Employment Law Update

Kansas Association of Counties
2019 Conference
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Agenda

• FLSA Regulations
• Developing issues with legalized marijuana
• LGBTQ2+ Protections
• Criminal History Inquiries – “Ban the Box”

Fair Labor Standards Act Regulations
**FLSA Regulatory Amendments**

- Fair Labor Standards Act provides federal requirements concerning minimum wage and overtime.
- Employees in "bona fide" executive, administrative, professional, and computer positions are exempt from minimum wage and overtime requirements.
- Department of Labor regulations define what’s required for these exemptions:
  - 1. Minimum salary
  - 2. Salary basis
  - 3. Job Duties

**Final Rule – Published Sept. 24, 2019**

- Effective January 1, 2020, minimum salary will increase to:
  - $35,568 ($684/week)
  - $107,432 for "highly compensated employee" provision
- Methodology for selecting the amounts was generally the same:
  - Main salary figure - 20th percentile of salaried workers in South and/or in retail industry
  - HCE – 80th percentile of all salaried employees

**Final Rule – Published Sept. 24, 2019**

- New provision: Employers may satisfy up to 10% of the minimum salary through nondiscretionary bonuses, incentives, and commissions.
  - Must be paid at least annually or more frequently (so no carry-over from year to year).
  - Measurement occurs over a 52-week period that employer may designate (default is calendar year).
  - Nondiscretionary payment must be made no later than the next pay period following end of 52-week period.
  - If employment terminates mid-year, employer has one pay period to provide pro-rated bonus/incentive to satisfy requirement.
Going Forward...

- DOL followed through with its initial proposal to not include any automatic review process.
  - Agency has expressed a “commitment” to keep the salary figures current, no definition of how often periodic review will occur.
  - Future updates will require formal rulemaking process.

What’s Not Changing

- No changes to job duties tests.
  - No changes to salary basis requirements other than the 10% non-discretionary bonus provision.
    - No expansion of definition of nondiscretionary incentives.
  - No changes to definition of highly compensated employee provision.
  - All of these are as expected based on DOL’s proposed amendments.

Practical Issues – Nondiscretionary Incentives

- Employers may satisfy up to $3,557 of the minimum salary.
  - Nondiscretionary bonuses and incentives:
    - Generally need to be pursuant to an agreement or program that is announced ahead of time.
    - Safest approach is through defined qualification criteria (such as written commission/bonus structure).
    - Consider program with guaranteed minimum.
    - Don’t rely on being able to give unannounced “spot” bonus.
Other pending regulatory changes

- In March DOL published proposed amendments to regulations governing the regular rate (how overtime is calculated).
  - Mostly explanatory with little substantive change.
- Last week (November 4), DOL published proposed amendments to the regulations governing the “fluctuating workweek” payment system.
  - A/K/A “fixed pay for fluctuating hours,” “half-time overtime,” and “salaried non-exempt.”
  - Governs how overtime is calculated.
  - Proposed amendments would allow employers to provide bonuses without jeopardizing the system.

Legalization of Marijuana

Developing issues with legalized marijuana
Legalization of Marijuana

Colorado
- Medical and recreational use legal under state law.
- Courts say no job protection to applicants/employees who test positive because marijuana use is still illegal under federal law.

Oklahoma
- Medical use legal under state law.
- With exceptions for safety-sensitive positions, State law specifically prohibits discrimination against applicants/employees who test positive but have a valid medical marijuana license. Discipline is permitted if employee is "under the influence" (unclear exactly what that means).

Missouri
- Medical use will be legal under state law. Application process is presently ongoing with product availability expected in Spring 2020.
- Statute does not provide job protection to applicants/employees who have valid license. But would courts recognize such protection?

Legalization of Marijuana

Nebraska
- In May 2019, bill to legalize medical marijuana went to Legislature, but did not have support and was taken off the agenda.
- Marijuana supporters have shifted efforts to a petition drive to get a proposed constitutional amendment to legalize medical marijuana on ballot for November 2020 election.

Kansas
- In 2018 Kansas Legislature rejected bill that would have allowed medical marijuana.
- Hemp-derived CBD oil (with zero THC) now legal. What’s next?

