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On the topic:
Employment and the Law in Texas
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Employment and the Law in Texas

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ACKNOWLEDGEMENT

• TWC's Office of the Commissioner Representing Employers produces a reference book entitled Especially for Texas Employers to provide information on important workplace issues.

• The content in this program was inspired by an in-depth study of this reference.

• Participants are encouraged to obtain a copy of this resource on the Texas Workforce Commission website: http://www.twc.state.tx.us/news/efte/especially-for-texas-employers.html
Federal Employment Laws

- Civil Rights Act of 1964, Title VII
- Pregnancy Discrimination Act of 1978 (PDA)
- Age Discrimination in Employment Act of 1967 (ADEA)
- Americans with Disabilities Act of 1990 (ADA)
- Immigration Reform and Control Act of 1986 (IRCA)
- U.S. Bankruptcy Code – Section 525

State Employment Laws

- Many States have additional laws that prohibit forms of discrimination as well as additional laws to protect certain classes from discrimination, such as sexual orientation, veteran status, and from filing certain types of claims.
State of Texas

- The State of Texas added these anti-discrimination statutes:
  - Texas Commission on Human Rights Act of 1983
  - Texas Workers’ Compensation Act

Employment At Will

- Texas is an “employment at will” State.
  - Applies to all phases of employment
  - Unless there is a statute or an expressed agreement, like an employment contract to the contrary
  - Either party may terminate the relationship or modify the terms of the relationship at any time, for any reason or for no reason, with or without notice

- Exception: the “public policy” exception
  - no termination or adverse job action may be held against an employee as retaliation for an employee who refuses to commit a criminal act for the employer or on the employers behalf
I-9 Procedures

• Must be obtained on new hires
• Must be completed within 3 days of hire
• Employers may not require additional documentation, once the employee has satisfied the required evidence as listed on the I-9 form
• Employer should make copies and keep them in a separate file in the event of an audit
• Must be kept for three years following the date of hire and for one year after the employee leaves, whichever is later.
• Highly recommended to keep all employment records for at least 7 years, to exhaust all statutes of limitations

New Hire Reporting

• Employers are required to submit the following information within 20 days from the first day of employment:
  – Federal Employer ID number
  – Employer Name
  – Employer Address
  – Employee Social Security Number
  – Employee Name and
  – Employee Address
New Hire Reporting

• Employer may report information via fax, mail, diskette, email or phone, etc.
• Most states will supply the required forms, however it is acceptable to use the W-4 form for notification as well.
• If the employer operates in multiple states, the employer may choose one state to report all new hires, or choose to report in the applicable state where they have hired employees.

Personnel Files

• Personnel files are relative only to the employees employment
• Separate files must be maintained for medical information, including FMLA and workers’ compensation records
• It is a requirement of the Americans with Disabilities Act (ADA) that medical records pertaining to employees are kept separately in confidential medical files.
Personnel Files

- The following records are suggested to be kept separate as well:
  - I-9 records
  - Safety records
  - Grievance and investigation records

- Keep these files secure - It is important that only those individuals with a right or need to know have access to these files

Personnel Files

- Texas law does not require the employer to allow the employee access to his/her personnel file
- Most companies do allow supervised access
- Caution: Employers should never put anything in an employee’s personnel file that they would not want to be discoverable in a claim or in a lawsuit
Salaries and Benefits

Compensation Agreements:
- Agreements may be oral or written
- Components of the agreements may be hourly, weekly, biweekly, semi-monthly, monthly, commission, piece, book, flag, day, ticket, or job rates, with other components like bonuses or dividends.
- Having the employee sign a separate written pay agreement outlining special conditions of pay may avoid misunderstandings and wage claims.
- An employer may change the method and rate of pay, prospectively, not retroactively. Retroactive changes could result in a breach of contract claim or violation of wage payment law.
- Benefits such as health insurance, retirement benefits, PTO, meal and breaks are not required under the law. If they are offered conditions should be spelled out in detail and written.

Fair Labor Standards Act

- FLSA covers:
  - minimum wage and overtime
  - equal pay for women and men – Equal Pay Act
  - Child Labor
- It is important to understand how and when the laws are applied.
- It is also important to note the change in the overtime calculation that takes effect at the end of the year.
Fair Labor Standards Act

FLSA does NOT require:
• *Optional* employee benefits and payroll practices that are not required by the law.
  – **Breaks**: Federal law has no break requirement. There is an exception under OSHA for occupations that are considered highly hazardous.
  – **Coffee breaks**: considered rest breaks; are paid and usually 20 minutes or less.
  – **Lunch breaks**: are not paid; 30 minutes or more, the employee must be fully relieved of their duties, otherwise this would be considered a “break” if the employee continues to answer the phone, filing, etc.

