Hot Legal Topics in the WTCS

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FLSA

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- 2016: Obama administration attempted to adjust the salary threshold but was enjoined by U.S. District Court in Eastern District of Texas.

- March 2019: NPRM issued by USDOL to bridge gap between 2004 regulations and 2016 proposed regulations.

- September 2019: Final regulation issued, formally changing the salary threshold for overtime exemptions.

The NEW Regulations Have Arrived

- On September 25, 2019, the USDOL announced its much anticipated revisions to the salary threshold requirements for the “white collar” overtime exemptions under the FLSA.
- It formally rescinds the Obama Administration’s final regulations.
- These are fairly modest changes, which should make compliance achievable, as long as you prepare yourself and your business now.

WHAT THE DOL DID NOT DO:

- Did not make any proposed changes to the “duties tests” of the EAP exemptions.
- Did not establish different salary levels for different regions of the country.
- Did not establish different salary levels for different types of employers, such as non-profits, educational institutions, or small businesses.
- Did not establish different weekly salary thresholds for different exemptions.

What is the Impact?

- Estimated to result in an additional 1.3 million workers becoming eligible for overtime pay.

- Obama DOL overtime proposal would have resulted in an estimated 4.2 million workers becoming overtime eligible.

Salary Threshold Test

2004:

- $455/ week or $23,660/year

2020:

- $684/week or $35,568/year
- Ability to apply *nondiscretionary* bonuses and commissions to fulfill 10% of the Salary Threshold *($68.40/ week or $3,556.80/year)*

Highly Compensated Employees (HCEs)

Salary Threshold Test + One Exempt Job Duty (from any exemption)

2004: $100,000

2020: $107,432 (80th percentile)

- Nondiscretionary Bonuses can make up any percentage of the salary so long as HCE makes at least $684/week or $35,568/year.

Automatic Updating?

- DOL has stated it plans to update the FLSA's salary thresholds more regularly using notice and comment rulemaking but stopped short of committing to a specific timeline for reviews.
- Different than the Obama rule that provided a formula for automatic updating every 3 years.
- In theory, future elections may cause changes to the Salary Threshold.

To Do List:

1. Audit, audit, and audit again.
2. Review salary levels of all exempt employees.
3. Double check that they meet the “Job Duties Test” (with the help of a neutral third party).
4. Determine if adjustments to salary (or actual job duties) need to be made.
5. Reevaluate HCE exempt employees.
6. Reevaluate nondiscretionary bonuses.
7. Do not forget about benefit plans and eligibility.
8. Given Employers are trying to prove an *exception* to the general rule, when in doubt, consider removing exempt status and introduce time tracking.

Drug-Free Schools & Communities Act Compliance

Drug-Free Schools & Communities Act Compliance

- DFSCA History/ Current Events
- Study Design & Results
- Recommendations for Improving Compliance

History

- War on Drugs: 1970s-1990s
- Anti-Drug Abuse Act of 1986
  - Drug-Free Schools and Communities Act
- 1989 National Drug Control Strategy
- 1989 DFSCA Amendments
  - Signed by President Bush, Dec. 12, 1989
  - Amended 1965 Higher Education Act
  - 34 CFR Part 86 - “EDGAR 86”

Legal Mandates: The Big Three

- §86.100

1. Implement AOD Prevention Program
2. Deliver Annual Notification
   - Content
   - Students/Employees
   - Annual distribution
3. Perform Biennial Review
   - Enforce sanctions consistently
   - Evaluate program effectiveness

Drug Free Schools & Communities Act

- Implemented by 34 CFR Part 86 (Part 86)
  - Requires institutions to certify that they have developed and implemented a drug and alcohol abuse education and prevention program (DAAPP) – completed through the PPA
    - The program must be designed to prevent the unlawful possession, use, and distribution of drugs and alcohol on campus and at recognized events and activities
    - As part of the program, institutions must distribute certain information to students and employees annually
    - Institutions must do a biennial review of the program

Drug Free Schools & Communities Act

- Annual disclosure
  - Must share information with current students and employees
  - 34 CFR § 86.100 outlines the information that must be included:
    - Standards of conduct prohibiting the possession, use, and distribution of drugs and alcohol
    - Possible sanctions for violations of Federal, state, and local drug and alcohol laws as well as sanctions for violation of institutional policies
    - Health risks associated with the use of drugs and alcohol
    - Information on counseling, rehabilitation, and treatment programs
    - A clear statement that the school will impose sanctions on students and employees who violate drug and alcohol laws, ordinances, and/or institutional policies

Drug Free Schools & Communities Act

- Biennial Review
  - Objectives are:
    - To determine the effectiveness of your drug and alcohol abuse prevention program
    - To ensure consistent enforcement of applicable laws, ordinances, and institutional policies against violators
  - The biennial review report and supporting documents must be maintained by the school and made available to the Department upon request

