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U.S. Department of Labor Releases Final Overtime Rules

Gerald C. Davis

The Department of Labor recently released the final rules regarding the payment of overtime to employees, governed by the Fair Labor Standards Act (FLSA). While the new rules were to go into effect in June of 2015, a large number of modifications changed the original draft, and the final rules are now made effective December 1, 2016. This will allow employers the opportunity to anticipate the broad changes that will go into effect.

Under the current rules, employees earning $23,360 or less must be paid overtime at a rate of time and a half for work in excess of 40 hours per week. The new rules effectively double the annual salary to $47,476 or $913 per week, below which level each employee must be paid time and a half for hours worked in excess of 40 hours per week. This applies to full-time salaried workers.

Up to 10% of the Standard Salary Level can be satisfied through non-discretionary bonuses, incentives or commissions paid at least quarterly. Thus, an employee earning less, but paid a non-discretionary bonus, incentive or commission on a quarterly basis of up to 10% of their salary, will not be required to automatically receive overtime compensation if the total wages plus 10% of those wages exceed $47,476 per year.

The new regulations also redefine "Highly Compensated Employees" and increases the level to $134,004 in total compensation, such that any employee earning above that level will be deemed "highly compensated," and hence not subject to the overtime requirement.

Both the Standard Salary Level ($47,476) and the Highly Compensated Employees level ($134,004) will be automatically updated every three years to achieve a 40th percentile and 90th percentile, respectively, in setting the Standard Salary Level and Highly Compensated Employees level to account for inflation. The first automatic adjustment will occur in January of 2020.

The FLSA further allows exemptions from overtime eligibility for certain categories, assuming the employees meet the above-recited Standard Salary Level, where the employee customarily and regularly performs at least one of the duties listed for the executive, administrative or professional exemptions which follow:

- **Executive** – the employee's primary duty must be to manage the business enterprise or a recognized department or subdivision of the enterprise, and the employee must regularly and customarily direct the work of at least two or more other full-time employees or their equivalents; and the employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees must be given particular weight.
- **Administrative** – the employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, and the employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of importance.
- **Professional** – the employee's primary duty must be the performance of work requiring advanced knowledge, defined as work predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment in the field of science or learning, and the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.
- **Creative Professional Employee** – the employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
- **Computer Employee** – employee is employed as a computer systems analyst, programmer, software engineer or similar skill-set, performing the following duties if the primary duty

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consists of the application of systems analyst techniques and procedures, including consulting with users to determine hardware, software or systems functional specifications, the design, development, documentation, analysis, creation, testing or modification of computer systems or programs related to systems design specifications or related to a specific user or to machine operating systems, or a combination of these duties, which require the same skill-set.

• **Outside Sales** – employee's primary duty must be making sales or obtaining orders or contracts for services or the use of facilities for which a consideration (money) will be paid by the customer, and the employee must be customarily and regularly engaged away from the employer's place of business.

If the employee does not qualify as a "Highly Compensated Employee," then the employee's duties must meet all of the requirements in the aforesaid subcategories as Executive, Administrative, Professional, Computer Employee or Outside Sales.

There are a variety of strategies that the employer can engage for compliance, such as:

- Converting salaried employees to hourly
- Reducing the number of hours each employee works
- Increasing base salary for employees who perform exempt duties and are currently paid below the Standard Salary Level
- Reclassifying employees as non-exempt and pay overtime as required
- Reclassifying employees as non-exempt and reduce hourly rate to maintain total annual compensation
- Reviewing all incentive, bonus and commission programs to determine if any financial increases can be offset by decreases elsewhere in a rewards program
- Reviewing the structure of the workforce and work processes

No single test or strategy will solve every employment issue or consideration, therefore a variety of strategies may be required.

As the new rules more closely approximate actual compensation in the marketplace, there will be more employees subject to the requirement of overtime compensation and the employer must take greater heed to assure compliance with the FLSA imposed by the Department of Labor and avoid the penalties and sanctions which noncompliance may generate.

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Sixth Circuit Holds Dismissal of Firefighter's Retaliation Complaint

On June 22, 2016, the Sixth District Court of Appeals unanimously issued a decision and order affirming the United States District Court dismissal of a firefighter's two count retaliation complaint against a local municipality, four former and current Trustees, and the Fire Chief.

Plaintiff, who is of Asian descent, submitted an application for the vacant Fire Chief position to the township Board of Trustees. During an open board meeting on September 25, 2012, and in a 5-1 vote, the Board disqualified plaintiff's application as insufficient. Besides missing an entire third page where some of the plaintiff's credentials would have been listed to complete his application, in response to a written question on the application regarding why he should be selected as chief, plaintiff responded by stating: "To put an end to the corrupt practices brought on by the Board." In response to a question regarding his goals for the next five/ten years, plaintiff responded: "To witness justice prevail." The court ruled that these statements on his written application were just plain insulting to the Board.