FLSA does NOT require:
  – **Premium, holiday, or weekend pay**: “double and triple time pay;” this type of extra pay is considered an incentive to get employees to work extra hours. There is no legal requirement to provide these benefits.
  – **Shift differentials**: used as an incentive to encourage employees to work second, third shifts.
  – **Raises**: except to increase wages to meet the Federal or State Minimum Wage Law requirements.
  – **Pensions**: not required under FLSA; keeping in mind the “1,000 – hour rule”.
Fair Labor Standards Act

- There are two ways that coverage for FLSA can apply:
  1. **Individual Coverage**: an individual whose work affects interstate commerce is a covered individual. Interstate commerce is defined very broadly. Accepting payments issued from out-of-state banks
  2. **Enterprise Coverage**: applies to most businesses if the business is involved in interstate commerce and the gross annual business income is at least $500,000, in this case all employees are covered
     - It does not apply to entities who are not organized for business purposes, such as churches.

Exemptions under FLSA:
- Minor exemptions for certain protected and favored industries,
- “white collar” jobs, such as executives, administrative employees, professionals, outside sales
- For the “white collar” job exemption there are two tests that must be applied.
Exempt Employees

- Exemption categories under the FLSA, two tests are applicable:
  1. Salary test
  2. Duties test

- Duties Test Categories:
  - Executive
  - Administrative
  - Professional

Duties Test

- **Exempt Executive** status:
  - has the authority to hire, fire, promote, set policy, and supervise two or more employees in managing the company or a division of a company
  - even if the exempt executive does not have the ability to hire or fire, but has influential power in making decisions, the exemption may still apply
Duties Test

- Exempt Administrative status:
  - performs specialized, technical or non-manual work related to management policies or general business operations of a company
  - the decisions that the employee makes are significantly important to the company and supports the company as a whole, not individual customers
  - the employee has discretion and independent judgment in the day to day activities
  - Examples: personnel directors, head buyer, department head, vice-president of operations

- Exempt Professional status:
  - performs original and creative work, or work that requires advanced knowledge, obtained through additional or prolonged academic study
  - The exempt professionals work cannot be standardized in respect to time
  - Examples: physicians, attorneys, CPAs, registered nurses
Salaries Test

• The definition of “salary” is an agreed upon periodic compensation, intended to cover a period of at least a week, equivalent to $455.00* per week, that is not subject to reduction based on the quantity or quality of work performed.
  – if an employee does poor work, if the employee violates a rule (other than a significant safety rule), if the employee misses a few hours in a day, a private employer cannot dock the salary.
  – However, a governmental employer can.

* New legislation will change the salary test to $913.00 per week effective December 1, 2016; this will drastically change how overtime is calculated. (Source: https://www.dol.gov/whd/overtime/final2016/overtime-factsheet.htm)

Salary Test-Deductions

• A private employer may deduct for vacation, sick days and two varieties of unpaid suspensions.
• For vacations and sick days, an employer can dock a salary only in units of a day.
• The employer must have policies for each scenario.
• Suspensions types are designated into two parts:
  1. A salary may be reduced in units of a full day in the case of suspensions without pay for infractions of workplace conduct rules, again the must be stated in a written policy and equally applicable to all employees.
  2. Deductions in any amount of time can be done for safety violations of major significance. Minor rules will not meet this requirement.
Salary Test-Deductions

• If the violation does not meet a “major” safety infraction (i.e., the employee violates a less serious rule), look for another alternative method such as a full day suspension.

• Rules for jury, witness or temporary military duty are tougher to navigate. If the employee works any portion of the week, they must be paid for the whole week.

• However, if the employee misses the full week, then no pay is due.

Salary Test-Deductions

• Avoid partial-day docking of a salary. Some courts may rule differently; protect yourself by not making deductions from salary or by leaving balances.

• There can be an effect on employee moral as well; the employee may feel that the company is “nickel and diming.”
Salary Test

*NOTE:* Special circumstances apply to Outside Sales Representatives and Computer Software Professionals.

**New Wage and Hour Guidelines**

- Effective December 1, 2016
  - the standard salary level threshold increases to $913.00 per week (equivalent to $47,476.00 per year)
  - the total compensation requirement for highly compensated employees subject to a minimal duties test increases to $134,004
Navigating the Change

• Step 1:
  – Identify all employees who would be affected.
    • Current salary
    • Current role
    • Classification of the role
    • How may hours do they typically work each week?

• Step 2:
  – Determine the hours the salaried employee actually works
    • Track the hours
      – Divide the current salary by 52 weeks:
        $35,000/52 wks = $673.08 (weekly salary)
      – Then, divide that number by the average hours worked each week: $673.08/40 hours(or avg. hours worked) = $16.83/hr
  – Having an accurate calculation going forward will be key.
Navigating the Change

• Step 3:
  – Determine the appropriate hourly rate for each affected employee.
  
  – Understanding the impact:
    ▪ One employee earning $40,000 per year could cost the practice an additional $1,500.00 per year for each additional hour they work.

