

MANCHESTER AREA HUMAN RESOURCES ASSOCIATION
APRIL 5, 2016

LEGAL AND LEGISLATIVE UPDATE

by

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I. INTRODUCTION

With lots going on in Concord and Washington, the following is an update on selected issues which could impact the workplace this year.

II. UPDATE ON NEW HAMPSHIRE WORKPLACE LEGISLATION

1. HB 1252 Title: Permitting employers to pay wages to employees weekly or biweekly.

Summary: Under NH wage and hour law the default period for payroll is for payment on a weekly basis. While employers may pay bi-weekly, semi-monthly or even monthly that is only with the approval in advance from NHDOL. This bill would give employers the option of a bi-weekly payroll without NHDOL approval.

Status: Introduced and referred to House Labor, Industrial and Rehabilitative Services. Ought to Pass with Amendment.

2. HB 1301 Title: Relative to the issuance of youth employment certificates.

Summary: This bill would permit parents or legal guardians (instead of school principals or administrators) to issue a youth employment certificate certifying the student's age, general health and confirming that the work wouldn't interfere seriously with the student's school work.

Status: Introduced and referred to House Labor, Labor, Industrial and Rehabilitative Services. Ought to Pass with Amendment.

3. **HB 1633 Title: Relative to the use of the Family and Medical Leave Act as it applies to workers' compensation.**

Summary: This bill would amend RSA 281-A and allow an employee to decide whether or not to apply for, or to use time off authorized under FMLA concurrently with time missed, as a result of a workers' compensation covered injury.

Status: Introduced and referred to House Labor, Industrial and Rehabilitative Services. Ought to Pass with Amendment.

4. **SB 413 Title: Relative to employment rights of persons with criminal records.**

Summary: This bill would prohibit employers from inquiring into a job applicant's criminal record during the initial employment application process. This bill is consistent with "ban the box" initiatives in other states and requirements now in federal contracts.

Status: Introduced and referred to Senate Commerce. Committee Report: Referred to Interim Study 03/17/2016.

*Similar House Bill: HB 1108 (referred to Interim Study Committee).

5. **SB 417 Title: Relative to employment contract restrictions upon physicians.**

Summary: This bill prohibits certain geographic area restrictions in partnership, employment or other professional relationship contracts for physicians licensed by the NH Board of Medicine. The focus of this bill is the balance between employers protecting their legitimate business interests and public access to physicians.

Status: Introduced and referred to Senate Commerce. Committee Report: Ought to Pass with Amendment.

6. **SB 488 Title: Requiring reasonable accommodations for pregnant workers.**

Summary: As amended, the bill would require employers to provide “reasonable” accommodations for pregnant workers. Reasonable accommodations would include, but not be limited to: more frequent or longer breaks; time off to recover from childbirth; acquisition or modification of equipment; seating; temporary transfer to a less strenuous or hazardous position; job restructuring; light duty; necessary break time, and private sanitary non-bathroom space for expressing breast milk; assistance with manual labor, or modified work schedules.

Status: Introduced and referred to Senate Commerce. Committee Report: Ought to Pass with Amendment.

7. **SB 393 Title: Relative to data privacy in the workplace.**

Summary: This bill attempts to clarify the rights of employers and employees concerning the possession and control of data. Specifically, this bill deals with employer access to and control of an employee’s personal data and personal electronic devices which may be stored or have access to the employer’s computer systems.

Status: Introduced and referred to Senate Commerce. Referred to Interim Study.

8. **HB 1512 Title: Relative to the definition of “employee” for the purposes of workers; compensation and unemployment compensation.**

Summary: This bill attempts to clarify the definition of “employee” for the purposes of workers’ compensation and unemployment compensation.

Status: Introduced and referred to House Labor, Industrial and Rehabilitative Services. Referred to Interim Study.

9. **HB 1310 Title: Establishing a commission to study health care for all residents of New Hampshire.**

Summary: This bill establishes a commission to study health care for all residents of New Hampshire.

Status: Introduced and referred to House Health, Human Services and Elderly Affairs. Referred to Interim Study.

10. **SB 407 Title: Relative to temporary worker rights.**

Summary: This bill requires temporary staffing companies to provide temporary workers with a substantial amount of information related to

each assignment. This bill also provides certain protections for temporary workers.

Status: Introduced and referred to Senate Commerce. Referred to Interim Study.

