty requirements to qualify for an exemption. As such, the standard duties test and the HCE duties test will not change.

The Final Rule will take effect December 1, 2016. Employers should consider their options now and develop an action plan in order to be ready for the implementation deadline. For more information, or to find a copy of the final rule, visit the DOL's website at **https://www.dol.gov/whd/overtime/final2016/**.

Obesity. Not a "Disability" Under the ADA, Unless Also a "Physical Impairment."

By Brittany N. Cooper, Esq.

According to the Eighth Circuit, obesity does not meet the definition of a "disability" under the Americans with Disabilities Act (ADA) for either the discrimination or the "regarded as" provisions of the statute, unless it is also a "physical impairment."

Melvin A. Morriss, III applied to BNSF Railway Co. for a job as a machinist, a safety sensitive position. He received a conditional offer of employment and underwent a prehire physical examination, which reported that he was 5' 10" tall and weighed slightly more than 280 pounds, with a body mass index (BMI) slightly in excess of 40. The prehire medical report stated that Morriss was "[n]ot currently qualified for the safety sensitive Machinist position due to significant health and safety risks associated with Class 3 obesity ([BMI] of 40 or greater)." The district court granted BNSF's motion for summary judgment on the ground that obesity did not meet the definition of "disability" because it was not a "physical impairment," and further denied Morriss's motion for partial summary judgment on his "regarded as" claim.

On appeal, the Eighth Circuit held that Morriss had failed to point to evidence that his obesity limited him from performing the essential functions of the job or caused any physical limitations. As such, Morriss had not shown that his obesity was an actual "disability" because he failed to prove that it was a "physical impairment." Moreover, as to Morris's "regarded as" claim, the Eighth Circuit agreed with the district court and found that "because BNSF acted only on its assessment of Morriss's predisposition to develop an illness or disease in the future, it did not regard him as having a disability under the ADA."

Finally, the Eighth Circuit rejected Morriss's argument that BNSF discriminated against him because it perceived him as having a physical impairment because "Morriss did not produce evidence that BNSF perceived his obesity to be an existing physical impairment." Rather, the Eighth Circuit observed, quoting the district court, it was "undisputed that Morriss 'was denied employment . . . not because of any then current health risk identified by BNSF . . . but because BNSF believed by having a BMI of 40, [Morriss] would or could develop such health risks in the future."

This decision provides valuable guidance to employers because with nearly two-thirds of American adults qualifying as either overweight or obese, a rule that would classify them as having a "disability" regardless of any "physical impairment" could make it rather difficult to manage a workforce, a substantial portion of which would otherwise be able to request a reasonable accommodation under the ADA.

States Continue to Probe Employers' "On-Call"/"Shift Cancellation" Policies.

By John Aberasturi, Esq.

It has been widely reported that Attorneys General of at least eight states and the District of Columbia have sent letters in April 2016 to numerous national retailers regarding the use of so called "on-call" scheduling, a practice whereby employees are required to check shortly before their scheduled shift to find out whether or not they will be needed that day.

According to Illinois Attorney General Lisa Madigan, quoted in the Chicago Tribune, "Learning just hours before a scheduled shift whether you are going or not is an unacceptable and challenging business practice. Workers-no matter where they work-should not be subject to that kind of unpredictability and uncertainty in their lives."

Employers argue that such scheduling can help save money by avoiding overstaffing during slow periods while ensuring that there are enough workers during busy times.

The letters from the Attorneys General reported that workers can be harmed by unpredictable work schedules which make it harder to arrange child care, increase stress and strain the family. The letters also say that such scheduling may violate state labor laws requiring workers be paid for at least some of a shift if told to stay home. It is argued that on-call scheduling is not a "business necessity" as some employers have abandoned the practice since the first inquires were made by the New York Attorney General in 2015.

Various studies report that although it is not known how many employers use this practice specifically, a large percentage of hourly employees, working under 32 hours per week, receive their work schedule a week or less in advance.

Although the inquiries from the Attorneys General are directed only to national retailers, the concept and practice exists in many public and private employment situations. The issue of pay for late cancellation, and whether it is required under the law and under regulations relevant to a particular employer, is a question which will continue to draw attention. At least with regard to these elected officials, there appears a political will to confront this issue.

Unions representing public and private employees have long focused upon this issue, seeking to provide contractually for at least some form of "stand-by" pay. The philosophical and practical arguments used in these negotiations appears now to be passing to nonunion employees with the assistance of elected officials.

As noted in the letters, at least some employers have reviewed their policies and determined that they should no longer use the practice. Other employers who have been contacted have reported that "on-call" scheduling is not used.

Given the increased scrutiny on the practice and the possibility that focus will expand beyond large retailers, employers should review their scheduling practices so as to be able to respond to such inquiries if received. Consultation regarding relevant wage and hour and other relevant employment laws and regulations may be appropriate.

SAVE THE DATE

MARCH 2, 2017

9:00 A.M. TO 4:00 P.M.

The 2017 ETS Employment Law Seminar will be held March 2, 2017, at The Grove in South Reno. Stay tuned for more information and a finalized seminar agenda. We look forward to seeing you all again.

Beware of Inflexible Leave Policies

By Charity Felts, Esq,

On May 16, 2016, the Equal Employment Opportunity Commission ("EEOC") announced that it settled a nationwide disability discrimination case against well-known home improvement retailer, Lowe's, for $8.6 Million. At the heart of the case was Lowe's medical leave of absence policies which created a maximum amount of time an employee could take a medical leave of absence. EEOC charged Lowe's with violating the Americans with Disabilities Act ("ADA") and engaging in a pattern and practice of discrimination against people with disabilities after employees were fired when their medical leaves of absence exceeded Lowe's maximum leave policy.

The EEOC criticized Lowe's medical leave policy which initially provided for 180 days, and was later increased to 240 days, as the maximum amount of leave an employee could receive for a medical leave of absence. This settlement should signal employers that the EEOC will scrutinize company policies that utilize a no-fault approach or prescribe a maximum amount of leave. These no-fault policies result in an automatic termination after an employee has been on leave for a specified period of time. The EEOC challenged Lowe's practice of refusing to provide, or to consider providing, an employee with a reasonable accommodation in the form of extended medical leave after the maximum leave allowed under the policy was reached. Under the ADA, the EEOC requires employers to consider requests for a reasonable accommodation regardless of any limits created by company policy.

This settlement serves as an example of employers' need to review their leave policies and update them to avoid maximum leave amounts or no-fault leave policies. Any policy that calls for automatic termination of employment upon reaching the limit will likely violate the ADA because it does not contemplate the interactive process and the need to consider potential additional leave as a reasonable accommodation. Failing to engage in the interactive process, even if other forms of eligible leave have been exhausted, could create liability under the ADA.

Now is a good time to review your leave policies to ensure compliance with various federal leave laws. If you have questions, or need assistance with this process, you can contact one of Erickson, Thorpe & Swainston's employment law attorneys for more information.