Hemp legalization
- Federal bill proposed in 2018 to remove hemp (defined as cannabis with less than 0.3% THC) from the list of Scheduled I controlled substances.
- Congress incorporated this bill into the 2018 Farm Bill, so it’s now legal federally.
- In April 2018, Kansas passed a law that removed hemp with 0% THC from the definition of marijuana.
- Federally legal Hemp (with 0.3% THC) remains illegal in Kansas.
- In March 2019, Kansas House approved a bill to provide legal defense for medical use of CBD oil with up to 5% THC. Has not advanced beyond the House.
## Practical Issues

- State law issues (outside of Kansas).
- CBS News tested nine CBD oil samples from across the country.
  - All were legal under federal law (no more than 0.3 percent THC)
  - Significant disparity in strength of dosage
    - 4 were consistent with stated dosage
    - 2 were under-strength (only 60-80% of advertised dose)
    - 3 were over-strength (including one that was 210% over labeled dose)
- CBD is still unregulated, so questions exist as to accuracy of stated THC content.
- Positive drug test for marijuana (THC). Consider addressing THC risks with CBD usage in policy.

## Employment substance testing

- Can implicate issues under the Americans with Disabilities Act.
  - Testing for illegal drugs is not a medical examination.
  - Testing for alcohol is a medical examination.
  - Timing issues for covered "medical examinations"
- Consider state laws regarding drug testing.
  - None in Kansas, but other area states have them (e.g., Oklahoma, Iowa)

## LGBTQ2+ Protections
The Law

Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e)
- "It shall be an unlawful employment practice for an employer to . . . discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."

Lay of the Land (today)

- EEOC – Title VII protects against sexual orientation and gender identity discrimination.
- Circuit Split
  - Fifth and Eleventh Circuits – Title VII does not protect against discrimination on the basis of sexual orientation
  - Second and Seventh Circuits – Title VII prohibits sexual orientation discrimination
  - Sixth Circuit – Title VII protects employees on the basis of transgender or transitioning status

LGBTQ Protections – Nationwide
State of the Law – Kansas

- Exec. Order No. 19-02
  - Jan. 15, 2019 – Governor Kelly
  - Sexual orientation and gender identity categories
  - State agency employment only
  - Also extends to government contractors
- H.B. 2130 (2019 legislative session)
  - Extend protections to private sector
  - 55 lawmakers co-sponsored, but it did not pass
- Cities/Counties
  - Overland Park (as of 10/7/19)
  - Several other KC metropolitan cities
  - Lawrence, Manhattan
  - Wyandotte County

What’s Next?

- U.S. Supreme Court heard oral argument last month (on October 8) in three cases:
  - Altitude Express v. Zarda
  - Bostock v. Clayton County, Ga
    - Argued together; both involved gay male plaintiffs
  - Evans v. R&G Harris Funeral Homes (transgender female)

- If you’re interested in the legal arguments:
  - scotusblog.com/2019/10/argument-analysis-justices-divided-on-federal-protections-for-lgbt-employees/

Criminal History Inquiries:
“Ban the Box”
### Criminal record/history information

- Movement to more liberally view hiring of those with criminal history.
- "Ban the Box" laws
  - These have been widely-embraced by government employers, but some states/cities have extended the restrictions to also apply to private employers:
    - 13 states including Colorado, Illinois, New Mexico
    - 18 cities/counties including Kansas City, MO and Columbia, MO
  - Kansas restrictions were established in May 2018 through an executive order from Governor Collyer and apply only to state (executive branch) agencies.

### Risk in not Asking about Criminal History

- Kansas recognizes the tort of negligent hiring/retention.
- Allows for a private claim from an injured third-party against the employer of the employee responsible for the injuries.
- Test – Did the employer know or reasonably should it have known of an individual’s particular quality or propensity that may create an undue risk of harm to others?
  - There must also be a sufficient connection to the circumstances surrounding how the harm occurred.

### Common examples

- Hiring an individual with a history of DUIs for a position that involves driving.
- Hiring an individual with a history of theft for a position involving access to customer property.
- Hiring an individual with a history of violent behavior for a position involving physical interaction with public (bouncer at a bar).
Practical advice

- Always do reference checks and document the results.
  - Even if results are that the former employer wouldn’t provide any information.
  - Helps to show you acted reasonably to try to identify negative information about the candidate.

- Consider criminal background checks based on the nature of the position.
  - If you use third-party provider to conduct criminal background check – Don’t forget about FCRA requirements.

