

# Division of Administrative Support Human Resources Program

Jennifer Eddy  
Human Resources Director



**MISSOURI**  
DEPARTMENT OF  
NATURAL RESOURCES

# Topics

- Proposed Overtime Rule/Fair Labor Standards Act (FLSA)
- Other Employment Law Issues
- Hostile Work Environment
- Interviewing
- Family and Medical Leave Act (FMLA)

## New Overtime Rule

- Was to go into effect 12/1/16
  - Would have raised the salary threshold from \$455 per week (\$23,660 annually) to \$913 per week (\$47,476).
  - Would have automatically updated the salary threshold every three years, based on wage growth.

# New Overtime Rule

- What happened?
  - 21 states challenged the rule in the U.S. District Court for the Eastern District of Texas.
  - A suit filed by the U.S. Chamber of Commerce was combined with the states' suit.
  - U.S. District Court Judge, Amos L. Mazzant III issued a nation-wide injunction to the rule on 11/22/16, in favor of the plaintiffs.

# New Overtime Rule

- What happened?!?!
  - Judge Mazzant ruled that the Obama administration had exceeded its authority by raising the overtime salary limit so significantly.

# New Overtime Rule

- What do we do now?
  - We wait for the final ruling, and any appeals that come after...
  - In the meantime, let's back up and look at the basics.

# Overtime 101

## The Fair Labor Standards Act of 1938

- Forty hour work week
- Federal minimum wage
- Time and a half for overtime
- Prohibited most employment of minors in “oppressive child labor”

# Overtime 101

- U.S. Department of Labor's Wage and Hour Division
  - Enforces the FLSA for state and local governments, among other employers.
  - Investigations
    - When a complaint is received
    - DOL selection



# Overtime 101

- **Classification of positions for overtime**
  - Exempt (Category 0) - Top level supervisory, managerial and administrative positions in very responsible professional, technical or consultative capacities who do not normally receive overtime.
  - Exempt (Category 1) – Other supervisory, professional, technical and related positions who earn state overtime (straight time for any hours physically worked over 40).
  - Non-exempt (Category 2) – all other employees who earn federal overtime (time & ½ for any hours physically worked over 40).

# Overtime 101

- **Three requirements for exemptions:**
  - **Salary basis test:** Employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed.
  - **Salary level test:** Earns more than \$455 per week/\$23,660 per year.
  - **Duties test:** Job duties must primarily involve executive, administrative or professional duties as defined by the regulations.

***Exempt employees must meet both salary and duties tests.***

# Overtime 101

- What do these exemptions mean?
  - **Executive exemption:** Must have a primary duty of managing the enterprise or a department or subdivision of the enterprise; must customarily and regularly direct the work of at least two employees; and must have the authority to hire or fire, or their suggestions and recommendations as to the hiring, firing or changing the status of other employees must be given particular weight.

# Overtime 101

- What do these exemptions mean?
  - **Administrative exemption:** Must have a primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, and their primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

# Overtime 101

- What do these exemptions mean?
  - **Professional exemption:** Must have a primary duty of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by prolonged, specialized, intellectual instruction and study, or must specialize in a few other similarly, highly specialized fields, such as teaching, computer analytics and engineering.

# Overtime 101

- Paid overtime vs. compensatory time
  - Most employers must pay their employees for overtime worked.
  - State and local governments are allowed an exemption to this – compensatory time.

# Overtime 101

- **Compensatory time**
  - An employee may “bank” overtime hours worked as compensatory or “comp” time, to be used as paid leave at a later time, as long as an agreement is in place to allow this.
  - The agreement must be in place prior to the working of the overtime to be “banked”.
  - An agreement can be a collective bargaining agreement, or any other agreement or understanding in place (e.g. a written policy).

# Overtime 101

- Compensatory time
  - Even if the new overtime rule is implemented, state and local governments can still utilize comp time in lieu of paid overtime, up to a maximum number of hours (generally 240).



# Overtime 101

- Beware
  - Cell phones, tablets, computers present opportunities for off the clock work.
  - Employers must set expectations with regard to working additional hours, especially concerning work on these devices.

# Overtime 101

- Penalties for Employers in Violation of the Act
  - Payment of back wages.
  - DOL may file a suit for back wages and an equal amount as liquidated damages.
  - Employee may file private suit for back pay, equal amount as liquidated damages, plus attorney's fees and court costs.
  - DOL may obtain an injunction to restrain an employer from violating the FLSA.

