

SMBA Hour by Hour CLE

2020 Employment Law Update

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FLSA – Change to Salary Basis

- Since 2004, salary basis had been \$455/week (\$23,660/year)
- September 24, 2019, the DOL issued new final regulations, increasing salary basis test to \$684/week(\$35,568/year)
- Salary requirements for Highly Compensated Employees increase to \$107,432/year
 - previously \$100,000
- The duties tests did not change

FLSA – Little Known Aspects of the New Rules

- Non-discretionary bonus and incentive payments (including commissions)
- Catch up payment permitted
- No automatic adjustments to salary threshold
- Estimated 1.3 million workers will now become eligible for overtime

Regular Rate – FLSA

Final Rule – Effective January 15, 2020
Regular Rate = Basis for Overtime Premium Payment

Excluded from the “regular rate” calculation:

- Parking benefits
- Wellness programs
- Employee discounts on retail goods and services
- Onsite specialist treatment
- Gym access and fitness classes
- Adoption assistance;
- Reimbursed expenses
- The cost of office coffee and snacks

Regular Rate – FLSA

Under revised regulations, these amounts are now confirmed to be excluded from the “regular rate” calculation:

- Reimbursements that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System or the optional IRS substantiation amounts for travel expenses are per se “reasonable payments”
- Sign-on bonuses
- Longevity bonuses
- Contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense Payments of certain penalties required under state and local scheduling laws

DOL – Joint Employer Rules

Adopts: Four Factor Balancing Test:

- (1) Control over hiring or firing
- (2) Control over work schedule or conditions of employment to a substantial degree
- (3) Control over rate and method of payment
- (4) Personnel records maintenance and control

DOL – Opinion Letters

January 7, 2020 – Salary basis test and additional compensation

July 1, 2019 – Rounding Time

April 29, 2019 – “Gig” economy

March 14, 2019 – Employer-sponsored community service

March 14, 2019 – Can employees decline FMLA leave or force employers to classify FMLA qualifying leave as another form of leave?

Ban the Box Laws

Ban the Box laws – restrict inquiries about an applicant’s criminal background at various stages of the hiring process

- Employment applications
- Decisions based on a particularized review

Ban the Box

- States with Ban-the-Box laws:
 - California
 - Connecticut
 - Hawaii
 - Illinois
 - Massachusetts
 - Minnesota
 - New Jersey
 - Oregon
 - Rhode Island
 - Vermont
 - Washington
- Cities with Ban-the-Box laws include Columbia, Missouri and Kansas City, Missouri

NLRB

Employer's Rules –

Must consider the balance between:

- (A) the nature and extent of the rule's potential impact on protected rights
- (B) the employer's legitimate justifications for the rule

Blanket rules?

Employee Handbooks?

SB 591 – Punitive Damages

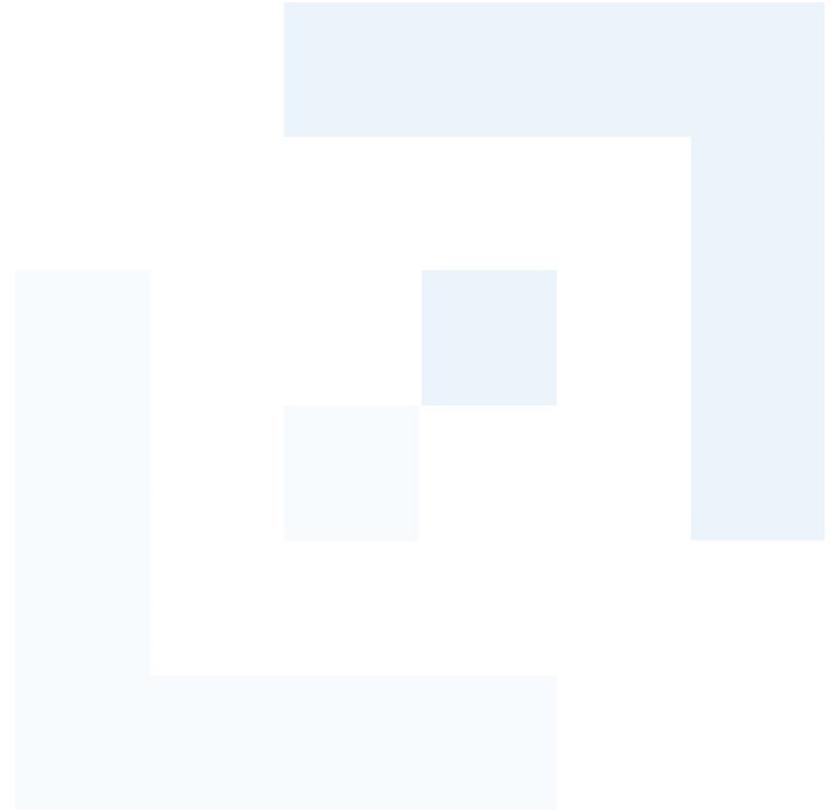
- Signed July 1, 2020
- Effective August 28, 2020
- Punitive damages will be awarded only if the plaintiff proves by “**clear and convincing evidence**” that the defendant intentionally harmed the plaintiff without just cause or acted with a deliberate and flagrant disregard for the safety of others,” and the plaintiff is awarded more than nominal damages.
- Punitive damages may be awarded against an employer or other principal due to an employee’s conduct only if
 - The principal or managerial agent of the principal authorized the doing and the manner of the act;
 - The employee was unfit and the principal or a managerial agent of the principal was reckless in employing or retaining the employee;
 - The employee was employed in a managerial capacity and was acting in the scope of employment; or
 - The principal or a managerial agent of the principal ratified or approved the act.

Other Recent Developments

- Epic Systems (Arbitration Agreements)
- Updated Title IX Regulations
- New FMLA Forms (July, 2020)

<https://www.dol.gov/agencies/whd/fmla/forms>

Questions?





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