*Similar House Bill: HB 1376 (Deemed Inexpedient to Legislate).

11. **SB 412 Title: Establishing a minimum wage.**

Summary: This bill is intended to re-establish a state minimum hourly wage at no less than \$12 per hour.

Status: Introduced and referred to Senate Finance. Deemed Inexpedient to Legislate.

*Similar House Bill: HB 1480 (similar fate).

12. **HB 1142 Title: Relative to employee compensation at certain hospitals.**

Summary: This bill attempts to clarify employee compensation at certain licensed facilities which receive state funds. This bill sets a ceiling on maximum compensation at non-profit hospitals at 100 times the value of the lowest paid full-time employee at that same facility.

Status: Introduced and referred to House Executive Departments and Administration. Deemed Inexpedient to Legislate.

13. **HB 1278 Title: Requiring payment of lawful money to employees.**

Summary: This bill would amend RSA 275:43 VII(e) to prohibit banks and credit unions from charging employees a check cashing fee on paychecks where the employee doesn't have an account at that institution. The penalties proposed are criminal sanctions: guilty of theft by extortion under RSA 637:5.

Status: Introduced and referred to House Labor, Industrial and Rehabilitative Services. Deemed Inexpedient to Legislate.

14. **HB 1341 Title: Relative to employee payments to unions.**

Summary: This bill permits an employee who is not a member of a union, but who is required to pay (agency) fees to a union, to opt to have such fees contributed to a charitable organization of the employee's choice.

Status: Introduced and referred to House Labor, Industrial and Rehabilitative Services. Referred to Interim Study.

15. **HB 1476 Title: Relative to prohibitions on the employment of youth.**

Summary: This bill adds an exemption to the prohibition on the employment of youth under age 16 by adding a provision allowing a parent or legal guardian to authorize the employment.

Status: Introduced and referred to House Labor, Industrial and Rehabilitative Services. Deemed Inexpedient to Legislate.

16. **HB 1346 Title: Relative to the minimum wage for tipped employees.**

Summary: This bill attempted to increase the minimum hourly rate for tipped employees from 45% of the current minimum wage to \$3.27 per hour but then increasing the rate by \$1.00 per hour each year on January 1st.

Status: Introduced and referred to House Labor, Industrial and Rehabilitative Services. Deemed Inexpedient to Legislate.

III. FEDERAL REGULATORY ACTION / ENFORCEMENT ACTIVITY

A. Proposed Rule to Amend 541 Overtime Regulations

President Obama sent a Presidential Memorandum to the Secretary of the Department of Labor (DOL) on March 13, 2014, directing Agency to “modernize” and “simplify” the Section 541 rules. Proposed regulations were issued on June 30, 2015 and published in *Federal Register* on July 6, 2015.

Under FLSA 541 Regulations, an employee qualifies as exempt from overtime if he or she satisfies a “duties test” (under the Executive, Administrative, Professional, Computer and Outside Sales regulations) and the employee is paid on a “salary basis”.

The regulation proposes to set the “salary threshold” at the 40th percentile of all full-time employees. This would increase the salary threshold by 113% from \$455 dollars a week (\$23,660 annually) to \$970 (\$50,440 annually) in 2016.

Proposed increase in “highly compensated executive” exemption \$122,148 from \$100,000 per year.

Regulation proposes to automatically increase the salary threshold annually based on either the 40th percentile or the Consumer Price Index (CPI-U).

No proposed changes to the “duties test” at this time but did ask input on whether “adjustments to the duties test are necessary, particularly in light of the proposed changes in the salary level test.”

Final regulations are expected any time (no later than Fall 2016) and once published they could be effective within 60 days.

Please Note: In mid-March 2016 a new bill was introduced in Congress to block these new OT regulations from going into effect. That bill, **The Protecting Workplace Advancement and Opportunity Act**, (S 2707 and HR 4773) would:

- Nullify the proposed rule.
- Require the DOL to first conduct a comprehensive economic analysis on the impact of mandatory overtime expansion to small businesses, nonprofit organizations and public employers.
- Prohibit automatic increases in the salary threshold.
- Require that any future changes to the duties test must be subject to notice and comment.

In short, this bill would nullify the proposed white-collar exemption regulations, and to require the Department of Labor to start its rulemaking process over, including an economic impact analysis that generates the criteria identified in the proposed legislation.