# Overtime 101

- Penalties for Employers cont.
  - 2 year statute of limitations applies to recovery of back pay, except when there is a willful violation.
  - If there is a willful violation, a 3 year statute of limitations applies.
  - Willful and/or repeated violations are subject to additional penalties for each violation.

# Overtime 101

- Penalties for Employers cont.
  - Willful violations may also result in criminal prosecution and the violator could receive a large fine.
  - A second such violation may result in imprisonment.

# Overtime 101

- Examples of Penalties
  - Minnesota sheetrock company president sentenced to two years in jail and potential fine of \$3.3 million for intentionally underpaying overtime and union pension and benefit contributions.
  - Illinois security company owner and officers fined over \$200,000 for violating overtime and record keeping provisions.

Remember: willful violations cause the most severe penalties.

# Overtime 101

Questions?

# Other Employment Law Issues

- “Ban the Box”
- Employment Rights for LGTB Married Couples
- Gender Pay Equity
- Paid Pregnancy Leave
- National Labor Relations Board

## “Ban the Box”

- This EEOC position is based on the premise that questions regarding criminal history results in a negative disparate impact on protected groups.
- Executive Order 16-04 – Requires Missouri Executive Agencies to refrain from inquiring about an applicant’s criminal background until later in the hiring process.



## “Ban the Box”

- **Several states have adopted “Ban the Box” rules including:**
  - California, Georgia, Maryland, Nebraska, New York, Rhode Island, Connecticut, Hawaii, Massachusetts, New Jersey, Ohio, Vermont, Delaware, Tennessee, Minnesota, New Mexico, Oregon, and Virginia.
  - Several municipalities have adopted similar rules (In Missouri - Kansas City, St. Louis & Columbia).

# Gender Pay Equity

- Governor's Executive Order 15-09 directs Missouri Executive Branch Agencies to identify and address any gender pay equity issues within their respective agency.
- The Women's Foundation from the University of Missouri Harry S Truman School of Public Affairs "Pay Equity Best Practices Guidelines".
- This order is limited in its coverage, but employers should be mindful.

# LGBT Employment Rights

- Lesbian, Gay, Bi-sexual, Transgender (LGBT) Employment Rights for Married Couples
  - *Obergefell v. Hodges* provides all states must issue marriage licenses to same sex couples and recognized validity of lawfully licensed same sex marriages.
  - Employee Benefits
  - Leave Protections –FMLA

# Pregnancy-Related Leave

- Paid parental leave gains momentum
- President-Elect Trump has indicated support

# National Labor Relations Board (NLRB)

- NLRB scrutinizes protected concerted activity in non-union shop employers.
- NLRB targets review of social media, confidentiality, professionalism, anti-harassment, trademark use, photography and video, and media contract policies.

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# Other Employment Law Issues

Questions?

# Hostile Work Environment

- When discriminatory or harassing conduct creates a work environment that would be intimidating, abusive, hostile, or offensive to reasonable people, or has the purpose or effect of unreasonably interfering with an individual's employment. Most instances of hostile work environment involve pervasive harassment that has a cumulative effect.

# Hostile Work Environment

- Key words in this definition are “discriminatory”, “harassing” “pervasive” and “cumulative”.
- “Discrimination” or “Unlawful Discrimination” as it relates to a hostile work environment - in the context of civil rights law, unlawful discrimination refers to unfair or unequal treatment of an individual (or group) based on certain characteristics.



# Hostile Work Environment

- Those characteristics include:
  - Age
  - Disability
  - Gender
  - National Origin
  - Race/Color
  - Religion
  - Sex
  - Color
  - Ancestry
  - Veteran's Status
  - Genetic Information
  - Pregnancy
  - Retaliation
  - Sexual Orientation

# Hostile Work Environment

- “Harassment” – Unwelcome conduct that is based on an individual’s membership in a protected category. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

# Hostile Work Environment

- “Pervasive” – Widespread or spreading through the whole of something and becoming a very obvious feature of it.
- “Cumulative” - increasing or growing by accumulation or successive additions.

# Hostile Work Environment

- What if the behavior does not meet the standard for Hostile Work Environment?
  - Uncomfortable
  - Abusive
  - Threatening

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# Hostile Work Environment

Questions?

