

Legal Update on Selected Employment Law Issues October 2015 – October 2016



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- It is not intended and it should not be construed or relied upon as legal advice.
- For specific information on recent developments, particular factual situations or the effect of a particular law, the opinion of qualified legal counsel should be sought.
- Consult with your own legal counsel before taking action or making changes.

Politics and HR



- First 100 Days
 - Repeal PPACA
 - Cancel “unconstitutional” E.O.s of Obama
 - Renegotiate NAFTA
 - Nominate SCOTUS justice “in the mold of Scalia”
 - Enhance UI to include 6 weeks paid maternity leave to mothers after childbirth
- Beyond
 - Provide tax-free dependent care savings accounts for children and elderly relatives
 - Expected to work to reverse new FLSA Rule in first 100 days; favors a small business exemption

EEOC



FINAL RULES: Wellness Programs (ADA and GINA Versions)

- Timing
 - Proposed Rules: 4/20/2015
 - Final Rules: 5/17/2016
 - Effective: First day of First Plan year beginning on/after 1/1/2017
- Summary: Meant to harmonize ADA and GINA wellness rules with ACA and HIPAA
 - Wellness Incentive Caps
 - Tobacco Cessation Caps
 - Wellness Program Notices
 - Model Notice (6/16/2016) <https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm>
 - GINA Rule does not allow wellness incentives if ee must provide current or past health information for ee's children, or specified genetic info of an ee, ee's spouse, and an ee's children
 - Reasonable Accommodations
 - Confidentiality
- ADA Rule Q&A
<https://www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm>
- GINA Rule Q&A
<https://www.eeoc.gov/laws/regulations/qanda-gina-wellness-final-rule.cfm>



FINAL RULE: Poster Penalties

- Timing
 - Final Rule: 6/1/2016
 - Effective: 7/1/2016
- From \$210 to \$525 per violation
- Annual adjustments of government penalties is now required by Federal Civil Penalties Inflation Adjustment Act of 2015
 - Limits increases to 150%
 - If not for this limit, the penalty would have been \$765



REPORTING CHANGES: EEO-1

- Timing
 - Proposed: 1/29/2016
 - Finalized: 7/14/2016
 - Sample Form Released: 9/29/2016
 - Effective: First Report due 3/31/2018
- Summary: Expands data reported on EEO-1 to help identify pay discrimination and promote equal pay
 - Applies to EEO-1 Employers with 100 or more ees
 - Report Aggregate W-2 Wages (Box 1) in 12 defined pay bands
 - Report Hours worked (can assume 40/wk for FT Exempts x number of weeks worked in EEO-1 reporting period; or provide actual)
 - Changes Reporting Period to 10/1 – 12/31
 - Changes Filing Deadline to March 31

https://www.eeoc.gov/employers/eeo1survey/2016_eeo-1_proposed_changes_qa.cfm

GUIDANCE: Retaliation

- Timing
 - Proposed: 1/21/2016
 - Finalized: 8/29/2016
- Summary: Update Retaliation Guidance
 - Replaces 1998 Compliance Manual section on Retaliation
 - Aggressive and expansive application of retaliation
 - Rejects the “manager rule” by protecting managers/ees who, as part of their job duties, report other ee’s complaints of discrimination
 - Keeps protections in place even when a charge is unreasonable, or filed in bad faith and with malicious intent

<https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm>

FACT SHEETS: HIV (2)

- Issued: 12/1/2015
- Living with HIV: Your Legal Rights in the Workplace under the ADA
 - https://www.eeoc.gov/eeoc/publications/hiv_individual.cfm
 - Rights: Privacy, Reasonable Accommodations, No Discrimination, No Harassment
 - Would allow ees to keep HIV diagnosis private, even when requesting reasonable accommodation
- Helping Patients with HIV Who Need Accommodations at Work
 - https://www.eeoc.gov/eeoc/publications/hiv_doctors.cfm
 - Suggests use of “immune disorder” rather than HIV if patient wants to keep it private



PROCEDURES: E Position Stmts

- Timing: Announced 2/22/2016; Applicable to charges filed after 1/1/2016
- Summary: To unify procedures across EEOC offices
 - Charging parties' initial formal complaint will be released to Es
 - E position statements and non-confidential attachments in response to the charge will be available to charging parties who request them during the investigation
 - Charging parties can respond to E's response within 20 days, but Es will not be able to get these responses during the investigation!
 - Es must identify and justify confidential information in a separate document
 - Sensitive medical information (not that of charging party)
 - SSNs
 - Confidential commercial or financial information
 - Trade secrets
 - Non-relevant personal identifying information of witnesses, comparators, or 3rd parties
 - References to charges filed against E by other charging parties
 - Put confidential information in separate, confidential attachments (e.g., SSNs, DOB in non-age cases, addresses, phone #, emails)

https://www.eeoc.gov/eeoc/newsroom/release/position_statement_procedures.cfm

RESOURCE DOCUMENT: Leave as ADA Reasonable Accommodation

- **Issued:** 5/9/2016
- **Summary:** “[R]equests for leave related to a disability can often fall under existing employer policies.... *That is not the end of an employer’s obligation under the ADA though. An employer must consider providing unpaid leave . . .*”
 - Even if E does not offer leave as a benefit
 - Even if ee is not eligible for leave under E’s policies
 - Even if ee has exhausted available leaves
- All requests for leave must be treated as requests for R.A
- E can ask: Reasons for leave; Block or intermittent; When need for leave will end; other R.A.s
- E needs ee’s permission to contact HCP to confirm or elaborate on a med cert
- Cannot require periodic updates from ee if there is a fixed RTW date
- Disabled ees cannot be penalized R.A. leaves
- 100% healed for RTW is presumed unlawful
- Automatic termination provisions for exhausting leave are presumed unlawful
- Reassignment to vacation position, without competing with others, is an R.A.