Special Note* The DFSCA requirements are stackable/cumulative i.e., if an institution fails to develop and implement a substantive DAAPP, the institution CANNOT comply with the other requirements

Penn State Investigation

- Nearly $2.4M in Clery Act fines
- $27,500 DFSCA violations
  - Failed to distribute AN for 14 years
    - All new students, including summer only students
    - Combined with Clery ASR, erroneously
  - AN lacked legal sanctions & health risks
  - *"Penn State did not conduct a single biennial review that meets the requirements of the regulations nor did it publish an accurate and complete report of findings for each review."*

Seek Training

- Handbook: Complying with the Drug-Free Schools and Campuses Regulations
- Focus on the Big Three
  - Write complete annual notification
  - Distribute notification correctly
  - Conduct biennial review
  - Document findings
  - Implement AOD programs

Collect (More) Data

- 18 colleges provided some disciplinary data
  - 7 colleges reported 0 AOD incidents*
- Health surveys
  - Core Institute Alcohol & Other Drug Survey
  - National College Health Assessment (NCHA)

*From Michigan survey

Be Transparent

- Not required
- Publish Biennial Review online
- Provide updated copies to:
  - FOIA Coordinator
  - Financial Aid Director

Move Beyond Compliance

- Be creative
- Why invest in DFSCA?
  - Federal Law
    - Penalties: fines & loss of funding
  - Health Promotion
    - High alcohol and drug use rates
  - Crime Prevention
    - Title IX + DFSCA

From Penn State Letter

- *"Failure to comply with the DFSCA's DAAPP requirements deprives students and employees of important information regarding the educational, disciplinary, health, and legal consequences of illegal drug use and alcohol abuse. Failure to comply with the biennial review requirements also deprives the institution of important information about the effectiveness of its own drug and alcohol programs. Such failures may contribute to increased drug and alcohol abuse as well as an increase in drug and alcohol-related violent crime."*

ADA and Academic Decisions

ADA & Academic Decisions – Finding the Balance

- Title II of the ADA requires a public entity to make reasonable modifications in policies, practices, and procedures when modifications are necessary to avoid disability discrimination, unless the entity can demonstrate that doing so would fundamentally alter the nature of the service, program, or activity.
- How does the protection arise?
  - Individual must request the accommodation.
  - Argument over whether this triggers an interactive dialogue.
  - Expectation that public entities will provide reasonable accommodations.

What's Unreasonable?

- Accommodations which are ineffective or do not enable meaningful access to or participation in the entity's program.
- Accommodations which impose an undue hardship on the program.
  - Significant difficulty or expense.
- Accommodations that fundamentally alter the nature of the service, program or activity.

The Helicopter Parent and the *Skidmore* Case

- Student with ADHD diagnosed with a major depressive disorder and requested several accommodations from Skidmore.
- College granted many, but denied others, including a request that the parents be contacted by the instructors when assignments were missed.
- District Court found that the College did not engage in meaningful dialogues associated with the disability and, therefore, the case survived the College's motion to dismiss.
  - *Isn't that the interactive dialogue?*
- Outlier case, however, we anticipate this is the tip of the iceberg.

Best Practices

- Students used to accommodation in K-12 schools begin to expect similar treatment in post-secondary education. Decisions should be made about how far parents are educated the availability of these services at the college level and the manner in which this is done.
- Creation of form procedure to handle accommodation requests.
- Centralize accommodation practice to ensure standardization of the process.

Free Speech

First Amendment – Olsen v. Rafn

- Student distributed valentines on college campus. Valentine contained messages with Bible verses.
- Student traversed many areas of the college distributing the valentines.
- Security informed her that she was disturbing the learning environment and entering into restricted areas of campus without invitation or announcement.
- Student alleged violations of First Amendment rights and sued.

First Amendment

- College challenges the case
  - Claim was moot because the College changed the policy.
  - Student was engaged in handbilling and the College was permitted to restrict handbilling.
  - Student was exercising free speech rights in non-public fora.
- Court rejects each argument and finds a violation.

Practical Suggestions

- Review designated public areas – few, small areas likely insufficient.
- Mark restricted areas and consistently enforce restrictions.
- Continue to enforce restrictions on obscene and unruly conduct.
- Review policies periodically for compliance.

Title IX Regulations Update

The Law

- No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Background on Sexual Assault component

- 2011 “Dear Colleague Letter”
- Letter served as the impetus to make changes in the way colleges conduct student sexual assault/harassment cases on campus
- Critics of the 2011 letter note that the guidance was focused too heavily on the rights of the complainant of the alleged sexual assault and not on the rights of the accused.