Examples

<table>
<thead>
<tr>
<th>Employee</th>
<th>Current Salary</th>
<th>Hours Worked per week</th>
<th>Wage under new Law</th>
<th>Overhead Impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sam</td>
<td>$35,000.00</td>
<td>60</td>
<td>$61,260.00</td>
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<td>$30,000.00</td>
<td>48</td>
<td>$39,000.00</td>
<td>$9,000.00</td>
</tr>
</tbody>
</table>
Your Options

1. Reclassify the employee from salary to hourly; adjust the rate to include overtime hours.
2. Change the employee’s salary to meet the new guidelines; do not track hours or overtime.
3. Reclassify the employee; don’t allow overtime. Reduced cost vs. reduced worktime.
4. Reclassify the employee without adjusting the pay; pay the overtime.
   – Calculation overview:
     OT hours x (1.5 x new rate) + (40 hrs x new rate)

Attendance and Leave

• Point systems: Many companies use this type of system in some form:
  – determined by a pre-set scale
  – this pre-set scale involves a points for certain infractions, i.e., tardiness, failure to give notice, and absences, with a series of warnings at set intervals with termination being a cumulative total of points between 18-20 in a 12 month period.
FMLA, Attendance and Leave

• No absence that is covered under FMLA can be counted toward total absences in a point system.
• The employer must keep FMLA absences out of the calculation when it comes to disciplinary actions.
• No absence that is covered under FMLA can be used toward any disciplinary action.

Other Exclusions to Attendance and Leave

• Examples of leave that should be excluded when attendance issues are being calculated:
  – Military Leave
  – Jury Duty Leave
  – Witness Leave
  – Voting Leave
Absence and Tardiness

• It is up to the employer to determine policies, as well as procedures for reporting for absences and tardiness.
• Make sure your policy addresses the following:
  – How much notice is required?
  – To whom is the notice to be given?
  – Is it acceptable to leave a message?
  – Is it acceptable for a spouse, companion or other family member to provide notice?
• The employer has the responsibility to ensure that the employee knows what is expected.

Absentee Documentation

• Employers have the responsibility to document attendance and hours worked for every employee.
• Employers have the right to require documentation anytime an employee misses work for health related reasons.
• ADA requires that such documentation be maintained in a separate, confidential file; do not keep these records in the personnel file.
• The employer must determine when documentation for medical absences is required.
  – Is it required for all medically related absences or for those lasting so many days?
  – It is standard for most employers to request documentation for medical related absences after 2 days.
Parental, Vacation or Sick Leave

• Not required under Texas Law
• May be paid or unpaid
• The Employer may impose caps and eligibility requirements
• Generally, paid vacation and sick leave is accrued at a pre-determined rate; i.e., day, month, year.
• Parental leave is based on a per event basis with a set amount of time for specified for each event.
• Parental leave covers births, adoptions and foster child placements.

Documentation for Leave

• Texas Payday Law will enforce the terms according to what is stated in the written policy.
• Employers should document the following:
  – Amount of time accrued, for what period.
  – Whether the leave can be carried over from one year to the next. If so, how much, and for how long.
  – What type of approval, what type of notice, how much notice is required
Documentation for Leave

• Work status reports
• Expectations when the leave runs out
  – what happens when leave ends and the employee is still out?
• Will paid leave advances be granted?
  – under what circumstances?
  – with what repayment obligations?
• Accrued leave balances when an employee leaves the company
  – what happens to the accrued hours?
  – will they be paid?

Don’ts

• Don’t count paid leave hours toward “hours worked” for overtime purposes.

• Don’t count paid leave hours toward FMLA eligibility purposes.
Holidays

• Texas law does not require employers:
  – to observe any holidays, or
  – to pay employees for taking time off if holidays are observed.

Documentation

• Employers are responsible for having written policies concerning holidays as Texas Payday Law will enforce whatever the written policy states.
• Other considerations:
  – Will the company observe holidays; which holidays will be observed and will they be paid holidays?
  – Specify company production and staffing needs, as well as employees that could be affected by having to work on designated holidays.
  – What happens if an employee works on a designated holiday:
    • Will the employee get paid double time?
    • Will the employee get another day off in lieu of the worked holiday?
Don’ts

• Don’t count paid holiday hours toward “hours worked” for overtime.
• Don’t count paid holiday hours toward FMLA eligibility requirements.

Disciplinary Policies

• Employers should have or develop a range of disciplinary measures known as a “Progressive Disciplinary Policy”.
• Items to include in policy:
  – Oral and written warnings
  – Probation
  – Suspension with or without pay
  – Disciplinary pay cuts
  – Demotion or reassignment
  – Final warning
  – Discharge
Disciplinary Pay Cuts

- Beware of this
- May result in a wage claim
- Recommended to not be more than .02 per hour
- Never impose without a prior written warning
- Always give notice of the cut in writing

Disciplinary Documentation

- Employers have the responsibility to document each encounter at every step in the disciplinary process as a defense against claims and lawsuits and to justify any action taken against the employee
- Documentation of progressive discipline, regardless of level performed:
  - Should clearly express the expected improvement and the next step for failure to improve
  - The employee or a witness must sign the documentation
  - Provide a copy of documentation to the employee and retain a copy in the employee's personnel record
Grievances

• Employers with department heads or supervisors should have a policy in place to handle grievances between employees and supervisors.