RESOURCE DOCUMENT: Leave as ADA Reasonable Accommodation

- Undue Hardship Considerations
 - Amount/length of leave required
 - Frequency of leave
 - Flexibility in days needed for leave
 - Predictability of leave needed
 - Impact on co-workers and the appropriate and timely manner of duty completion
 - Impact on E operations and ability to serve customers appropriately and timely (including size of E)
 - Amount of leave already taken
 - Indefinite leave is an undue hardship
- Right to leave includes right to reinstatement

<https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>



POSITION: Title VII Covers Sexual Orientation and Gender Identity

- Announced: 12/2012
- DOJ Opinion: 12/15/2014
- Agency Decisions: incl. 7/16/2015
- Settlement of first EEOC case: 6/23/2016
 - Harassment of lesbian female forklift driver by night shift manager
 - 1 hr EEO/Harassment training for managers & HR
 - Hire SME to develop LGBT training module that E & EEOC can use
 - LGBT training for all employees



TASK FORCE STUDY: Harassment

- Released: 6/20/2016
- Attack on Harassment Training
 - No data shows that 30 years of Harassment Training has had any effect
 - Recommendation: Holistic Approach
 - Trainings endorsed and supported by senior management
 - Live/in-person training
 - Interactive training
 - Customized to the workplace
 - Workplace civility training – Wait for NLRB/EEOC ‘agreement’
 - Bystander intervention training
 - Create a culture of respect and civility
 - Swift, consistent, proportionate sanctions
 - Comprehensive policies (*not* zero-tolerance)
 - Robust complaint procedures



TASK FORCE STUDY: Harassment

12 Workplace Harassment Risk Factors

1. Homogenous workforce (lack of diversity)
2. Some workers do not conform to workplace norms
3. Cultural/language differences
4. Coarse social discourse outside the workplace
5. Lots of young workers
6. Presence of high-value ees
7. Significant power disparities
8. Business relies on customer service/client satisfaction
9. Work is monotonous with low intensity tasks
10. Isolated work spaces
11. Culture tolerates/encourages alcohol consumption
12. Decentralized workplaces

https://www.eeoc.gov/eeoc/task_force/harassment/

2017 Focus

- Contingent work arrangements, including gig work
- Joint employer liability
- Data-driven selection tools
- Discrimination against Muslims, Sikhs, and of Arab, Middle Eastern or South Asian descent

EEOC & ICRC Charges Filed-FY 2015

		EEOC	ICRC	
Retaliation	1	44.5%	20%	1
Race	2	34.7%	15%	3
Disability	3	30.2%	19%	2
Sex (and Pregnancy)	4	29.5%	15%	3
Age	5	22.5%	10%	5
National Origin	6	10.6%	6%	7
Religion (and Creed)	7	3.9%	2%	8
Color	8	3.2%	7%	6
Equal Pay	9	1.1%	Not tracked	
GINA	10	0.3%	N/A	
Sexual Orientation		N/A	2%	8
Gender Identity		w/in Sex	2%	8



EEOC FY 2015 Statistics

Note: Column
not intended
to add to 100%

Employment Decision Listed in Charge	Percent
Discharge	94.5%
Harassment	56.2%
Terms & Conditions	44.1%
Discipline	20%
Reasonable Accommodations	16.8%
Promotion	10.7%
Constructive Discharge	10.7%
Wages	10.3%
Hiring	9.7%
Assignment	8%
Suspension	7.1%
Demotion	5.2%
Lay Off	2.6%



EEOC FY 2015 Statistics

Note: Column
not intended
to add to 100%

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Demotion	5.2%
Lay Off	2.6%



EEOC FY 2015 Statistics

- 174 New Lawsuits Filed By EEOC
 - Slight increase over 2014
- 171 Lawsuits Resolved
 - Second lowest in 19 yrs
- \$65.3 Million Recovered
 - Significant increase from 2014



Federal Contractors & Subcontractors



FINAL RULE: Minimum Wage

- Issued: 10/7/2014; Effective: 12/6/2014
- E.O. 13658 (2/12/2014)
- Summary:
 - **Rate is annually indexed for inflation**, beginning 1/1/2016
 - Applies to workers working directly on federal government contracts awarded, renewed, modified, or resulting from solicitations issued on or after 1/1/2015 AND covered by FLSA and contracts must be issued under:
 - Davis-Bacon Act
 - Service Contract Act
 - Contract for Concessions
 - Contracts in connection with federal property or lands offering services to federal employees or the general public
 - Applies to work done in connection with covered contracts if $\geq 20\%$ of the ee's weekly hours (must keep records to prove/disprove)
 - Provision in contracts (can be explicit or incorporated by reference to EO 13658), and if not, subcontractor may be entitled to contract adjustment from upper tier contractor to cover the additional costs
 - Keep records on each worker's occupation and total wages paid
 - **Poster requirement – New Each Year with New Min. Wage Rate**



ANNOUNCEMENT: 1/1/ 2017 Minimum Wage Rate

\$10.20/hour

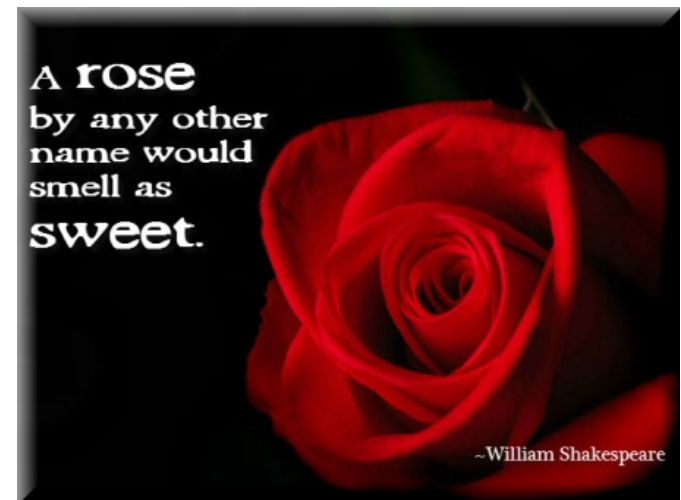
FINAL RULE: Updated Sex Discrimination Regulations