# Interviewing 101

- Select applicants for interviews based on unbiased and defensible criteria.
- Develop questions that help you identify the best candidate.
- Develop expected responses to your questions.

# Interviewing 101

- Put your interview panel together (2-3 panel members recommended).
- Ask the same questions in each interview.
- Score the interviews.
- Check top candidate's references.

# Interviewing 101

Questions?



# Family and Medical Leave Act

- **FMLA-COVERED EMPLOYERS**
  - Public agency employers, including a local, state, or federal government agency, regardless of the number of employees it employs.

# Family and Medical Leave Act

- FMLA-Eligible Employees
  - Works for a covered employer
  - Has worked for the employer for at least 12 months (does not have to be consecutive).
  - Has physically worked at least 1250 hours during the 12 month period immediately preceding the leave.

# Family and Medical Leave Act

- Allows time off for serious health conditions.
- Protects employee's job.
- Provides for the maintenance of benefits.
- Guarantees reinstatement to the same or an equivalent position.

# Family and Medical Leave Act

- Leave Entitlement
  - Eligible employees may take up to **12 workweeks (or 480 hours)** of leave in a 12-month period for one or more of the following reasons:
    - The birth of a son or daughter or placement of a son or daughter with the employee for adoption or foster care;

# Family and Medical Leave Act

- Leave Entitlement (cont.)
  - To care for a spouse, child, or parent who has a serious health condition (Child = Under the age of 18 or 18 or over and “\***incapable of self-care** because of mental or physical disability” at the time FMLA leave commences);
  - For a serious health condition that renders the employee unable to perform the essential functions of his or her job; or
  - For any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status.

# Family and Medical Leave Act

- **Military Exigency**
  - An eligible employee may also take up to **26 workweeks** of leave during a "single 12-month period" to care for a covered service member with a serious injury or illness, when the employee is the spouse, son, daughter, parent, or next of kin of the service member. The "single 12-month period" for military caregiver leave is different from the 12-month period used for other FMLA leave reasons.

# Family and Medical Leave Act

- Medical Certification includes:
  - Healthcare provider contact information.
  - The starting date and expected duration.
  - Medical facts.
  - A statement of the need for time off.
  - Information on the ability to perform essential functions.

# Family and Medical Leave Act

- Medical Certification (cont.)
  - HR may contact the healthcare provider.
  - Privacy requirements must be met.
  - More information may be needed.
  - Department of Labor Forms.
  - In most cases, employees must return form within calendar 15 days.
  - Certification may be required for family military leave.



# Family and Medical Leave Act

- Notice Requirements
  - Employees must:
    - Give at least 30-days notice or, reasonable notice, where leave is foreseeable.
    - Give notice under employer's usual and customary notice requirements where leave is not foreseeable.
    - Give notice "as soon as possible" if the need for military leave is foreseeable.
    - Provide certification as required.

# Family and Medical Leave Act

- Notice Requirements
  - Employer must:
    - Provide Notice of Eligibility/Rights and Responsibilities (FMLA-1) within 5 business days of employee submitting application.

# Family and Medical Leave Act

- Records Requirements
  - Employer must:
    - Keep medical records confidential and separate from personnel files.
    - Retain records for at least three (3) years.

# Family and Medical Leave Act

- Prohibitions and Liabilities
  - Under FMLA, Employers may not:
    - Interfere with employee rights.
    - Retaliate against any employee.
    - Discriminate against or discharge employees who oppose unlawful practices.
    - Discharge an employee for filing charges.
  - Employer may be liable for damages if employees' FMLA rights are violated.
  - Supervisors could also be held personally liable.

# Family and Medical Leave Act

- Intermittent Leave
  - Permitted for serious health conditions.
  - May be assigned temporarily to an equivalent position.
  - Must designate if absence is FMLA related.

# Family and Medical Leave Act

- FMLA Abuse

- Supervisors should:

- Address suspected abuse.
- Look for patterns.
- Address situations where employee is using more sick leave than medically necessary.
- Ensure that FMLA qualifying leave is being coded as FMLA.
- Enforce Attendance policies.
- Document!

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# Family and Medical Leave Act

Questions?

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Jennifer Eddy

Human Resources Director

(573)751-2518

[jennifer.eddy@dnr.mo.gov](mailto:jennifer.eddy@dnr.mo.gov)