• A grievance policy should designate a person to evaluate, investigate and resolve or recommend resolutions for grievances.

• An effective grievance policy can help avoid morale problems within the workplace.

• Having an alternative dispute resolution system is also important.

Grievances

• Grievance records should be kept separate from the employees personnel record, preferably in a grievance and investigation file.
Harassment

• Employers should have a clear policy regarding harassment.

• The policy should state or contain:
  – What is considered harassment
  – Statements forbidding such conduct
  – Education and training for all employees
  – Outline for actions, investigation and remedial action

Harassment

• In light of the 1998 Supreme Court rulings:
  – Employers should limit supervisors authority to adversely affect conditions or terms of employment for subordinates.
    • Includes: firing, suspensions, pay cuts, demotion, shift changes, work locations, or duties
  – Ensure that supervisors can only make recommendations for changes and that any changes must be approved and carried out by another designated individual.
  – Results should be shared only on a strict “need to know” basis.
Performance Evaluations

- Performance evaluations should be given at regular intervals.
- Employers must be sure that evaluation criteria is job related.
- Evaluations must be objective, including comments.
- It is important for employers to let employees know about their faults.

Performance Evaluations

- Criteria should relate to the job and the measures should be as quantifiable as possible.
- Review and discuss the evaluation with the employee.
- Have an area for the employee to respond in writing to the evaluation.
- Have the employee sign the evaluation. Be clear that signing the evaluation does not necessarily mean that they must agree with the evaluation but is a verification that the evaluation was performed and reviewed by the employee.
Special Problems and Issues

- Affirmative Action/Equal Employment Opportunity
- Drug and Alcohol
- English Only
- Part-Time/Full-Time status
- Searches
- Privacy of Employee Information
- Metal Detectors and X-Ray Machines
- Telephone Monitoring
- Video Surveillance
- Computers, Email and Internet

Affirmative Action/Equal Employment Opportunity Policies

- Employers may be ordered by a court or administrative agency to adopt such policies.
- Federal grantees and federal contractors must have a policy according to Executive Order #11246
- Employers may have policies dealing with affirmative action and EEOC. However, be careful about reverse discrimination; do not base a hiring decision on minority status alone.
Drug and Alcohol Policies

- Pre-employment, random, post-accident and “for cause” testing are allowed in Texas, as well as in other states.

Drug and Alcohol Policies

- Have a written policy outlining about having a drug-free workplace.
- Ensure that all employees get a written copy and acknowledge receipt of the policy.
- If you test for alcohol or drugs:
  - Utilize a laboratory that will provide a written copy of the results
  - Use a nationally certified testing lab
  - Be certain the lab has chain of custody protocols that show who handled the sample at all times
  - Ensure that results are confirmed by gas chromatography/mass spectrometry method
  - Ensure that the lab will follow strict procedures and will provide complete documentation in the event of a lawsuit.
English Only Policies

• Controversial according to the EEOC
  – see 29 CFR §1606.7

• Courts may uphold if the employer can prove that the policy is necessary based on the nature of the business.
  – *Examples*: public safety, customer service, minimizing complaints from other employees

• The burden will be on the employer to prove necessity for having this type of policy.

English Only Policies

• How does an Employer justify an English policy?
  – Must have documentation to support that a business need exists
    • For example:
      – Reports of safety problems
      – Comments from customers about lack of service
      – Complaints from co-workers, that the makes workers feel talked, excluded or targeted.
English Only Policies

- Employers must ensure that the policy focuses on the business needs that necessitated such a policy.
- The employer should not enforce English only speaking on non-duty time.
- Employers must ensure that managers are properly trained in how to explain and apply the policy.

English Only Policies

- It is important to recognize that it is possible to create morale problems, regardless of what language is being spoken.
- Top managers and HR departments should routinely monitor how the policy is applied in the workplace.
- Do not apply the policy any more than necessary to get the job done and to minimize any friction among employees.
Pay Status

• Texas and Federal laws leave it up to the employer to define what constitutes part-time status within a company.

• Most companies define full-time as a set number of hours worked each week; generally 40 hours.

• Part-time status may be defined as regularly scheduled work of less than the full time allotment each week; most companies determine part-time status to be 32 hours or less per week.

Pay Status

• Distinguishing between full and part time status is largely to differentiate between a group of employees who will receive company benefits and those who would not be eligible to receive company benefits.