By way of background, two years previously, in March of 2010, plaintiff filed an EEOC complaint against the township alleging that he was removed as the township's IT Administrator because he is Asian. The township defended this matter on the ground that plaintiff was not the IT Administrator, although he had assisted with some networking responsibilities in the past. The plaintiff did not pursue a lawsuit against the township in 2010. Following the plaintiff's 2012 disqualification for the Chief position, he sued claiming the disqualification was in retaliation for his 2010 EEOC complaint in violation of Title VII of the Civil Rights Act of 1964 and Michigan's Elliott-Larson Civil Rights Act (ELCRA). Plaintiff also claimed that he was harassed by the new Fire Chief in 2013 and 2014 in retaliation for the 2010 EEOC complaint. Plaintiff claimed $1.02 million in damages for lost future wages which he believed he was entitled to because he should have been hired for the vacant position.

The Appellate Court noted for the "failure to interview" portion of the retaliation claim, there was no direct evidence of discrimination and that even circumstantially, a former trustees' subjective opinion, with nothing more, that the plaintiff was not interviewed due to his EEOC claim was insufficient as

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a matter of law to support a cause of action. The court also agreed that the current Fire Chief's actions of counseling the plaintiff regarding his low participation rates were not materially adverse employment actions, nor were the warnings causally connected to the plaintiff's prior EEOC claim. Another significant factor for both the trial court and appellate court was the fact that the timing between the 2010 EEOC charge and the September 25, 2012 decision by the Board not to interview the plaintiff was simply too remote to establish a claim of retaliation under Title VII order ELCRA. Central to both the trial and appellate court decisions was the United States Supreme Court decision of *Univ. of Tex. SW. Med Ctr. V. Nassar,* 133 S.Ct. 2517 (2013). To establish a prima facie case of retaliation under Nassar, a plaintiff would have to make an offer of proof that "the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions on the part of the employer"—meaning defendants could not have denied plaintiff an interview or counseled him for low participation "but for" their retaliatory intent. Both courts found that plaintiff could not prove this threshold requirement.

This case was handled by CMDA attorneys Elizabeth Rae-O'Donnell and Linda Davis Friedland. Karen Daley assisted with preparing the motion.

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Pokémon Go: What does your Condo or HOA need to know?

Pokémon Go, a free mobile video game taking the world by storm, makes use of the GPS and camera in a mobile device and requires players to travel to various locations, which may include homes or common areas in condominiums or subdivisions.

Can community associations stop third parties from entering onto private property to play Pokémon Go?

A community association has several options if third-party Pokémon Go players enter a common area, such as a road, sidewalk, greenspace, clubhouse, or pool.

First, the Board can simply file a request to have a certain location removed from the Pokémon Go game at the Pokémon Go support page and report an issue with a gym or Pokémon stop. While there is no guarantee the location will be removed, this is an easy and practical initial step to take to try and resolve a Pokémon Go invasion.

Second, if removing the location of a community association from Pokémon Go does not resolve the issue, the common area of a condominium or subdivision is often private property that is administered by the community association. Third parties who do not have a legal basis for being on private property may qualify as trespassers. In serious cases where third parties ignore warnings to leave or continue to come back, a community association board could file a civil action to obtain an injunction preventing trespasses or call the police to see if they will remove the trespassers. Third-party trespassers not only pose a nuisance to the owners, but also create safety hazards and additional liability issues for community associations.

Can co-owners, renters or guests be stopped from playing Pokémon Go?

Community associations must be mindful of regulating co-owners, renters or guests. Existing bylaws should be reviewed to determine whether restrictions are currently in place regarding the use of the common areas or whether the association has the ability to make rules and regulations regarding the use of the common areas. In many instances, bylaws contain provisions that preclude co-owners, renters and guests from causing a nuisance, obstructing the common elements, or engaging in activity that increases the rate of insurance.

An association would be best served to create a set of rules and regulations specifically relating to Pokémon Go if it becomes an issue. For example, a condominium association or homeowners association may wish to restrict certain locations where Pokémon Go is played, the time of day it is played, etc. This is not only important from a nuisance perspective, but also from a safety perspective as co-owners or guests could walk off the ledge of a retaining wall or fall into a retaining pond if they are not paying attention. When creating rules related to Pokémon Go, a community association should be mindful of the federal Fair Housing Act, which prohibits discrimination against "any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provisions of services or facilities . . . because of race, color, religion, sex, familial status, or national origin." Accordingly, any rules related to Pokémon Go would need to apply to all co-owners and should not be targeted at children.

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To meld our legal expertise, professional support staff, technical resources and variety of locations to deliver first rate legal services at a fair value to a full range of business, municipal, insurance and individual clients.

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