- Timing
 - Issued: 1/28/2015 (applies to E.O. 11246)
 - Finalized: 6/15/2016
 - Effective: 8/15/2016
 - Summary
 - Specifically prohibits harassment
 - Specifically prohibits sex stereotyping (overlaps with 2015 Final Rule on Sexual Orientation and Gender Identity protections)
 - Requires single-user or same-sex facilities if you provide restrooms, changing rooms or showers on premises
 - Requires allowing transgender persons to use facility of gender w/ which they identify
 - Adds pregnancy protections (broadly defined to include childbearing capacity and lactation; includes R.A. requirement that may exceed Young)
 - Recognizes disparate impact claims, specifically calling out reliance on word-of-mouth recruiting and tap-the-shoulder promoting
 - Allows comparisons of pay between “similarly situated” jobs (broadly defined)
- <https://www.gpo.gov/fdsys/pkg/FR-2016-06-15/pdf/2016-13806.pdf>



FINAL RULE: Updated Sex Discrimination Regulations

- Factors for What Jobs are “Similarly Situated”
 - Tasks performed
 - Skills needed
 - Effort required
 - Level of responsibility
 - Working conditions
 - Job difficulty
 - Minimum Qualifications
- Not all factors are listed
- Not all factors must be met
- Case-by-case approach
- DOL denies a “comparable worth” approach & claims this is consistent with Title VII



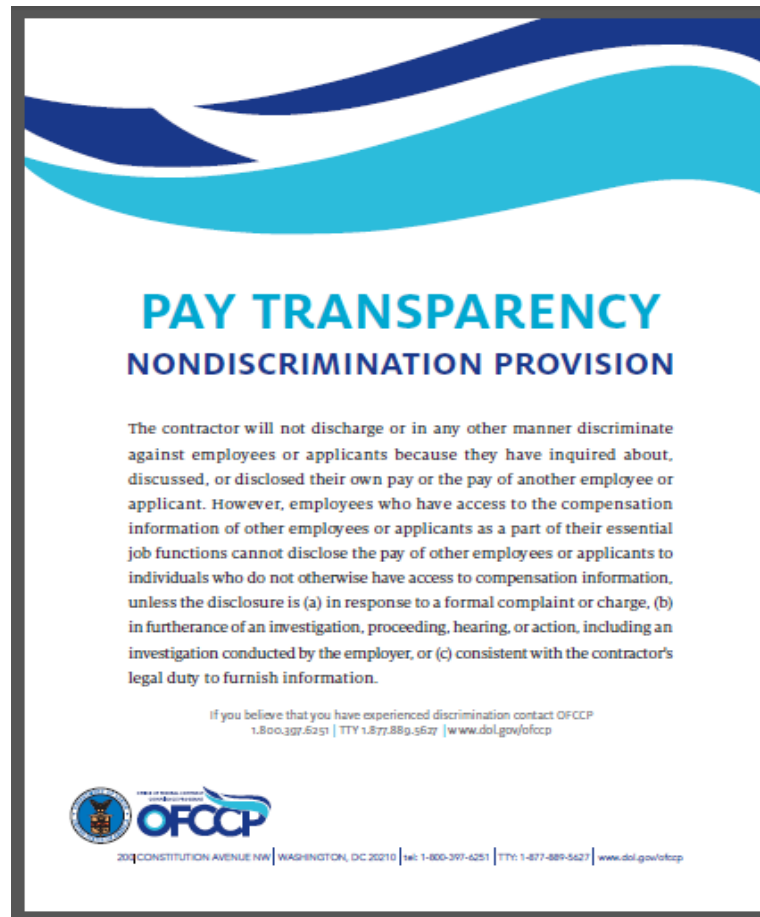
FINAL RULE: Compensation Disclosures

- Timing
 - E.O. 13665: 4/8/2014 [Non-Retaliation for Disclosure of Compensation Info; amends E.O. 11246]
 - Issued: 9/11/2015
 - Effective: 1/11/2016
- Summary
 - Makes unlawful policies, written or unwritten, that prohibit or restrict ees or applicants from inquiring, discussing or disclosing their comp or the comp of others (e.g., hrly rates, salary, OT, shift diff, bonuses, commissions, vacation pay, benefits)
 - Requires handbook **policy** of non-discrimination for inquiring, discussing, or disclosing comp info, and distribute it to ees & applicants
 - Requires provision in contracts and subcontracts
 - Requires written notice to each union with a CBA
 - Requires a **Poster**
 - Defenses: General Defense & Essential Job Function Defense

<https://www.gpo.gov/fdsys/pkg/FR-2015-09-11/pdf/2015-22547.pdf>




FINAL RULE: Compensation Disclosures



**PAY TRANSPARENCY
NONDISCRIMINATION PROVISION**

The contractor will not discharge or in any other manner discriminate against employees or applicants because they have inquired about, discussed, or disclosed their own pay or the pay of another employee or applicant. However, employees who have access to the compensation information of other employees or applicants as a part of their essential job functions cannot disclose the pay of other employees or applicants to individuals who do not otherwise have access to compensation information, unless the disclosure is (a) in response to a formal complaint or charge, (b) in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or (c) consistent with the contractor's legal duty to furnish information.

