Minimizing Your FLSA Risk: Over-time is Money

- On December 1, 2016, the Overtime Rule goes into effect and raises the salary level threshold to $913/week or $47,476 per year for exempt employees; $134,004 for highly compensated employees. Be sure you fully understand the differences between an exempt, non-exempt and non-exempt salaried employee. Employers may use bonuses to satisfy part of the new standard salary level test.
- The DOL allows nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary test requirement. Such bonuses include, for example, nondiscretionary incentive bonuses tied to productivity or profitability (a bonus based on the specified percentage of the profits generated by a business in the prior quarter). Be careful in how you communicate changes from salaried to hourly to employees.
- In making changes from salaried to hourly, be sure to consider the emotional/prestige impact of the change. Employees tend to think being “salaried” is more prestigious than being “hourly”. Consider and fully explain how overtime will be handled and what the expectation is for checking/responding to e-mail after regular work hours.

Headline News

- Changes for federal contracts will take effect at various times: federal minimum wage, pay transparency, paycheck transparency, independent contractor notices, sex discrimination guidelines, and paid sick leave.
- These initiatives have been blocked at this point: DOL Persuader Rule changes and Blacklisting requirements.
- FTC and DOJ anti-trust guidance is targeted at HR professionals so be very careful about sharing wage information or other terms of employment with other organizations on an informal or formal basis. Need to use a third party to gather and aggregate data to avoid penalties.
- CT is prohibiting inquiries on applications regarding criminal history effective 1/1/2017.
- MA passed the HOME Act this summer. One portion requires employers with 50 or more employees to provide paid leave for Veterans who wish to participate in Veteran’s Day activities.
- RI employers need to be aware of the Identity Theft Protection Act which took effect on June 26, 2016.

Social Media at Work

- After previous attempts, there is an expectation that Massachusetts will pass a Social Media Privacy bill in 2017 which would prevent employers from compelling employees from turning over passwords as a condition of employment or forcing employees to accept “friend requests” made by a supervisor.
- Emerging social media case law does not view the term “WTF” as an obscenity to warrant termination of an employee in violation of social media policy and “likes” (when made by a co-worker in response to an online employee comment) may be afforded protection as concerted activity.

OSHA: The New Final Rule

- Companies of over 250 employees will be required to electronically report their OSHA 300 logs starting July 1, 2017 and then additionally their 300A and 301 logs starting July 1, 2018.
- Companies with 20-249 or more employees will be required to electronically file 300 A logs as of July 1, 2018.
- Employers must ensure safety reward programs do not incent employees to not report accidents or injuries.
The Talent War: A Marketing/HR Function

- The HR department is uniquely positioned to deliver news and information to your organization’s workforce — and by thinking more like an internal marketing team, or PR firm, you can communicate in a way that boosts culture and employee engagement, showcases training and development opportunities, advertise vacant positions, and otherwise informs, entertains, and updates your employees.

- In today’s job market, the best candidates don’t want to read informational, tactical job ads. This outreach should be seen as an opportunity to create additional brand awareness, and attract candidates who share the organizations goals and mission.

- Be aware that how you are seen in your marketplace, and within your own walls, is what will create your brand. Take the time to develop a strategic plan, and adhere to it. Involve stakeholders from different levels to ensure consistency.

Who’s in Charge? You or the Temp Agency?

- If your company representatives influence or participate in the selection, retention, separation, discipline, pay rate decisions for temporary employees, you could be viewed as the employer.

- If your company representatives provide the day-to-day supervision of the temporary employee, you could be viewed as the employer.

- Is the temp really a temp? If the temp is on site at your location, performing work for months or years on end, they are probably not a temporary employee.

- Joint employment is a complex concept and the employer/employee relationship is not always crystal clear. Remember, a staffing agency cannot provide a bullet-proof vest from all potential liabilities associated with the employment relationship with a temporary employee.

Welcome to the Company, Please Sign Here

- For a non-compete agreement to be considered reasonable in geographic scope, existing case law views most non-competes with a prohibition within 10 miles of a business as reasonable in scope.

- For a non-compete agreement to be considered reasonable in duration, a prohibition of 12 to 18 months is generally acceptable in the eyes of most courts.

Assessment: Within the Limits of the Law

- Assessments can assist with improving hiring decisions by standardizing the process, removing interviewer bias, and having a greater sense of what high-performance looks like in your organization for specific job roles.

- Take caution to use assessments that comply with EEOC standards or you risk legal action, and you’ll have to become familiar with them as the EEOC does not validate or recommend any specific tool.