EEOC Guidance: Pre-employment inquiries regarding arrests and convictions

- Arrest record may not be used by itself to exclude candidate from position, but it may be used to trigger further investigation into the circumstances that led to the arrest.

- Conviction information may be used for employment decisions, but employer must consider (to establish BFOQ defense):
  - Nature and gravity of the offense;
  - Time that has passed since the offense and/or completion of sentence;
  - Nature of the position at issue.

- Upshot – No categorical exclusions (e.g., you’re disqualified if you’ve been convicted of a felony)
FORREST T. RHODES, Partner

PRACTICE AREAS

- Employment & Labor Law
  - Wage and Hour (FLSA) Litigation and Government (DOL) Audits
  - Employment Discrimination Litigation and Government (EEOC) Audits
  - Employer Counseling and Preventative Measures
  - Leaves of Absence
    - Family and Medical Leave (FMLA)
    - Reasonable Accommodation Leave (ADA)
    - Military Leave (USERRA)
  - National Labor Relations Board Proceedings
- OSHA

PRACTICE EMPHASIS

Forrest brings legal expertise with a down-to-earth approachable style to partner with clients to help identify and resolve issues before they become legal problems and effectively address difficult employment situations to avoid or minimize legal risk.

A cornerstone of Forrest’s practice is assisting employers with the review and development of employment policies and other day-to-day preventative measures, including working through challenging discipline situations, the proper handling of employee absences that may implicate the Family and Medical Leave Act (FMLA) and Americans with Disabilities Act (ADA), and military leave under the Uniformed Services Employment and Reemployment Rights Act (USERRA). He also has significant experience defending employers in government audits brought by the Department of Labor (FLSA) and the Equal Employment Opportunity Commission, as well as those agency’s state counterparts.

Where employment litigation cannot be avoided, Forrest defends the client’s interests through practical legal advice and advocacy with the goal of resolving the matter in a way that is effective as well as cost efficient.

Forrest counsels employers on labor-management issues, including union organizing efforts, labor contract negotiations, and responding to unfair labor practice charges filed with the National Labor Relations Board (NLRB).

Forrest also represents employers through all aspects of the safety and health compliance process, including inspections brought by the Occupational Safety and Health Administration (OSHA) and the negotiated resolution of any proposed penalties, and,
where necessary, defense of litigation brought before the Occupational Safety and Health Review Commission (OSHRC).

In 2013 and 2014 Forrest was selected by Chambers USA as one of America’s Leading Lawyers in the area of Employment Law. He has been selected by peers for inclusion in The Best Lawyers in America© in the areas of Employment Law – Management and Litigation – Labor and Employment. Forrest is a frequent speaker on employment law issues, especially the complicated and evolving requirements under the FLSA and other aspects of wage and hour compliance.

LEGAL ACCOMPLISHMENTS
• Represented employers in a wide variety of industries including hospitality, financial services, manufacturing, retail, and health care, with wage and hour (FLSA) compliance investigations conducted by the U.S. Department of Labor.
• Served as defense counsel for numerous hospitality industry (restaurant) employers in federal court litigation regarding tip credit compliance and delivery driver reimbursements under the FLSA and state wage and hour laws.
• Defended several different manufacturing companies in lawsuits stemming from allegations of employment discrimination and/or retaliation, with cases resolving on client-friendly terms, including summary judgment and favorable settlements.
• Provided cost-effective defense for employers in wide variety of industries facing employment discrimination investigations from the Equal Employment Opportunity Commission or equivalent state agency. Successfully resolved every charge while minimizing interference on client’s business operations.

LEADERSHIP EXPERIENCE
• United States Navy, Cryptologic Division Officer
  ◦ Led teams of cryptologic support sailors and marines in support of national military requirements and surface and subsurface naval units deployed in the Mediterranean Sea and western Indian Ocean.
• United States Navy, Cryptologic Officer, Naval Space Support Teams
  ◦ Provided support and training on military space systems to shore training facilities and operational naval units.