If you believe that you have experienced discrimination contact OFCCP
1.800.357.6251 | TTY 1.877.889.5627 | www.dol.gov/ofccp



200 CONSTITUTION AVENUE NW | WASHINGTON, DC 20210 | tel: 1-800-357-6251 | TTY: 1-877-889-5627 | www.dol.gov/ofccp

<https://www.dol.gov/ofccp/PayTransparencyNondiscrimination.html>



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FINAL RULE: E.O. 13673

- Timing
 - E.O. 13673: 7/31/2014 [**Fair Pay and Safe Workplaces**]
 - Proposed Rule: 5/28/2015
 - Final Rule: 8/25/2016
 - Effective: 10/25/2016
 - PARTIAL STAY: 10/24/2016
- Summary
 - Three Parts
 1. Required disclosures to employees and independent contractors regarding of hours and pay-related information (pay transparency)
 2. Required disclosures of LEL violations (blacklisting)
 3. Prohibits pre-dispute arbitration agreements for claims under Title VII or torts related to sexual harassment or sexual assault
 - DOL Rule Interfaces with FAR Rule

<https://www.dol.gov/asp/fairpayandsafeworkplaces/>



FINAL RULE: (1) Pay Transparency

- Effective: 1/1/2017 [delayed from 10/25/2016, as proposed]
 - Summary
 - Applies to contractors performing or bidding on covered contracts or subcontracts above \$500K (unless providing commercially available, off the shelf products)
 - 1. Each pay period, provide wage stmt document w/ weekly break down of
 - Hours worked each week (unless exempt)
 - OT hours worked each week (unless exempt)
 - Rate(s) of pay
 - Gross pay
 - Itemized additions and deductions from Pay
 - Anything else req'd by state laws equivalent to FLSA, D-BA, SCA
 - If complying with AK, CA, CT, DC, HI, NY, OR state laws, then this is fulfilled
 - 2. Exempts get written notice of Exempt status to avoid reporting hours worked on the weekly wage stmt document; provided once before work begins and for each contract on which s/he is working, and any time Exempt status changes
 - 3. Independent Contractors get written notice of IC status; provided once before work begins and for each contract on which s/he is working; notice must be separate from any IC agreement.
- Notices can be electronic if if worker can access it on a device, system, or network made available by the contracting company/employer (not a mere



FINAL RULE: (2) Blacklisting

- Applies on graduated scale
 - 10/25/2016 for Prime contracts at & above \$50 million; reporting period starts at 1 yr and gradually increases to 3 yrs
 - 4/25/2014 for Prime contracts at & above \$500K
 - 10/25/2017 for Subcontracts at & above \$500K re: contracts entered into after 10/25/2017
- Must disclose Reportable “Serious Labor Law Violations” committed in 3 years before bidding on a contract—even if violation is challenged or subject to appeal
 - Domestic administrative agency merits determinations
 - Domestic arbitration Awards or decisions
 - Domestic civil Judgments
- 14 Federal Laws Plus Equivalent State Laws
 - FLSA (e.g., WH-56 unpaid wages, letter finding violations, WH-103 child labor)
 - Davis-Bacon, Service Contract Act, SCAWPA
 - OSHA and OSHA-approved State Plans (WH-561 citations)
 - NLRA (complaint issued by NLRB Regional Director)
 - Davis-Bacon and Service Contract Act
 - VEVRAA and Rehab Acts
 - FMLA
 - AA laws and E.O.s (show cause notice from OFCCP)
 - Title VII, ADA, ADEA (reasonable cause letter; action filed by EEOC)
 - E.O. 13658 (minimum wage for contractors)



FINAL RULE: (2) Blacklisting

- Reporting
 - When: Initial bid proposal (Yes or No only); pre-award responsibility determination (with detail); semi-annual post-award updates (with detail)
 - What: Law violated; case number; date; agency/court rendering decision; mitigating information (opt)
 - Who: Prime contractors and subs must collect, review, and report same to DOL (website)
 - How: Reported electronically on website
- If “serious, repeated, willful and/or pervasive violations,” (SRWP) can be recommended for disqualification (by a Agency Labor Compliance Advisor to Contracting Officer making decisions)
- Beginning 9/12/2016, contractors may request a “voluntary” assessment of their record of labor law compliance
 - Pre-assessments can be submitted with bid responses
 - This is not intended to be publicly-available information



FINAL RULE: (3) Arbitration Limits

- Effective: 10/25/2016
- Summary
 - Prohibits pre-dispute arbitration agreements for
 - Title VII claims
 - Tort claims arising from sexual assault or harassment
 - Allows post-dispute arbitration agreements for any claim
 - Applies to
 - Es with contracts and subcontracts valued above \$1 million (unless providing commercially available, off the shelf products)
 - All eses and ICs of the contractor or subcontractor—not just those working on the federal government contract
 - Pre-dispute arbitration agreements entered into or modified after 10/25/2017
 - Does not apply to employees covered by CBAs



FINAL RULE: Paid Sick Leave

- Timing
 - E.O. 13706: 9/7/2015
 - Proposed Rule: 2/24/2016
 - Final Rule: 9/30/2016
 - Effective: for solicitations issued after 1/1/2017 for new or replacement contracts
- Summary
 - Applies to covered contractors with at least 15 ees
 - Eligible ees: works on covered contracts with wages governed by FLSA, DBA, or SCA, both Exempt and Non-Exempt, unless less than 20% of weekly hours are on covered contracts
 - Entitlement
 - 1 hour paid sick leave for every 30 hours work on or connected to a covered contract
 - May limit accrual and may cap SL banks at 7 days or 56 hours per year
 - Leave either accrues or is front-loaded on 1/1 (E choice)
 - Must allow ees to carry over up to 56 hours into new leave year
 - Unused SL does not have to be paid at termination
 - Must reinstate lost SL if break in service is less than 12 months (unless SL bank was paid out)
 - Penalty – Payment of contract is conditioned on providing paid sick leave (and must include that provision in contracts)



FINAL RULE: Paid Sick Leave

- PTO
 - If E has PTO, can limit amount of PTO used for sick leave to 56 hours
 - If E has PTO, can limit amount of carry-over PTO to 56 hours
 - If ee uses all PTO for vacation, does not get another 56 hours for paid sick leave
- Use – in increments as small as 1 hour
 - Self: own illness and HCP appts
 - Family member: care for ill child, parent, spouse, domestic partner, or other related by blood or affinity w/ close association equal to family
 - Domestic violence, sexual assault, or stalking of Self or Family: illness, HCP appts, counseling, seek relocation, seek victim svcs, take legal action, or assist in same
 - Limit on one-incident SL use cannot be less than 7 days/56 hours
 - Requests made 7 calendar days in advance, when leave is foreseeable, or as soon as practicable
- Certification – if leave of at least 3 full consecutive days
 - Can require Med Cert for medical leaves; by HCP treating the ee or ee's family member
 - Can require Cert for domestic violence leaves; by HCP, counselor, victim svcs org, atty, clergy, family, or close friend—Cannot disclose these w/o ee consent
 - Use FMLA-type certs
- Denials in writing with reason for denial—but not for 'operational needs'
- Cannot require ee to find own replacement



