Labor & Employment Law Newsletter

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New Overtime Rule Creates Concern and Controversy

By Jonathan P. Geen, Esq.

On May 18, 2016, President Obama and Secretary of Labor, Perez, announced the publication of the Department of Labor's final implementation of updated overtime regulations to become effective December 1, 2016. These changes substantially change the compensation requirements for employees to be eligible for the executive, administrative, and professional work exemptions under the Federal Fair Labor Standards Act.

The new rule changes the minimal salary level for the aforementioned exemptions to $913 per week, or $47,476 annually for a full-time worker, which is double the current threshold of $23,660. In addition to setting this considerably higher standard salary level, it increases the total annual compensation requirement for highly compensated employees (exempt from the duties requirement) to $134,004 per year.

The final rule enacted by the Department of Labor and signed by the President also establishes an automatic mechanism that updates the salary and compensation levels every three years to maintain levels at a set percentile for full-time salaried workers. The first automatic update to the threshold will be on January 1, 2020, and then every three years thereafter. The burden that the regulations place on employers is somewhat reduced due to a new provision that allows employers to use non-discretionary bonuses and incentive payments such as commissions to satisfy up to 10% of the new standard salary level.

This final rule was not enacted in haste. Planning and investigation resulted from a Presidential Memorandum dating back to 2014, in which the President directed the Department of Labor to investigate and update the regulations for white-collar workers to ensure that they were being fairly compensated for a hard day's work. One certainly could argue that the salaried standard levels were outdated, since they had not been updated since 2004. The Department invited and received thousands of comments from a variety of parties including employers and employees. The final rule differs from the initial draft rule in several ways.

The final rule based its standard salary level on a percentile calculation

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using the figures of full-time salaried workers in this country's lowest wage census region, rather than based on national data. Additionally, the final rule allows employers to make a "catch-up" payment. The Department of Labor believes that the new rule is fair and that employers have several options to establish the new salary requirements. Employer's options include increasing the salary of an employee who meets the duties set to a least the new salary level and thereby retain his or her exempt status, pay an overtime premium for any overtime hours worked and, either reduce or eliminate overtime hours.

Many California employers think the new Department of Labor rule is oppressive and only adds to the burdens on employers under California labor law. It is not only employers that have raised concerns about the effect of the new Department of Labor Overtime Rule; so have entire States. On September 19, 2016, a group of 21 States filed suit in the Federal District Court for the Eastern District. The lawsuit claims that many State employees would become eligible for overtime pay, even though they perform management duties that should make them exempt. The claim that this new rule places a heavy burden on their budgets. The States' lawsuit was spearheaded by the Attorney Generals of Texas and Nevada and joined by the Attorney Generals from Michigan, Ohio and others claiming that the Department abused its authority by increasing salaries thresholds so dramatically without considering regional variations and the cost of living. The lawsuit is too new for additional information at this time. It is not yet known when the Court will issue any opinion or decision in the case; and new developments are expected.

Nonetheless, in the meantime, on September 28, 2016, the House of Representatives voted in favor of Bill T/R 6094 to delay the effective date of the new overtime rules until June 1, 2017. It is unclear whether the Senate will vote on it and the President has it made clear he will veto such a bill if the Senate votes on and passes it. Stay tuned.

The Pros and Perils of Drug Testing

By Jonathan P. Geen, Esq.

Employers have long been justifiably concerned about the effects of drug and alcohol use in the workplace. Having an employee who is intoxicated in the workplace can create serious liability issues for employers. Some employers, in seeking to avoid such liability, become hyper-vigilant and implement and enforce a zero-tolerance policy with expansive drug testing. Depending on the circumstance, however, this over-zealousness can be the equivalent of shooting oneself in the foot as it subjects an employer to liability for invasion of privacy as well as potential disability discrimination claims.

The history of California law on drug testing shows courts struggling with balancing the interests of the employer for a safe workplace and employee privacy rights. The California Supreme Court began to weigh-in on these issues starting with the case of *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, in which the California Supreme Court applied a balancing test standard to uphold the NCAA's drug testing program for student athletes. Since that time, the California Supreme Court, as well as California appellate and trial courts have grappled with how to apply such balancing to various fact patterns. In the case of *Loder v. City of Glendale* (1997) 14 Cal.4th 846, the California Supreme Court found that the defendant City had gone too far in requiring individuals up for promotion to provide urine samples under surveillance, as well as disclose any and all medications they were taking. The Court found these actions intruded on

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employee autonomy and informational privacy interests. However, one of the most important aspects of the Court's ruling in the *Loder* case was the fact that the California Supreme Court made a clear differentiation between drug tests given to job applicants as a condition of hiring after a job offer is extended, as opposed to those that are seeking a promotion. The general rationale of the California Supreme Court was that applicants should not have as much of a reasonable expectation of privacy as current employees who have been employed for a period of time before the drug test. The Court determined that the defendant's decision to require all employees who were up for a promotion to suspicion-less drug testing regardless of the nature and job duties of their position was too broad and violated constitutional rights of privacy. The Court specifically stated: "Thus we conclude that an employer has a significantly greater interest in conducting suspicion-less drug testing of job applicants than it does in testing current employees seeking promotion, and that the imposition of the urine analysis drug testing requirement on job applicants as part of their offer of pre-employment medical examination involves a lesser intrusion on reasonable expectations of privacy than those tests being conducted independently of such an examination." *Id*. at 886-887. The analysis of the Supreme Court in *Loder* was further discussed by the Court of Appeal of the First District in the case of *Wilkinson v. Times Mirror Corp.* (1989) 216 Cal.App.3d 1034, in which the Court of Appeal reversed a trial court's preliminary injunction order enjoining an employer from enforcing a policy for pre-employment physical examination involving a drug and alcohol test for all job applicants. The Court of Appeal stated that the applicants had notice of the drug testing policy and the tests were conducted under conditions designed to minimize both the intrusiveness of the procedure and access to the test results.

Further complicating the legal issues and related interest balancing to be done in evaluating the risks of drug testing, is the use of medical marijuana. Though a few states like California allow medically prescribed marijuana, marijuana is still illegal under federal law. The California Supreme Court in the case of *Ross v. Ragingwire Telecommunications*, *Inc.* (2008) 40 Cal.4th 920, rejected the plaintiff's claim that his employment was terminated in violation of the California Fair Employment and Housing Act ("FEHA") and a violation of public policy based on his use of medical marijuana. The Ross Court ruled that FEHA does not require employers to accommodate the use of illegal drugs and no public policy was violated by terminating the employee for illegal drug use.

Despite the holding in the *Ross* case, other California courts, as well as courts from other jurisdictions are increasingly questioning employers unreasonably intruding upon or inquiring about what employees do off duty, particularly, for jobs that do not warrant such intrusion or that do not squarely fall within a duty set out in governmental regulations mandating any such intrusion. The take away from this group of cases, and body of case law (which is still developing) is that employers should be very careful and probably completely avoid suspicion-less drug testing of **employees**. Pre-employment drug testing of job applicants made as a condition of employment after extension of a job offer is probably permissible, and in fact, advisable for jobs that require a high level of safety. Employers are also well-advised to consider drug policies that allow for suspicion-based drug testing for employees. Nonetheless, these policies must be carefully and reasonably drafted, implemented and enforced. Beyond this, employers should take efforts not to unduly interfere with what their employees do during their off time, provided that such off-duty conduct does not violate any contract, regulation or other legal restriction that directly applies to the employer.

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