PROFESSIONAL MEMBERSHIPS, AFFILIATIONS & HONORS
• Selected for inclusion in Missouri & Kansas Super Lawyers® List, 2017-2018 (a Thomson Reuters business)
• Identified in Chambers USA America’s Leading Lawyers in the area of Employment Law, 2013 - 2018
• Selected by peers for inclusion in The Best Lawyers in America in the areas of Employment Law – Management and Litigation – Labor and Employment, 2015-2019
• American Bar Association, Labor & Employment Section and Federal Labor Standards Committee
• Kansas Bar Association
• Wichita Bar Associations

RECENT PRESENTATIONS & PUBLICATIONS

Wage & Hour

• “Five Things You Can Do to Avoid Wage and Hour Law Headaches,” Foulston Siefkin Employment Law Institute, May 2018
• “Proposed Amendments to the White Collar Exemptions – what they mean and how they’ll impact your business,” Foulston Siefkin HR Box Lunch Series, July & August 2015
• “FLSA Potpourri,” Foulston Siefkin Employment Seminar, 2015
• The Fair Labor Standards Act, ABA Section of Labor & Employment, Cumulative Supplement 2014, 3rd ed., Contributing Author
• “Wage and Hour Update,” Foulston Siefkin HR Box Lunch Series, December 2014
• “Wage and Hour Compliance,” InfoComm Live 2013, March 2013
• Kids in Candyland: DOL audit reminds employers about child labor, Kansas Employment Law Letter, June 2012
• “An FLSA Audit is Coming – Be Prepared Before DOL Arrives,” Foulston Siefkin Employment Law Seminar, 2012
• The Fair Labor Standards Act, ABA Section of Labor & Employment, Cumulative Supplements 2010 and 2011, 2nd ed., Contributing Author
• Employers with Salaried Non-Exempt Employees Beware! New DOL Regulations Change How You May Pay These Employees, Foulston Siefkin Issue Alert, May 16, 2011
• “Advanced FLSA: Understanding, Preparing for, and Defending Wage and Hour Audits,” Foulston Siefkin Employment Law Seminar, May 2010

General Employment Law

• “Not as Easy as One, Two, Three: How the FMLA, ADA, and Workers’ Compensation Interact with Employee Leave of Absence and Return to Work,” Foulston Siefkin HR Training, October 2018
• “Just the Facts: Difficult Conversations, Discipline, and Performance Management” Foulston Siefkin HR Training, October 2018
• “Back to the Basics: HR Topics from A-Z that Every HR Professional Should Know” Foulston Siefkin HR Training Series, August 2018
• “Box of Tricks or Pandora’s Box? How Outside Information Can Help or Hurt Employee Hiring and Retention” Foulston Siefkin HR Training Series, July 2018
• Employment Law Round-up - The Latest from the Legislature, Agencies, and Courts,” Foulston Siefkin Employment Law Institute, May 2018
• “Best Hiring Practices,” Kansas County Counselors Conference, November 2014
• “Hot Topics in Employment Law,” Foulston Siefkin HR Box Lunch Series, October 2014
• “What Do I Do When My Competitor Is Hiring My Employee, or I’m Hiring Theirs?” Foulston Siefkin Employment Law Seminar, April 2014
• “Best Hiring Practices,” Kansas Human Rights Commission Employment Law Seminar,
November 2013

• “Equal Pay Act – Compliance and Audit Preparation,” Foulston Siefkin HR Lunch Series, September 2012

• “Alphabet Soup of Employment Law, from FLSA to FMLA to COBRA,” Kansas County Clerk’s Conference, March 2012

• Foulston Siefkin HR Workshop for Health Care Providers, Topeka, Overland Park, and Wichita, October 2011

Labor-Management Relations

• “The NLRB and the Non-Union Employee,” Foulston Siefkin HR Box Lunch Series, July 2014


• New Notice Rule Reaches out to Union and Nonunion Employers Alike, Kansas Employment Law Letter, Vol. 18, No. 7, October 2011

Occupational Safety and Health

• “OSHA Inspections: How to Respond and Prepare”, Foulston Siefkin HR Box Lunch Series, January 2018

• “OSHA Compliance,” Foulston Siefkin OSHA Workshop, Overland Park, February 2011

• “Exempt or Non-Exempt? Applying the FLSA White Collar Rules to the Health Care Industry,” Foulston Siefkin Kansas Health Law Institute, September 2007

COMMUNITY INVOLVEMENT

• El Dorado YMCA, Advisory Board, 2004 - present (Board President 2013 - 2014)

• Butler Community College Foundation, Board of Directors, 2014 - present