• It is perfectly legal to have either no benefits at all or one set of benefits for full-time employees and another set of benefits for part-time employees.
Searches

• Search policies must overcome any expectations of privacy an employee may have.
• The search policy must state and the employer must make sure that employees are made aware of what areas within the employer's premises may be subject to search at anytime.
• Employers must not use physical force to force an employee to submit to a search.
• Employers should make submission to searches a condition of employment.
• Search policies should state that failure to submit to a search would be grounds for termination.

Employee’s Right to Privacy of Information

• All information regarding an employee’s family matters and personal characteristics are private and confidential.
• Should be released only on a “need-to-know” basis or with appropriate release of information, as and if the law requires.
• It is best to have any inquiries concerning an employee directed to a designated individual or office.
Metal Detectors and X-Ray Machines

- Should be used in conjunction with search policies
- Can be a condition of employment
- Contact authorities in the event you come in contact with illegal items; do not handle any further.
- There are no restrictions on the employer’s ability to use these machines to detect or see into items that are brought to work.

Telephone Monitoring

- It is legal for employers to monitor employees’ use of company phones that are for business purposes.
- Advance notice must be given to employees and the public that such monitoring is being done.
- Employers must stop listening as soon as it becomes apparent that the conversation is personal in nature.
- It is legal to record conversations as long as one party to the conversation is aware that the conversation is being recorded.
Telephone Monitoring

• Beware:
  – Guard against surreptitious recordings of workplace conversations
  – Defamation lawsuits, i.e., Frank B. Hall Co. vs. Buck case, in which bad statements were made in the context of job reference calls.

Video Surveillance

• Only authorized individuals should view surveillance video
• **Warning:** Defamation and invasion of privacy lawsuits can result if tapes are viewed or shown to unauthorized individuals.
• Same basic rules apply as in Telephone Monitoring
• Inform employees that video surveillance is being done, or will be done, in certain areas of the workplace.
• Notice to employees will help avoid misunderstandings, complaints and bad publicity
Computer, Email, and Internet Policies

• Employers have the right to monitor employees’ use of company computers and email.

• The employer must have a detailed policy regarding the use of company computers and resources accessed with computers, i.e., email, internet and the company’s intranet.

Computer, Email and Internet Policies

• This policy must:
  – Define computers, email, internet, intranet broadly, with specifics given, but not limited to such specifics.
  – Define prohibited actions broadly, with specifics given, but not limited to such specifics.
  – Employees must sign the policy
  – Should be presented as a condition of employment
Computer, Email and Internet Policies

• The policy should:
  – Remind employees that there should not be an expectation of privacy in their use of the company’s electronic resources.
  – Remind employees that all of the company’s resources are to be used for business related purposes only and the company reserves the right to monitor any and all usage of the systems.
  – Remind employees that the company has the right to inspect an employee’s computer, drives, disks and/or other media at any time.
  – Remind employees that job loss as well as civil liability and criminal prosecution may result from certain actions/violations.
  – Advise employees that the employer has the right to withdraw access to computers, internet and email if required.

Disclaimers

• Texas is an “Employment at Will” state; disclaimers can help employers avoid contractual liability to “at-will” employees.

• Disclaimers should be used in offer letters, employment agreements and employee handbooks.
Disclaimers

• Disclaimers should include:
  – the employee handbook is not a contract
  – the employee handbook may not be modified except by specified procedures and by certain company officials
  – the employee handbook does not alter the “employment at-will” status
    • Many companies will place the above-mentioned statement at the beginning and at the end of the employee handbook.

Required Posters

• Links to required posters, as well as comprehensive information is found at http://twc.state.tx.us/ui/lablaw/posters.html

• Required posters must be displayed in an area that is accessible to each employee and that can be readily seen; do not place required posters in a place where employees do not usually go.
Smoking

• Not considered a disability under ADA.
• However, if an employee is so dependent on nicotine that it is determined an addiction, then it could be considered a disability.
• If an employee tries to claim this addiction to request additional breaks, the employer still has the option of whether or not to permit the accommodation.
• Most companies would be able to claim a loss of efficiency and productivity and identify potential issues with non-smokers in the workplace.

Work time and Record keeping

• Employers are required to keep accurate records on all hours worked for non-exempt employees.
• Beware of “rounding” time.
  – Many time clocks have the capability to round up or down.
  – Develop or enforce policies that prohibit employees from clocking in or out more than one to two minutes before or after the scheduled work time.
**Work: Suffered or Permitted**

- 29 C.F.R. 785.11 notes the following:
  
  "work that is not requested, but suffered or permitted, is work time."
  
  – In this instance, policy statements regarding overtime and required approval may not be sufficient in the DOL's eyes.
- The DOL holds the employer responsible to control extra work through scheduling and disciplinary actions.
- Bottom-line - if you allow it to happen, then you are going to have to pay for it.