ANNOUNCEMENT: Vets Benchmark

- Issued: 3/4/2016
- Summary
 - New VEVRAA Benchmark for AAP goal setting reduced to **6.9%** (nationwide)
 - If CY AAPs, applicable for CY 2017 AAPs



(Other) Department of Labor



UNITED STATES
DEPARTMENT OF LABOR



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FINAL RULE: Minimum Salary for EAP and HCE Exemptions

- Timing
 - Proposed: 7/6/2015
 - Finalized: 5/18/2016
 - Effective: 12/1/2016
- Summary: Raises Minimum Salary for Most of the FLSA White Collar Exemptions

#1 Change – NEW Salary Level

- Increase EAP min. salary level to **40th** percentile of FT salaried workers in the lowest-wage Census region (Southern) in 4th Qtr 2015
- Increase HCE min. total comp to **90th** percentile of all FT salaried workers, nationwide, in 4th Qtr 2015

	CURRENT	AS OF 12-1-2016	DOLLAR DIFF	% DIFF
EAP	\$455/wk \$23,660/yr	\$913/wk \$47,476/yr	+\$458/wk +\$23,816/yr	100.7%
HCE	\$100,000/yr	\$134,004/yr	+\$34,004	34%

#2 Change – Non-Discretionary Pay Can Count

Up to 10% of **non-discretionary** bonuses, incentive pay and/or commissions can count toward the minimum Salary Level

- Paid at least **quarterly**
- If short, **catch-up** payments due by the 1st pay period after qtr end to stay EX in the *previous* qtr



How It Works

	90% Fixed Salary (Minimum)	10% (Bonus) Variable Pay (Maximum)	Total
Min. Per Wk	\$821.70	\$91.30	\$913
Min. Per Qtr	\$10,682.40	\$1,186.90	\$11,869
Min. Annualized	\$42,728.40	\$4,747.60	\$47,476

- Even poor performers must get the Bonus
- If past Bonuses have not been at least \$4,747.60 per yr, this may not work
- If Bonus plans don't pay out at least quarterly, this will not work (unless the plan is changed)

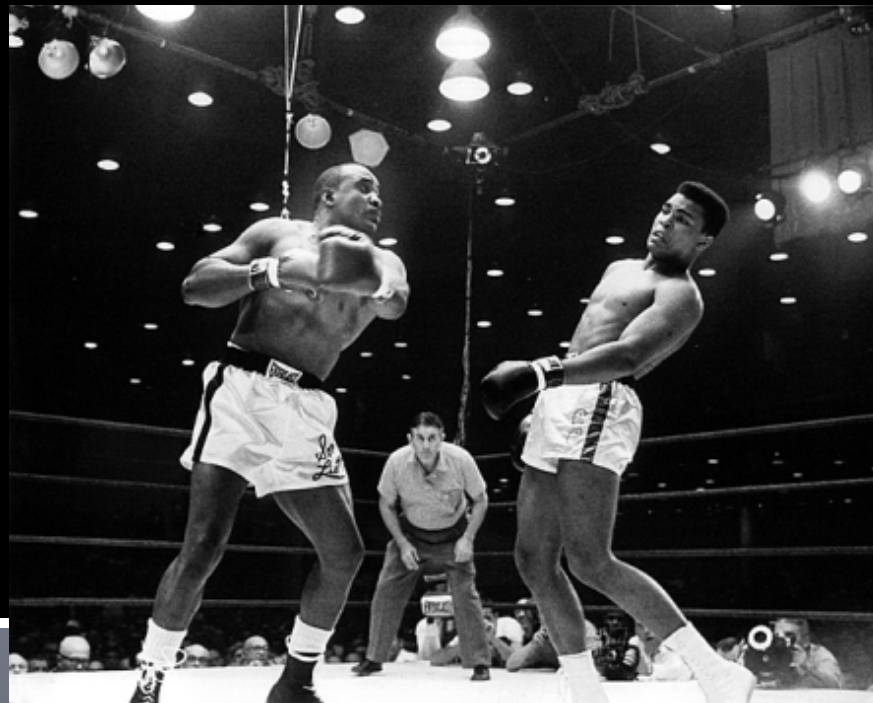


#3 Change – Automatic Index to Salary Level

- Indexed to the applicable Percentile of FT Salaried Workers
 - EAP = 40th percentile of lowest-wage Census region
 - HCE = 90th percentile nationwide
- Triennially [1/1/2020 & every 3 yrs thereafter]
- At least 150 days advance notice
- Based on 2nd Qtr #s from BLS
 - DOL estimate for 2020 = \$984/week; \$51,168/year



Duties Test Untouched



...for now



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Legislation



- Protecting Workplace Advancement & Opportunity Act
- Congressional Review Act
- Overtime Reform and Enhancement Act/Overtime Reform and Review Act
- FY 2017 Appropriations Bill for DOL
- Regulatory Relief for Small Business, Schools & Non-Profits
- Small Business Survival from Disaster Act

Litigation



- Nevada, et. al. v. DOL
 - Filed 9/20/2016 by 21 states with Republican Governors, including Iowa
- Plano Chamber of Commerce, et. al. v. DOL
 - Filed 9/20/16 by Nat'l Federal of Independent Businesses, Nat'l Retail Federation, etc.
- Filed in E.D. Texas; Cases now consolidated
- Emergency motion to stay (or delay effective date to 6/1/17) filed, but not yet decided



Politics



- President-Elect
 - Expected to work to reverse e in first 100 days
 - Favors a small business exemption; business groups didn't jumping on board yet because "there is no meat on the bones"
- Republicans
 - Not specifically addressed in Party Platform

