

# 2017 Employment Law Update

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# Wage and Hour Updates

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# FLSA

## Update on FLSA Regulations

- New FLSA regulations were blocked approximately one week before their implementation
- The injunction blocking the regulations is currently up on appeal, but remains in force
- Resolution to come in the next 90 days in the Fifth Circuit and perhaps the underlying case in the Eastern District of Texas
- \*In California, federal salary threshold will be a moot issue beginning in January 2019 when our minimum salary will be even greater than the proposed federal minimum salary.



## Update on FLSA Regulations

- Trump has repeatedly stated his desire to remove regulations that hamper business community
- Very possible that rules will be further delayed, completely overhauled, or deleted altogether
- Uncertain status puts employers in difficult position

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## New Civil Penalty Increases

- On June 30, 2016, the USDOL announced penalty increases associated with wage and hour, safety, and benefits compliance matters.
- Penalties for willful or repeat FLSA violations rose from \$1,100 to \$1,894 per person wrongfully paid
- Child labor violation penalties rose from \$11,000 to \$12,080 per worker who was employed in violation of FLSA child-labor restrictions
- Several new increases to daily ERISA penalties for failure to provide required information or comply with other ERISA requirements
- New penalties are applicable to violations that occurred after November 2, 2015

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## CA Employers – *Vaquero v. Stoneledge Furniture LLC*



- CA Appellate Court held that commission employees must be separately compensated for legally required rest periods
- Compensation options:
  - #1 - Base hourly rate for all hours worked plus commissions or other incentives based on percentage of sales
  - #2 – commissions/bonuses for sales activity and paying separately for non-sales activity and rest period time sufficient to satisfy the applicable minimum wage
  - #3 – maintain commission/bonus structure but pay hourly compensation for rest and recovery periods only

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## Minimum Wage and Paid Sick Leave

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## Minimum Wage

- Trump administration may be receptive to federal minimum wage increase to \$10 per hour
- Trump administration likely to leave the issue of wage increase to state and local legislatures rather than pushing Congress to act at the federal level

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## Minimum Wage and Paid Sick Leave

- Many different statewide minimum wage increases and paid sick leave laws taking effect in 2017
  - State minimum wage rates, not city or county rates, governs exempt salary, inside sales and tool rate requirements
- Also many different cities and counties have passed minimum wage and paid sick leave initiatives
  - Many apply not just to employers based in that city, but also employees who work in the city

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## Interplay Between State and City Minimum Wage and Paid Sick Leave Laws



- Update policies to reflect these laws and decide whether you want addendums for employees in specific cities, or whether to be over-inclusive
- The differences include for whom leave can be taken, the amount of leave that can be taken, the accrual rates that are required, and rate of payment.

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## Minimum Wage



- DOL Tip-Pooling Rule
  - bars restaurants from requiring wait staff to share tips with back-of-the-house employees
  - Upheld by the Ninth Circuit but petition pending before Supreme Court
- Trump administration likely to oppose rule as being anti-business because it is seen as economically advantageous for restaurant employers to have back-of-house employees participate in tip pools
- Restaurants have begun to rethink their approaches to tipping because of this and other concerns

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# Paid Sick Leave for Federal Contractors

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## Paid Sick Leave for Federal Contractors

EO 13706 requires federal contractors to grant employees at least 56 hours/year of paid sick leave:

- to tend to a personal illness, to obtain diagnostic or preventative care from a physician, or
- to care for family members, or
- for absences related to domestic violence, sexual assault, stalking.

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## Paid Sick Leave for Federal Contractors

- Covered contracts:
  - governed by the Davis-Bacon Act,
  - governed by the Service Contract Act,
  - for concessions, or
  - in connection with federal property or lands and related to offering services for federal employees, their dependents or the general public,entered into, renewed, extended, or amended after 1/1/17.

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## Paid Sick Leave for Federal Contractors

### Accrual Details:

- 1 hour of leave for every 30 hours worked on or in connection with covered contract.
- Cannot cap usage, can cap accruals at 56 hours until employee uses paid sick leave
- Employees can also receive lump sum of 56 hours paid sick leave at beginning of each accrual year.
- Must allow employees to carry over up to 56 hours of earned, unused paid sick leave at year end.
- On separation, not required to pay out unused hours, but hours must be reinstated if employee is rehired within 12 months.

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## Paid Sick Leave for Federal Contractors

### Other Details:

- Employer must notify employees of amounts accrued once each pay period or month, whichever is shorter, on separation of employment, and upon rehiring within 12 months of separation.
- Employer required to provide written explanation if request for leave is denied.
- Employer also must post notice of availability of leave, and must maintain records related to the leave for three years.
- Employer may not require detailed information about need or relationship to third party.