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**Training Programs and Meetings**

- 29 C.F.R. 785.27 states:
  
  – “attendance at lectures, meetings and training programs or similar activities need NOT be counted as working time if all of the following four criteria are met:

  1. Attendance is outside of the employee’s regular working hours
  2. Attendance is voluntary
  3. The course, lecture or meeting is not directly related to the employee’s job
  4. The employee does not perform any productive work during such attendance
Hours Worked

- Hours worked for the purpose of overtime calculations refers only the time that an employee actually spends engaged in work.
- Paid holiday and paid leave time does not count toward hours worked.
- It is not common for an employee to have FMLA related leave and overtime in the same week; though it could be possible.

Hours Worked and FMLA

- DOL applies the same standards to determining hours worked under FMLA leave or FLSA overtime requirements.
- FMLA has a 1250 hour requirement of “worked hours” for eligibility.
- These periods are NOT considered when computing hours worked for FMLA:
  - Paid or unpaid vacation time, sick leave, parental leave, other personal leave, FMLA leave;
  - Paid or unpaid holidays, furloughs or suspensions.
Conclusion - FMLA & Hours Worked

- Be clear that as long as the employee is carried on the employers payroll, even though the employee was off work for a week, this time must be counted toward the 12 month’s service requirement.

- Refer to DOL guidance in Wage-Hour Opinion Letter FMLA-70 dated August 23, 1995 for additional information regarding 1250 hours and 12 month requirements.

Conclusions

- The employee must be paid for all the time that the are at the disposal of the employer.

- Employees don’t have to be paid for time they can use for their own purposes.

- If employees work too much or not enough, they still have to be paid for time worked.
Pay Frequency

• It is important to understand that although we largely follow federal laws, whichever law is stronger will trump the other.

• Example: Federal Law leaves pay frequency up to the employer, but the Texas Payday Law requires non-exempt employees be paid at least twice a month.

FLSA Pitfalls

• “We’re not covered, we’re too small.
• All our managers are exempt; they are salaried.
• We don’t owe overtime because the salary paid covers it.
• We don’t have overtime; employees volunteer for extra work.
• Our employees keep their own time records.
• We give comp time instead of paying overtime.
• They don’t get overtime; they are contract labor.
How do you stay out of the Pit?

- Apply the duties and salary tests to all employees; titles do not dictate the classification.
- There is no such thing as “volunteered” overtime or “donated” time
- Implement a system of accurate time-keeping
  - DOL applies the “best evidence” rule
  - Don’t let employees keep their own time
- Comp time does not replace overtime pay.
  - Government employees can use comp time
  - Private sector employers may not use comp time; however, private employers may adjust an employee’s time schedule WITHIN the same work week to ensure total hours worked do not exceed 40 hours
- Do not hire temporary/contract employees to avoid overtime pay
- Ensure you assign the appropriate classification to all employees; contract workers, independent contractors must meet certain duties tests.

Conclusion

- Throughout my many years of work in healthcare, personnel management stands out as the most stressful aspect of the Office Manager/Practice Manager’s duties.
- We have only touched the tip of the iceberg regarding employment law in Texas; continue educating yourself.
**RECOMMENDED RESOURCE**

- Obtain a copy of *Especially for Texas Employers* on the Texas Workforce Commission website:
  

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**Questions?**

- Thank you for your attendance!

- Get your questions answered on PMI's Discussion Forum:
  
  http://www.pmimd.com/pmiForums/rules.asp

- Contact information: gwright@pmiMD.com
Fact Sheet: Final Rule to Update the Regulations Defining and Delimiting the Exemption for Executive, Administrative, and Professional Employees

In 2014, President Obama directed the Department of Labor to update and modernize the regulations governing the exemption of executive, administrative, and professional (“EAP”) employees from the minimum wage and overtime pay protections of the Fair Labor Standards Act (“FLSA” or “Act”). The Department published a notice of proposed rulemaking on July 6, 2015, and received more than 270,000 comments. On May 18, 2016, the Department announced that it will publish a Final Rule to update the regulations. The full text of the Final Rule will be available at the Federal Register Site.

Although the FLSA ensures minimum wage and overtime pay protections for most employees covered by the Act, some workers, including bona fide EAP employees, are exempt from those protections. Since 1940, the Department’s regulations have generally required each of three tests to be met for the FLSA’s EAP exemption to apply: (1) the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (“salary basis test”); (2) the amount of salary paid must meet a minimum specified amount (“salary level test”); and (3) the employee’s job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (“duties test”). The Department last updated these regulations in 2004, when it set the weekly salary level at $455 ($23,660 annually) and made other changes to the regulations, including collapsing the short and long duties tests into a single standard duties test and introducing a new exemption for highly compensated employees.

This Final Rule updates the salary level required for exemption to ensure that the FLSA’s intended overtime protections are fully implemented, and to simplify the identification of overtime-protected employees, thus making the EAP exemption easier for employers and workers to understand and apply. Without intervening action by their employers, it extends the right to overtime pay to an estimated 4.2 million workers who are currently exempt. It also strengthens existing overtime protections for 5.7 million additional white collar salaried workers and 3.2 million salaried blue collar workers whose entitlement to overtime pay will no longer rely on the application of the duties test.

