

Highlights for Week Ending April 1, 2016

STATE OF VERMONT

H.261; “Ban the Box” - Criminal record inquires by an employer

The Senate Economic Development & Housing Committee heard a great deal of testimony on this bill, which is a spring board from the State Employee ‘ban the box’ executive order signed in April 2015. State job applications have removed questions relative to criminal history at the onset of the application process, and background checks can only be conducted after a person is deemed qualified for a certain state job. All employers in the state would be subject to similar mandates where the hiring process is concerned if the bill passes, though there are several proposed carve outs based on current federal or state laws or presumptive disqualifications based on conviction. The Senate will probably wrap up S.261 this week, and if passed, it is likely the bill would not be implemented for a year to allow for a proper role out and education of employers.

H.867 (formerly H.773). Classification of employees and independent contractors.

It appears that the task of updating the definition of an employee and an independent contractor was more daunting than originally anticipated. The House Committee on Commerce & Economic Development and the Department of Labor spent most of the week working on this bill, and it became stuck on the House floor for lack of support. The bill was sent back to the House Committee on Commerce & Economic Development to review the three amendments currently under debate.

If the oversight of classification of independent contractors is to be transferred to the Attorney General’s Office, as recommended in two of the amendments, Susanne Young, Deputy Attorney General, testified that the office does not currently retain employment law experts and that funding would be necessary to hire staff and to perform training.

As the session heads to an end over the next month, it is unclear if this bill will make it to the House Floor for a vote and then move on to the Senate.

FEDERAL UPDATE - FROM THE SHRM HR POLICY ACTION CENTER

SHRM's 8 Things to Know about Proposed Overtime Regulations

The Department of Labor’s (DOL) proposed changes to the overtime regulations under the Fair Labor Standards Act (FLSA) have been officially released. SHRM has reviewed the proposal to ascertain the impact these changes to the overtime exemptions will have on workplaces across the country. In the meantime, please review the list below to prepare for what lies ahead and make your voice heard on behalf of the profession.

1. **Significant Impact.** Employees and employers across every industry and sector will be impacted. Most employers covered by the FLSA will need to analyze employee classifications and make other changes, by the anticipated 2016 effective date which will be established in the final rule. According to DOL, 11 million employees will be impacted.
2. **Salary Level Will Increase.** To be exempt currently, workers must make more than \$455/week (\$23,660 annually). The proposed rule sets the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers which for 2013 was \$921 per week, or \$47,892 annually. If the 40th percentile approach is adopted, the 2016 level is projected to be \$970 a week, or \$50,440 annually. This will impact all sectors but

it will disproportionately affect the non-profit and service sector industries as well as certain geographic areas of the country.

3. **For the First Time Ever, DOL Proposes to Automatically Raise the Salary Level.** The Department is proposing to automatically update the salary level (including for highly compensated employees) on an annual basis, either based on percentiles of earnings for full-time salaried workers or based on changes in inflation.
4. **Changes to Highly Compensated Employees (HCE).** The Department is proposing to set the HCE annual compensation level equal to the 90th percentile of earnings for full-time salaried workers (\$122,148 annually), or based on changes in inflation. Currently, in order to come within this exemption an employee must earn at least \$100,000.
5. **Feedback Sought on Duties Test and Nondiscretionary Bonuses.** While no changes have been proposed yet, the regulation acknowledges challenges associated with the duties test and seeks additional examples regarding specific occupations. Similarly, the Department wants to hear from employers about the possibility of including nondiscretionary bonuses to satisfy a portion of the standard salary requirement.
6. **State Law Application.** Employers in states with wage and hour laws that are more restrictive in their application (for example, California) will need to review their coverage requirements under federal law in light of these proposed changes.
7. **Workplace Flexibility Reduced.** Changes will require employers to reclassify a significant number of employees from exempt to non-exempt status, requiring tracking of hours worked, resulting in the loss of workplace flexibility.
8. **You Are the Voice of the HR Profession.** SHRM has created a special section on its **HR Policy Action Center** dedicated to content and advocacy efforts surrounding the upcoming overtime regulations. **Be sure to share your story!**

This significant change means that some employees who have been treated as exempt may be eligible for overtime pay (i.e. lower paid supervisors and assistant managers). Suggested options to manage the new rule include raising salaries for employees close to the increased salary level threshold to keep them in exempt status, or reclassifying employees as nonexempt and start paying overtime. Check the Fair Labor Standard's Act duties test at: http://www.dol.gov/whd/overtime/fs17a_overview.htm for each position that may be impacted, and speak with counsel for more guidance.

The proposed Overtime Regulations are currently before the Office of Management and Budget. If approved, it is estimated there will be a 60 day lead time before the new Overtime Regulations would go into effect.

For more information about the SHRM Vermont State Council Legislative Employment Law and Legislative Advocacy Update, please contact Shelley Field at 802-772-2215 or shelley.field@casella.com.