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## Paid Sick Leave for Federal Contractors

- Make sure if your company qualifies as a federal contractor that your policies are updated

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# Joint Employment Issues

## New Joint Employment Interpretation

- USDOL Administrator Interpretation 2016-1 deals with concepts of joint employment under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act.
- Under both FLSA and MSPA, worker can be employed by two or more employers simultaneously. Each joint employer shares the same legal compliance responsibilities.
- New interpretation focuses on two joint-employment scenarios: Horizontal and Vertical.



## New Joint Employment Interpretation

- Horizontal View

- Horizontal – two or more employers separately employ a worker, but share a sufficiently close association or relationship with respect to the employee’s work.
- Example: two restaurants owned by separate entities that operate under the same brand, have common majority owner, coordinate employee’s schedule, share supervision, and pay through same payroll processor.
- Factors to be considered include overlap of ownership/management, shared control, shared customers, shared supervision of employee, and any relevant agreements that shed light on the relationship.

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## New Joint Employment Interpretation

- Vertical View

- Vertical – one company contracts for workers who are directly employed by an intermediary company supplying their labor.
- Example: construction worker employed by subcontractor, but who is economically dependent on general contractor.
- Economic reality test controls here. Ultimate question is whether worker is economically dependent on potential joint employer who, via an arrangement with the intermediary employer, is benefitting from the work.
- 7 Factor test to help with analysis – each case different on its own unique facts.

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# Class Action Waivers

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## ***Ernst & Young, LLP v. Morris*** (9<sup>th</sup> Cir.)

- Court: class action waiver in arbitration agreement violated the National Labor Relations Act's right to "concerted activity" by employees:
  - Concerted activity is a substantive right, and
  - All contracts, including arbitration contracts, are unenforceable when a party's right to pursue a substantive right is waived
- Petition to the Supreme Court granted!

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## Where Are We Going With Arbitration

- The upcoming decision in *Morris* will be critical
- Prevention point: it is recommended that you implement an opt-out provision for your arbitration agreements.

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## Where Are We Going With Arbitration

- Prevention tip: Three Opt Out Options:
  - “Check the box” placed inside the agreement
  - E-mail in the opt-out
  - Mail in an opt-out
- You also need a system where the opt-out process is given to employees
  - Providing signed copy of handbook
  - Including it in handbook
  - Posting on intranet or breakroom accessible to employees

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# Social Media Workplace Conduct

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# Pre-Employment Screening

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## Pre-Employment Screening

- An employer CANNOT:
  - Require disclosure of username or password of social media
  - Require applicant to access personal social media
  - Require applicant to divulge any personal social media
  - Caution – reviewing social media creates risks that it will appear decisions were made based on unlawful, discriminatory reasons

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## Pre-Employment Screening

- Same discrimination rules apply
- Ignorance is bliss
  - Not knowing about protected categories is the best defense in failure to hire cases
- Software may be tracking which Facebook pages are reviewed by hiring managers

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## Pre-Employment Screening: Avoiding the Pitfalls

- If using social networking for screening, be consistent and use it for everyone
- Consider giving notice in writing that you search internet or social networking sites
- If search reveals information that plays a part in hiring decision, keep copy of information and consider giving candidate opportunity to address the information
- Don't ask for social media password or other log-in credentials
- Do not try to gain access to a candidate's profile by asking an employee who is friends with the candidate to show you the profile (potential privacy issue)
- Do not send a friend request without disclosing the real reason for the request.

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## Pre-Employment Screening: Avoiding the Pitfalls

- Create a form that lists the various items (good and bad) that you are looking for in a candidate for the position.
- Leave a space for the name of the company representative who will be performing the search, the date the search was conducted, and the name of the candidate.
- The key: the searcher must not be involved in the hiring decision.
- The searcher documents anything he or she finds from the pre-designated list on the form and makes a copy to give to the hiring manager;
- That information and only that information may then be turned over to the hiring manager for consideration. This step is critical as it helps to effectively prevent the hiring manager from learning information that cannot be used in the hiring process.
- If the hiring manager is inclined not to hire a candidate as a result of the searcher's findings, the manager should present the candidate with the information and identify the basis for concern. This is particularly important if you are at all worried about a case of mistaken identity – i.e., there are more than one Jane Smith registered on Facebook.