IV. WORKPLACE CASES PENDING BEFORE UNITED STATES SUPREME COURT

If this Presidential election season wasn't controversial enough, the sudden death of Justice Scalia in February 2016 added yet another wrinkle to partisan fights as Democrats and Republicans argue about whether the Senate will consider the President's nomination for the 9th seat on the High Court. Many cases pending on the Supreme Court's docket now almost certainly will reach a different outcome than they would have had Justice Scalia remained on the Supreme Court through the end of the June 2016 Term. Several key cases, including some with important ramifications for employers, have not yet been decided.

This Term also includes several cases that have the potential to affect employers in the realm of consumer or employment class actions, labor relations, and affirmative action. Supreme Court prognosticators were expecting several of these decisions to be decided 5 – 4 and set national precedent. Although, as we have seen in recent years, no one can predict with certainty as to how the Supreme Court will rule, it now appears more likely than not that many of the decisions from this court, if the Scalia seat remains vacant, will turn out 4 – 4. That would leave the lower court decision intact and, in some cases, failing to resolve circuit splits that led to the grant of certiorari in the first place.

Key cases affecting employers this session include:

Spokeo, Inc. v. Robins, No. 13-1339 – Widely considered the most important class action case of the current Supreme Court term, this case concerns whether

individuals who lack allegations of actual injury, but claim a technical violation of a statutory right, can still file class actions. The case involves the Fair Credit Reporting Act and liability for hiring procedures. Oral argument on this case took place in November of 2015.

Tyson Foods, Inc. v. Gouphakeo, No. 14-1146 – The case presents an opportunity for the Supreme Court to allow or forbid class actions that rely on a composite or “average plaintiff” or “average class member” for damages purposes, sometimes dubbed as “trial by formula.” Brought under the Fair Labor Standards Act, this case presents an opportunity for the Supreme Court to determine whether differences between class members essentially prohibit class treatment or that averaging and aggregation are permissible. Oral argument also took place in November of 2015.

Friedrichs v. Calif. Teachers Association, No. 14-915 – At issue in this case is whether public-sector employees may be compelled to contribute dues to a union. Oral argument took place in January of 2016, and the five conservative Justices seemed ready to invalidate the law. Again, a 4 – 4 split would leave intact the lower court ruling that permitted the law to stand.

CRST Van Expedited, Inc. v. EEOC, No. 14-1375 – This closely watched case concerns the largest fee sanction award – approximately \$4.7 million – ever issued against the Commission. The fee was issued in favor of an employer after a district court ruled that the EEOC failed to meet its pre-suit investigation obligations in a case involving dozens of claimants. The Supreme Court is expected to clarify the obligations of the EEOC in prosecuting systemic lawsuits, and the grounds on which it may be sanctioned for initiating litigation without satisfying its duties under Title VII. Oral argument is set for March 2016.

Fisher v. University of Texas, No. 14-981 – This case involves the use of affirmative action programs in public university admissions processes. Fisher had previously been up to the Supreme Court in 2013, at which point it was remanded to the lower court for reconsideration. At oral argument in December of 2015, the conservative Justices seemed ready to strike down the law. Because Justice Kagan has recused herself, it is possible that this case may still be decided on a 4 – 3 vote.

Heffernan v. Patterson, No. 14-1280 – This case concerns First Amendment freedoms of speech and association. The Supreme Court is likely to determine what standards apply to public employers taking action on the basis of the assumed speech or assumed political affiliation of employees. Oral argument took place in January 2016.

Zubik v. Burwell, No. 14-1418 – This case addresses whether or not the government places an undue burden on religiously-affiliated employers by requiring them to opt out of the Affordable Care Act’s contraception coverage mandate. Oral argument is set for March of 2016. A 4 – 4 split would affirm the Third Circuit’s holding that the Act places no substantial burden on employers and religiously-affiliated employers will be required to comply with the Act or face statutory penalties.

V. CONCLUSION

Workplace laws and regulations, especially over the last twenty-five years have evolved at a rate often faster than the business community's ability to understand and comply with the new obligations. Hopefully, this outline, to the extent possible, has provided a useful preview of what may be coming along next.

That all folks. Stay tuned and buckle up. This could be a bumpy ride!

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Please note: This outline is intended as general guidance and not specific legal advice. Your legal counsel should be consulted with specific questions or for advice on how to proceed with these matters.