ADMINISTRATOR'S INTERP.:

Joint Employment

- Issued: 1/20/2016
- Summary
 - Horizontal Joint Employment
 - ee works for 2 or more entities that are technically separate, but related & overlapping Es
 - EE's work for 1 entity simultaneously benefits the other(s)
 - Focus is on the relationship between the Es
 - Vertical Joint Employment
 - E contracts or arranges with an intermediary E to provide the intermediary E with labor or to perform some of its E functions (e.g., hiring, P/R)
 - ee of intermediary E is also economically dependent on the potential joint E
 - Focus is on the ee's relationship to the entities
 - Result
 - Hours of ee's work for all joint entities are aggregated to determine OT
 - Es are jointly and severally liable for compliance, including wages due
 - Follows *Browning-Ferris Industries* (NLRB, Aug. 27, 2015)
 - Accompaniments: Q&A; Fact Sheet 28N (FMLA); Revised Fact Sheet 35 (FLSA/MSAWPA)

https://www.dol.gov/whd/flsa/Joint_Employment_AI.htm



GUIDE: FMLA Employer Guide

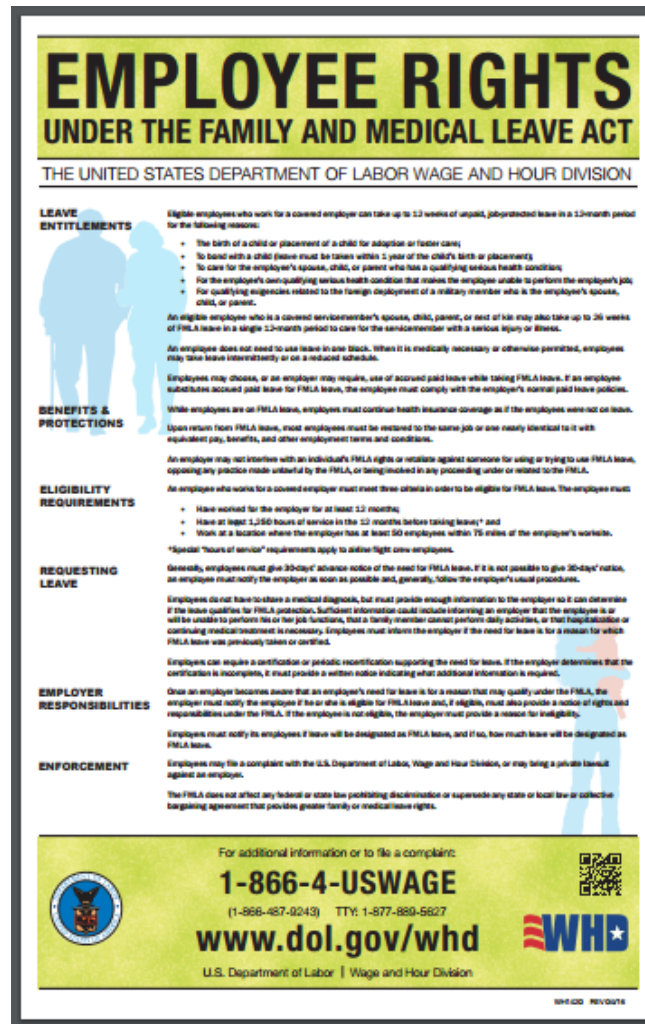
- Issued: 4/26/2016
- Summary: A 'companion' to the Employee Guide the DOL issued in 2012
 - 75 pages
 - Includes easy-to-follow flow charts and cartoons!
 - "Did You Know?" callouts on lesser-known Regs
 - Hyperlinks to applicable sections of Regs and pages on DOL website
 - Explains med cert process

<https://www.dol.gov/whd/fmla/employerguide.pdf>



Updated FMLA Poster

Issued:
4/26/2016



EMPLOYEE RIGHTS UNDER THE FAMILY AND MEDICAL LEAVE ACT
THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

LEAVE ENTITLEMENTS

Eligible employees who work for a covered employer can take up to 12 weeks of unpaid, job-protected leave in a 12-month period for the following reasons:

- The birth of a child or placement of a child for adoption or foster care;
- To bond with a child (leave must be taken within 1 year of the child's birth or placement);
- To care for the employer's spouse, child, or parent who has a qualifying serious health condition;
- For the employer's own qualifying serious health condition that makes the employee unable to perform the employer's job;
- For qualifying exigencies related to the foreign deployment of a military member who is the employer's spouse, child, or parent.

An eligible employee who is a covered servicemember's spouse, child, parent, or next of kin may also take up to 26 weeks of FMLA leave in a single 12-month period to care for the servicemember with a serious injury or illness.

An employee does not need to use leave in one block. When it is medically necessary or otherwise permitted, employees may take leave intermittently or on a reduced schedule.

Employees may choose, or an employer may require, use of accrued paid leave while taking FMLA leave. If an employee substitutes accrued paid leave for FMLA leave, the employee must comply with the employer's normal paid leave policies.

While employees are on FMLA leave, employers must continue health insurance coverage as if the employees were not on leave.

Upon return from FMLA leave, most employees must be restored to the same job or one nearly identical to it with equivalent pay, benefits, and other employment terms and conditions.

An employer may not interfere with an individual's FMLA rights or retaliate against someone for using or trying to use FMLA leave, opposing any practice made unlawful by the FMLA, or being engaged in any proceeding under or related to the FMLA.

An employer who works for a covered employer must meet three criteria in order to be eligible for FMLA leave. The employee must:

- Have worked for the employer for at least 12 months;
- Have at least 1,250 hours of service in the 12 months before taking leave;* and
- Work at a location where the employer has at least 50 employees within 75 miles of the employer's worksite.

*Special "hours of service" requirements apply to airline flight crew employees.

Generally, employees must give 30-day* advance notice of the need for FMLA leave. If it is not possible to give 30-day* notice, an employee must notify the employer as soon as possible and, generally, follow the employer's usual procedure.