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# Social Networking and Discipline

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## Social Networking and Discipline

- Concerns
  - Consistency
  - Coercion
  - Retaliation
  - Off Duty Conduct

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# Social Networking and Harassment

## Social Networking and Harassment

- Should be addressed to the extent it:
  - Interferes with workplace; and/or
  - Violates policies prohibiting discriminatory or harassing behavior towards co-workers
- Supervisor posts are more likely to be a legal problem
- Issue is not only harassment but also evidence of discriminatory animus

## Social Networking and Harassment: How to Avoid Claims



- Employers should cause managers on pitfalls of becoming “friends” with employees on social networking sites
  - Could become part of harassment or discrimination claim even though “personal” page
  - Diligently use privacy controls to manage flow of information
  - Train employees on various ways they can get in trouble for things they say or post on Facebook

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## Social Networking Policies

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## Social Networking Policies: Zones of Regulation



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## Miscellaneous Updates

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## OSHA Updates



- New OSHA Reporting Rule
  - In May 2016, OSHA published its new Electronic Reporting Rule.
  - Rule is designed to enhance injury and illness data collection by requiring many employers to electronically submit information about workplace injuries and illnesses to the government
  - Reported information would then be posted on OSHA's public website

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## OSHA Updates



- New OSHA Reporting Rule
  - Also would significantly enhance anti-retaliation provisions regarding injury reporting.
  - OSHA interpretation prevents automatic post-injury drug testing, because OSHA believes this will dissuade employees from reporting accidents.
  - Instead, according to OSHA, employers should make a determination about whether drug use may have contributed to the accident before requiring a drug test.

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## OSHA Updates

- New OSHA Reporting Rule
  - OSHA interpretation also states that it would be a violation for an employer to use a safety incentive program to take adverse action after an employee reports an injury or illness.
  - Again, OSHA believes these programs will dissuade employees from reporting accidents.

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## OSHA Updates

- New OSHA Reporting Rule
  - Several business advocacy groups filed a lawsuit hoping to halt implementation and to eliminate rule altogether.
  - In November, federal judge in Texas refused to halt implementation, but did not issue decision on merits.
  - New lawsuit filed by different industry groups on 1/6/17
  - Future of this rule is uncertain, but key provisions went into effect on 12/1/16.

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## OSHA Updates

- New OSHA Penalty Increases
  - OSHA penalties significantly increased in 2016
  - Penalties increased overall by 78%
  - Maximum penalty for serious violations rose from \$7,000 to \$12,471
  - Maximum penalty for willful or repeated violations rose from \$70,000 to \$124,709.

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## Ban-the-Box Updates

- Ban-the-box laws are aimed at delaying when employers can ask applicants about their criminal history
- Concern is that employers will throw out applicant who have a criminal history, which adversely affects certain groups of applicants

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## Ban-the-Box Updates

- 24 states, the District of Columbia, and over 150 cities and counties have adopted ban-the-box policies.
- 9 states have mandated the removal of conviction history questions from job applications for private employers
- Most ban-the-box laws apply only to public employers, but the new trend is to extend these laws to cover private employers as well

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## Ban-the-Box Updates

- *Austin, TX*
  - Passed the Fair Chance Hiring Ordinance on March 24, 2016
  - Prohibits employers from asking questions about or considering an applicant's criminal history until after making a conditional offer of employment
  - Covers all types of workers
  - Employers also cannot publish information about a job that states that an individual's criminal history automatically disqualifies them
  - Cannot take an adverse action against an applicant based on criminal history unless good faith belief that the applicant is unsuitable for the job based on an individualized assessment conducted by the employer

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## Ban-the-Box Updates

- *Vermont*
  - Ban-the-box law goes into effect July 1, 2017
  - Requires employers to wait until an interview or wait until the employer has deemed the applicant qualified for the position to inquire as to the applicant's criminal history
  - Limited exceptions

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## Ban-the-Box Updates

- *Connecticut*
  - Ban-the-box law recently went into effect on January 1, 2017
  - Appears to permit an inquiry into an applicant's criminal history at any time as long as that inquiry is not made on the initial employment application
  - Limited exceptions
  - Does not appear to prohibit other types of inquiries into criminal history during the application process, such as a criminal background check by a consumer reporting agency

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## Ban-the-Box Updates

- *Los Angeles, CA*
  - Ban-the-box law recently went into effect on January 22, 2017
  - Arguably the strictest ban-the-box law in the country
  - Prohibits employers from inquiring about applicants' criminal histories until after making a conditional offer of employment
  - Written assessment needed to withdraw conditional offer, must effectively link the criminal history to risks inherent in the job
  - "Fair Chance Process"

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## Ban-the-Box Tips

- Review employment applications and job postings
- Review hiring processes and timing of criminal background checks
- Train employees involved in hiring decisions to ensure that criminal history is not discussed prematurely
- Identify risks in jobs linked to certain crimes

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