* Key Provisions of the Final Rule *

The Final Rule focuses primarily on updating the salary and compensation levels needed for EAP workers to be exempt. Specifically, the Final Rule:

1. Sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, currently the South, which is $913 per week or $47,476 annually for a full-year worker;

2. Sets the total annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally, which is $134,004; and
3. Establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles and to ensure that they continue to provide useful and effective tests for exemption.

Additionally, the Final Rule amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level. The Final Rule makes no changes to the duties tests.

Effective Date

The effective date of the Final Rule is December 1, 2016. The initial increases to the standard salary level (from $455 to $913 per week) and HCE total annual compensation requirement (from $100,000 to $134,004 per year) will be effective on that date. Future automatic updates to those thresholds will occur every three years, beginning on January 1, 2020.

Standard Salary Level

The Final Rule sets the standard salary level at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region, currently the South ($913 per week, equivalent to $47,476 per year for a full-year worker).

The standard salary level set in this Final Rule addresses our conclusion that the salary level set in 2004 was too low given the Department’s elimination of the more rigorous long duties test. For many decades the long duties test—which limited the amount of time an exempt employee could spend on nonexempt duties and was paired with a lower salary level—existed in tandem with a short duties test—which did not contain a specific limit on the amount of nonexempt work and was paired with a salary level that was approximately 130 to 180 percent of the long test salary level. In 2004, the long and short duties tests were eliminated and the new standard duties test was created based on the short duties test and was paired with a salary test based on the long test.

The effect of the 2004 Final Rule’s pairing of a standard duties test based on the short duties test (for higher paid employees) with a salary test based on the long test (for lower paid employees) was to exempt from overtime many lower paid workers who performed few EAP duties and whose work was otherwise indistinguishable from their overtime-eligible colleagues. This has resulted in the inappropriate classification of employees as EAP exempt who pass the standard duties test but would have failed the long duties test.

The Final Rule’s salary level represents the most appropriate line of demarcation between overtime-protected employees and employees who may be EAP exempt and works appropriately with the current duties test, which does not limit non-EAP work.

The Department also is updating the special salary level for employees in American Samoa (to $767 per week) and the special “base rate” for employees in the motion picture industry (to $1,397 per week).

HCE Total Annual Compensation Requirement

The Final Rule sets the HCE total annual compensation level equal to the 90th percentile of earnings of full-time salaried workers nationally ($134,004 annually). To be exempt as an HCE, an employee must also receive at least the new standard salary amount of $913 per week on a salary or fee basis and pass a minimal duties test. The HCE annual compensation level set in this Final Rule brings this threshold more in line with the level established in 2004 and will avoid the unintended exemption of large numbers of employees in high-wage areas who are clearly not performing EAP duties.
Automatic Updating

The Final Rule includes a mechanism to automatically update the standard salary level requirement every three years to ensure that it remains a meaningful test for distinguishing between overtime-protected white collar workers and bona fide EAP workers who may not be entitled to overtime pay and to provide predictability and more graduated salary changes for employers. Specifically, the standard salary level will be updated to maintain a threshold equal to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region. Similarly, the Final Rule includes a mechanism for automatically updating the HCE compensation level to maintain the threshold equal to the 90th percentile of annual earnings of full-time salaried workers nationally. The Final Rule will also automatically update the special salary level test for employees in American Samoa and the base rate test for motion picture industry employees. The Department will publish all updated rates in the Federal Register at least 150 days before their effective date, and also post them on the Wage and Hour Division’s website.

Regularly updating the salary and compensation levels is the best method to ensure that these tests continue to provide an effective means of distinguishing between overtime-eligible white collar employees and those who may be bona fide EAP employees. Experience has shown that these earning thresholds are only effective measures of exempt status if they are kept up to date.

Inclusion of Nondiscretionary Bonuses and Incentive Payments

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. Such payments may include, for example, nondiscretionary incentive bonuses tied to productivity and profitability. For employers to credit nondiscretionary bonuses and incentive payments toward a portion of the standard salary level test, the Final Rule requires such payments to be paid on a quarterly or more frequent basis and permits the employer to make a “catch-up” payment. The Department recognizes that some businesses pay significantly larger bonuses; where larger bonuses are paid, however, the amount attributable toward the standard salary level is capped at 10 percent of the required salary amount.

The Final Rule continues the requirement that HCEs must receive at least the full standard salary amount each pay period on a salary or fee basis without regard to the payment of nondiscretionary bonuses and incentive payments, and continues to permit nondiscretionary bonuses and incentive payments (including commissions) to count toward the total annual compensation requirement. The Department concludes that permitting employers to use nondiscretionary bonuses and incentive payments to satisfy the standard salary amount for HCEs is not appropriate because employers are already permitted to fulfill almost two-thirds of the total annual compensation requirement with commissions, nondiscretionary bonuses, and other forms of nondiscretionary deferred compensation.