Employees do not have to obtain a medical diagnosis, but must provide enough information to the employer so it can determine if the leave qualifies for FMLA protection. Sufficient information could include informing an employer that the employee is or will be unable to perform his or her job functions, that a family member cannot perform daily activities, or that hospitalization or continuing medical treatment is necessary. Employees must inform the employer if the need for leave is for a reason for which FMLA leave was previously taken or certified.

Employees can require a certification or periodic recertification supporting the need for leave. If the employer determines that the certification is incomplete, it must provide a written notice indicating what additional information is required.

Once an employer becomes aware that an employee's need for leave is for a reason that may qualify under the FMLA, the employer must notify the employee if he or she is eligible for FMLA leave and, if eligible, must also provide a notice of rights and responsibilities under the FMLA. If the employee is not eligible, the employer must provide a reason for ineligibility.

Employers must notify its employees if leave will be designated as FMLA leave, and if so, how much leave will be designated as FMLA leave.

Employees may file a complaint with the U.S. Department of Labor, Wage and Hour Division, or may bring a private lawsuit against an employer.




The FMLA does not affect any federal or state law prohibiting discrimination or supersede any state or local law or collective bargaining agreement that provides greater family or medical leave rights.

For additional information or to file a complaint:

1-866-4-USWAGE
(1-866-487-9243) TTY: 1-877-889-6627

www.dol.gov/whd

U.S. Department of Labor | Wage and Hour Division



816100 REV0476



New FLSA Poster

Issued:
7/27/2016

Effective:
8/1/2016



EMPLOYEE RIGHTS
UNDER THE FAIR LABOR STANDARDS ACT

FEDERAL MINIMUM WAGE
\$7.25 PER HOUR
BEGINNING JULY 24, 2009

The law requires employers to display this poster where employees can readily see it.

OVERTIME PAY At least 1½ times the regular rate of pay for all hours worked over 40 in a workweek.

CHILD LABOR An employee must be at least 16 years old to work in most non-farm jobs and at least 18 to work in non-farm jobs declared hazardous by the Secretary of Labor. Youths 14 and 15 years old may work outside school hours in various non-manufacturing, non-mining, non-hazardous jobs with certain work-hour restrictions. Different rules apply in agricultural employment.

TIP CREDIT Employers of "tipped employees" who meet certain conditions may claim a partial wage credit toward tips received by their employees. Employers must pay tipped employees a cash wage of at least \$2.13 per hour if they claim a tip credit against their minimum wage obligation. If an employee's tips combined with the employer's cash wage of at least \$2.13 per hour do not equal the minimum hourly wage, the employer must make up the difference.

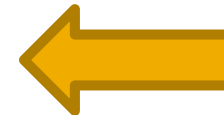
NURSING MOTHERS The FLSA requires employers to provide reasonable break time for a nursing mother employee who is subject to the FLSA's overtime requirements in order for the employee to express breast milk for her nursing child for one year after the child's birth each time such employee has a need to express breast milk. Employers are also required to provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by the employee to express breast milk.

ENFORCEMENT The Department has authority to recover back wages and an equal amount in liquidated damages in instances of minimum wage, overtime, and other violations. The Department may initiate and recommend criminal prosecution. Employers may be assessed civil money penalties for each willful or repeated violation of the minimum wage or overtime pay provisions of the law. Civil money penalties may also be assessed for violations of the FLSA's child labor provisions. Negligent civil money penalties may be assessed for each child labor violation that results in the death or serious injury of any minor employee, and such assessments may be doubled when the violations are determined to be willful or repeated. The law also prohibits retaliating against or discharging workers who file a complaint or participate in any proceeding under the FLSA.

ADDITIONAL INFORMATION

- Certain occupations and establishments are exempt from the minimum wage, and/or overtime pay provisions.
- Special provisions apply to workers in American Samoa, the Commonwealth of the Northern Mariana Islands, and the Commonwealth of Puerto Rico.
- Some state laws provide greater employee protections; employers must comply with both.
- Some employers incorrectly classify workers as "independent contractors" when they are actually employees. Under the FLSA, it is important to know the difference between the two because employees (unless exempt) are entitled to the FLSA's minimum wage and overtime pay protections and correctly classified independent contractors are not.
- Certain full-time students, student learners, apprentices, and workers with disabilities may be paid less than the minimum wage under special certificates issued by the Department of Labor.

 **DOL** WAGE AND HOUR DIVISION UNITED STATES DEPARTMENT OF LABOR
1-800-457-6890
TTY: 1-877-684-6827
www.dol.gov/flsa



DICKINSONLAW

New EPPA Poster

Issued:
7/27/2016

Effective:
8/1/2016



EMPLOYEE RIGHTS
EMPLOYEE POLYGRAPH PROTECTION ACT

The Employee Polygraph Protection Act prohibits most private employers from using lie detector tests either for pre-employment screening or during the course of employment.

PROHIBITIONS Employees are generally prohibited from requiring or requesting any employee or job applicant to take a lie detector test, and from discharging, disciplining, or discriminating against an employee or prospective employee for refusing to take a test or for exercising other rights under the Act.

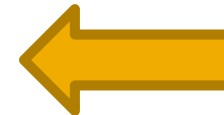
EXEMPTIONS Federal, State and local governments are not affected by the law. Also, the law does not apply to tests given by the Federal Government to certain private individuals engaged in national security-related activities. The Act permits polygraph (a kind of lie detector) tests to be administered in the private sector, subject to restrictions, to certain prospective employees of security service firms (armored car, alarm, and guard), and of pharmaceutical manufacturers, distributors and dispensers. The Act also permits polygraph testing, subject to restrictions, of certain employees of private firms who are reasonably suspected of involvement in a workplace incident (theft, embezzlement, etc.) that resulted in economic loss to the employer. The law does not preempt any provision of any State or local law or any collective bargaining agreement which is more restrictive with respect to lie detector tests.

EXAMINEE RIGHTS Where polygraph tests are permitted, they are subject to numerous strict standards concerning the conduct and length of the test. Examinees have a number of specific rights, including the right to a written notice before testing, the right to refuse or discontinue a test, and the right not to have test results disclosed to unauthorized persons.