- Assessments should make up no more than 30% of a hiring decision. Also, consider experience, skills, education, and culture fit. Never tell job-candidates they did or didn’t receive a job offer based on assessment results.

- Building a defensible job-candidate benchmark is as important as using the right assessment. A legally defensible process includes job survey studies and concurrent studies of both high and low performers using the tool that will also be used to assess candidates.
Medical Marijuana – Lightening Up Your Workplace

- The bottom line, whether it is medical marijuana or recreational (legal by state), an employer can rescind a job offer if an applicant tests positive for marijuana on the job.
- Marijuana is not legal at the federal level so employers don’t need to allow employees to be under the influence at work.
- Be careful not to rescind the offer or terminate just because you discover (or the employee tells you) that they have a medical marijuana card. Terminating simply because they have the card would be discriminatory.

Pay Equity – Keeping a Vigilant Eye

- Pay equity defined as a “means of eliminating discrimination in the wage/comp system; broadly speaking, it is not just a gender issue.
- Federal Law has allowed employers a strong argument that jobs are “not similar titles” are not gender biased.
- States, particularly Massachusetts, are amending their laws as of July 1, 2018 and shifting toward the standard of “comparable work” as the measure of pay equity. This is likely to favor employees in proving their work is the same.
- Massachusetts is moving toward not allowing an employer to ask about an applicant’s salary history in an interview. An interpretation of this statutory language is being awaited from the AG Office but can have a great impact to the hiring process.

ACA: Checkup & Checklist

- Employers who offer health or other welfare benefit plans to employees must have a Plan Document and Summary Plan Description (SPD) for each welfare benefit offered. These documents will determine compliance with ACA, ERISA and IRS regulations. Employers may wish to have a Wrap Plan Document and Wrap SPD but a Wrap SPD may get confusing for employees so our recommendation is to provide separate SPDs for each benefit. The health insurance carriers’ member handbook, explanation of coverage, summary of benefits and coverage do not meet the requirements under the regulations.
- Employers with over 50 employees have to decide on a method for determining which employees will be eligible for health insurance. Even if you don’t think you will ever hire an employee to work under 30-hours per week, you need to determine if you will use the monthly or look-back method for determining individual employee eligibility. This decision will need to be communicated through your SPD.

Retaliation: How to Spot It

- Three elements common to most retaliation complaints include:
  1. Some type of protected activity by employees such as exercising rights under FMLA, wage and hour, concerted activity.
  2. An adverse employment action by the employer such as demotion, discipline, termination.
  3. The employee only needs to establish a causal link between the protected activity and the action taken by the employee.
- Strategies for reducing your exposure to retaliation claims include: consistently follow policies and don’t make exceptions; have a sufficient “paper trail” before you take disciplinary action; watch out for bad timing; make the decision based on objectively verifiable facts rather than subjective opinions; and train your supervisors on employment law issues.
It’s Not CSI: Conducting Real Workplace Investigations

- Investigations are the employers’ tool to enforce both company policy and support culture.
- A thorough internal investigation based on factual evidence serves to potentially mitigate damages.
- Employers need to understand how confidentiality operates in an internal investigation.
- Investigators need to remain neutral and take all complaints seriously and get to them in a timely manner.

HR Challenges in the Gig Economy

- The gig economy has been around longer than we think. Temporary workers, consultants, and piecemeal workers are all early members of the gig economy.
- The new gig economy challenges facing businesses center around the use of technology to contract with workers. In the “war for talent” some employees (especially millennials and recently retired boomers) are not looking for full time on-site work and prefer the freedom that contact work provides.
- Be careful when hiring and contracting gig workers. Length and scope of projects/work, control over the contractors time outside of the specific project, and providing resources such as a computer, phone, or even email address should be considered a need for reclassification.

Breaking Ground on Gender Identity

- The best thing to do when working with a transgender employee is to ask questions for understanding. It’s important to understand how the individual wants to be treated, how they want their co-workers to be informed, and how they envision the transition.
- Most transgender employees who have had a successful transition in the workplace attribute this success to how their employer sought to understand. The degree of successful transition is directly correlated with the individual’s ability to continue being an active contributor to the organization.
- Building an inclusive workplace environment starts well before you’re faced with a transgender employee situation – it’s a matter of culture not accommodation.
- Before a gender transition can be handled properly, there has to be a culture of respect. Generally, respect is facilitated by leadership with a top-down approach. A company’s harassment-free and respect-in-the-workplace efforts should be inclusive of transgender situations.