Duties Tests

The Final Rule is not changing any of the existing job duty requirements to qualify for exemption. The Department expects that the standard salary level set in this Final Rule and automatic updating will work effectively with the duties test to distinguish between overtime-eligible workers and those who may be exempt. As a result of the change to the salary level, the number of workers for whom employers must apply the duties test to determine exempt status is reduced, thus simplifying the exemption. Both the standard duties test and the HCE duties test remain unchanged.
For additional information, visit our Wage and Hour Division Website: www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4-USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

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national origin. The title VII principles of disparate treatment and adverse impact equally apply to national origin discrimination. These Guidelines apply to all entities covered by title VII (collectively referred to as “employer”).

§ 1606.3 The national security exception.

It is not an unlawful employment practice to deny employment opportunities to any individual who does not fulfill the national security requirements stated in section 703(g) of title VII.1

§ 1606.4 The bona fide occupational qualification exception.

The exception stated in section 703(e) of title VII, that national origin may be a bona fide occupational qualification, shall be strictly construed.

§ 1606.5 Citizenship requirements.

(a) In those circumstances, where citizenship requirements have the purpose or effect of discriminating against an individual on the basis of national origin, they are prohibited by title VII.2

(b) Some State laws prohibit the employment of non-citizens. Where these laws are in conflict with title VII, they are superseded under section 708 of the title.

§ 1606.6 Selection procedures.

(a)(1) In investigating an employer’s selection procedures (including those identified below) for adverse impact on the basis of national origin, the Commission will apply the Uniform Guidelines on Employee Selection Procedures (UGESP), 29 CFR part 1607. Employers and other users of selection procedures should refer to the UGESP for guidance on matters, such as adverse impact, validation and recordkeeping requirements for national origin groups.

(b) Because height or weight requirements tend to exclude individuals on the basis of national origin, the user is expected to evaluate these selection procedures for adverse impact, regardless of whether the total selection process has an adverse impact based on national origin. Therefore, height or weight requirements are identified here, as they are in the UGESP, as exceptions to the “bottom line” concept.

(b) The Commission has found that the use of the following selection procedures may be discriminatory on the basis of national origin. Therefore, it will carefully investigate charges involving these selection procedures for both disparate treatment and adverse impact on the basis of national origin. However, the Commission does not consider these to be exceptions to the “bottom line” concept:

(1) Fluency-in-English requirements, such as denying employment opportunities because of an individual’s foreign accent, or inability to communicate well in English.3

(2) Training or education requirements which deny employment opportunities to an individual because of his or her foreign training or education, or which require an individual to be foreign trained or educated.

§ 1606.7 Speak-English-only rules.

(a) When applied at all times. A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages

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1 See also, 5 U.S.C. 7532, for the authority of the head of a Federal agency or department to suspend or remove an employee on grounds of national security.


4 See section 4C(2) of the Uniform Guidelines on Employee Selection Procedures, 29 CFR 1607.4C(2).

5 See CD YAUB-046 (1968), CCH EEOC Decisions ¶6008, 1 FEP Cases 921.

§ 1606.8 Harassment.

(a) The Commission has consistently held that harassment on the basis of national origin is a violation of title VII. An employer has an affirmative duty to maintain a working environment free of harassment on the basis of national origin. *

(b) Ethnic slurs and other verbal or physical conduct relating to an individual's national origin constitute harassment when this conduct:

(1) Has the purpose or effect of creating an intimidating, hostile or offensive working environment;

(2) Has the purpose or effect of unreasonably interfering with an individual's work performance; or

(3) Otherwise adversely affects an individual's employment opportunities.

(c) [Reserved]

(d) With respect to conduct between fellow employees, an employer is responsible for acts of harassment in the workplace on the basis of national origin, where the employer, its agents or supervisory employees, knows or should have known of the conduct, unless the employer can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees with respect to harassment of employees in the workplace on the basis of national origin, where the employer, its agents or supervisory employees, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

APPENDIX A TO §1606.8—BACKGROUND INFORMATION


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August 23, 1995

Dear Name*,

This is in response to your letter regarding the Family and Medical Leave Act of 1993 (FMLA).

You ask, in your letter, how overtime hours are to be counted for purposes of determining whether or not an employee has satisfied the eligibility test of working 1,250 hours in the 12-month period immediately prior to the beginning of the employee’s FMLA leave. For purposes of this test, there is no difference between overtime and non-overtime hours worked. No premium is applied to the "hours actually worked" test under FMLA regardless of whether the employee may have received an overtime premium of pay under Federal or State law or the terms of a collective bargaining agreement. Further, only hours actually worked are counted. For example, annual or sick leave, paid or unpaid holidays, or FMLA leave are not counted.

As you have requested, we are enclosing a current copy of the medical certification, Optional Form WH-380. We are also enclosing a copy of the revised employer response to employee request for leave, Optional Form WH-381.

If we may be of further service to you, please do not hesitate to contact us.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosures

*Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).