ENFORCEMENT The Secretary of Labor may bring court actions to restrain violators and assess civil penalties against violators. Employees or job applicants may also bring their own court actions.

THE LAW REQUIRES EMPLOYERS TO DISPLAY THIS POSTER WHERE EMPLOYEES AND JOB APPLICANTS CAN READILY SEE IT.

 **DOL** **WHD** WAGE AND HOUR DIVISION UNITED STATES DEPARTMENT OF LABOR 1-866-484-9000 TTY: 1-877-889-5627 www.dol.gov 



FINAL RULE: Persuader Rule

- Timing
 - Proposed: 6/21/2011
 - Finalized: 3/24/2016
 - Effective: 4/25/2016 for arrangements made after 7/1/2016
 - Stayed: 6/27/2016 (N.D. Texas)
- Summary
 - Significantly narrowed the “advice” exemption from the Labor-Management Reporting & Disclosure Act
 - Required Es and their hired consultants (incl. attorneys) to report to the DOL the scope and cost of arrangements where consultants’ work persuaded ees about unionization—even if work is indirectly with ees

<https://www.dol.gov/olms/regs/compliance/ecr.htm>



Miscellaneous Federal Updates

Stronger Together?

Worker.gov



FINAL RULE: New Smart I-9



U.S. Citizenship and
Immigration Services

■ Timing

- Proposed: 11/15/2015
- Re-Proposed: 3/28/2016
- Approved by OMB: 8/25/2016
- Finalized: ??
- Effective: 1/21/2017 (until then, the form that says it expires on 3/31/2016 is still good)

■ Summary

- Expanded Instructions (up to 15 pages)
- Fillable Form option
 - Drop-down menus (e.g., Lists A, B & C)
 - Help buttons
 - Field Checks
 - Error messages and Warnings



New Year-End Report Filing Deadline



- Applies to W-2 and 1099-Misc
- Deadline for filing SSA copy now 1/31 for all filing methods—same as deadline to get copies to ees/ICs
- Deadline was 2/28 if paper filing and 3/31 if electronically filed
- Part of Protecting Americans from Tax Hikes Act (PATH) (passed 12/2015)
- Intended to prevent refund fraud
- Many states mimic the new filing deadline



PROPOSED RULE: Immigration & Nationality Act Enforcement



- **Timing**
 - Proposed: 8/15/2016
- **Summary**
 - Revises regulations re: unfair immigration-related employment practices
 - Expands prohibitions on discrimination based on national origin and citizenship beyond I-9 process to the E-Verify process
 - Replaces “documentation abuses” with “unfair documentary practices”
 - Signals that intent to harm does not have to be shown for Es to face liability, only intent to treat someone differently
 - Changes OSC’s name to “Immigrant and Employee Rights Section”



Defend Trade Secrets Act

- **Enacted: 5/11/2016**
- **Summary**
 - **Offers standardized federal option to state mash-ups of the UTSA**
 - **Expands Economic Espionage Act of 1996 to further protect U.S. business information as long as it is used in interstate commerce**
 - **Key Provisions**
 - **Provides private right of action in federal court**
 - **Allows ex parte actions to seize trade secrets**
 - **Provides injunctive relief, compensatory damages for actual loss or a reasonable royalty, attorneys' fees and exemplary damages for willful & malicious misappropriation**
 - **Protects whistleblowers who need to disclose trade secrets**
 - **3 year statute of limitations**



Defend Trade Secrets Act

Notice for Contracts entered into after 5/11/2016 (without it you waive right to exemplary damages and attorneys' fees):

Employee shall not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that is made in confidence to a federal, state, or local government official or to an attorney solely for the purpose of reporting or investigating a suspected violation of law. Employee shall not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal. If Employee files a lawsuit for retaliation by Company for reporting a suspected violation of law, Employee may disclose the trade secret to his attorney and may use the trade secret information in the court proceeding, as long Employee files any document containing the trade secret under seal and does not disclose the trade secret, except pursuant to court order.



Dodd-Frank Act: Rule 21F-17

Non-waiveable Whistleblower protection to add to separation agreements and settlements, as well as confidentiality and non-disclosure agreements

Notwithstanding anything to the contrary in this Agreement, Employee may communicate directly with the Securities and Exchange Commission regarding possible securities law violations, including sharing Confidential Information relevant to such concerns.

Local Minimum Wage Laws in Iowa

- **Johnson County (9/2015)**
 - **Increase Schedule**
 - 11/1/2015 = \$8.20/hour
 - 5/1/2016 = \$9.15/hour
 - 1/1/2017 = \$10.10/hour
 - 7/1/2018 and 7/1 thereafter = indexed to CPI
 - **Enforcement**
 - Johnson County Attorney for “wage theft”
 - Investigations by Johnson County Sheriff
 - Private right of action
 - Poster requirement
 - **Penalties**
 - \$750/day
 - **Some cities opted out**

Local Minimum Wage Laws in Iowa

- **Polk County (10/11/2016)**
 - **Increase Schedule**
 - 4/1/2017 = \$8.75/hour
 - 1/1/2018 = \$9.75/hour
 - 1/1/2019 = \$10.75/hour
 - Thereafter indexed to CPI
 - **Exceptions**
 - Lower wage for youth workers (85% if < 18 y/o)
 - Wage freeze for tipped workers (\$5/hour)
 - Lower beginning wage allowed for first 90 days (per state law)
 - **Cities can opt out**



Local Minimum Wage Laws in Iowa

- **Linn County (9/12/2016)**
 - Raises min wage by \$1 each year for 3 years (beginning 1/1/2017); ultimately to \$10.25
 - No indexing
- **Wapello County (9/13/2016)**
 - Raises min wage effective 1/1 for 3 years (beginning 2017) ending at \$10.10 on 1/1/2019
 - Indexed to CPI thereafter
- **Lee County (still under consideration?)**





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Thank you!

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