Challenges by the accused have been on the rise.

- Out of 305 Title IX claims analyzed in a 2015 study by United Educators (UE), one-fourth were challenged by students

  - *Source*: United Educators, *Confronting Campus Sexual Assault: An Examination of Higher Education Claims.* http://www.ncdsv.org/ERS_Confronting-Campus-Sexual-Assault_2015.pdf

Proposed Regulations in Fall of 2018

- 2011 “Dear Colleague” letter rescinded in September 2017
- September 2017 Q&A on Campus Sexual Misconduct
- On November 16, 2018, the DOE under the Trump administration issued its long-awaited *Notice of Proposed Rule Making* regarding Title IX and sexual misconduct
  - Attempt the balance the rights of the accused
  - Intended to limit the scope and number (cost) of investigations

Current Guidance

- As we wait for the proposed regulations to become final, be reminded that the following OCR guidance remains in effect, including:
  - September 2017 Q&A on Campus Sexual Misconduct;
  - 2015 DCL on Title IX Coordinators;
  - 2015 DOE Title IX Resource Guide;
  - 2010 DCL on Harassment and Bullying;
  - 2010 DCL Intercollegiate Athletics Policy Clarification: The Three-Part Test;
  - 2001 Revised Sexual Harassment Guidance: Harassment of Students By School

Proposed Regulations

Proposed new definition of Sexual Harassment

- “Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity” […] includes “requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”

Scope of Investigation

- College's responsibility to investigate triggered when alleged incidents:
  - occurred on campus or within an campus program or activity, and
  - only when officials at an institution had received a formal complaint

Investigation Compliance Timeline

- Proposed removal of federal guidance that institutions resolve Title IX complaints within 60 days.

Notice of Allegations

- Need to provide notice of the charges and opportunity to review

Mediation as an Option

- Colleges may opt for an informal resolution at any time, provided that both parties voluntarily agree to it.

Hearings

- No single investigator model.
- Decision maker must be separate from the Title IX Coordinator or investigator.
- Requires live hearings.

Standard of evidence for findings

- Allows colleges to set their own standard of evidence for findings of misconduct as long as it is consistent with standards used for other kinds of campus-based misconduct.
  - Preponderance of the evidence
    - 50% plus a feather
  - Clear and convincing

Cross Examination

- Allows for cross examination.
  - Questioning would have to be done in a live hearing by a lawyer or other adviser, but the parties could be in separate rooms, using technology if needed.

HEA Reauthorization: biggest sticking points

- Specifically, members of the committee are discussing how language addressing live hearings for campus proceedings and cross-examination rights for accused students should figure into a bill.
- In June of this year bi-partisan group of senators including Senator Tammy Baldwin formed a group to see if they can try to help break the stalemate

Recent Court Rulings

Doe v. Baum, 903 F.3d 575 (6th Cir. 2018)

- Background
- The Sixth Circuit court of Appeals held:
  - if a student is accused of misconduct, the university must provide a hearing before imposing a serious sanction (e.g., expulsion or suspension);
  - and when the university's determination depends on a credibility assessment, the hearing must include an opportunity for cross-examination.
  - The Court of Appeals agreed with John Doe that he should have had the opportunity to cross examine Jane Roe and her witnesses. The Court further noted that the right to cross-examine is not satisfied by a university permitting parties to review the other party's written statements and submitting a response identifying those inconsistencies for the investigator;
  - if credibility is in dispute and material to the outcome, due process requires cross-examination;
  - cross-examination is not necessary where a student admits to engaging in misconduct;
  - and the value of cross-examination is tied to the fact-finder's ability to assess the witness' demeanor, and a fact-finder in one instance (university proceedings) cannot exclusively rely on the credibility assessment performed by a different fact-finder (state court proceedings).

Haidak v. University of Massachusetts-Amherst, No. 18-1248 (1st Cir. 2019)

- Background
- First Circuit held:
  - Haidak had been given no prior notice of a hearing about the suspension before it happened.
  - While universities can legally do this in extreme circumstances, Judge Kayatta noted there appeared to be no urgency among officials -- they waited 13 days after they learned Haidak had violated the original no-contact order to suspend him. “The university offers no evidence suggesting that it was infeasible to provide some type of process during the available 13 days before it imposed a suspension,” Kayatta wrote.
  - Haidak’s due process rights were not ignored simply because the university hadn’t allowed him to interrogate Gibney directly, according to the opinion. The university let the panel determine the facts of the case and ask questions, not Haidak or Gibney, in a process that is called an “inquisitorial model,” Kayatta wrote.
  - The court did not follow the Sixth Circuit’s opinion that an accused student had to be the one to confront an accuser -- and it was unconvinced that allowing Haidak to do so would have been helpful.

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