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**Vermont Retail & Grocer's Association:
Paid Sick Leave and FLSA Changes
by Tim Copeland and David Harlow**

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Tim Copeland focuses his practice exclusively on the representation of employers in all aspects of their relationships with employees: from proactive management consulting, to complex labor negotiations, to resolving claims of wrongful discharge, discrimination, unpaid wages and other employment disputes. He has a nationwide traditional labor law practice representing Fortune 500 and other leading companies in industries including manufacturing, construction, utilities, health care, retail and other industries devising and executing labor relations strategies. He has handled numerous organizing campaigns by unions including United Steelworkers of America, the Teamsters, the IAM and the IBEW, among others. He has litigated and handled numerous strikes across the United States. Tim regularly represents employers in state and federal courts, in administrative proceedings and in arbitrations, whether defending claims brought by employees or their representatives, or pursuing legal action to protect employers' interests. Readily accessible and responsive to his clients' needs, Tim guides employers' responses to pre-litigation complaints and provides counsel on sound H.R. and labor relations practices.

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A native Vermonter, David Harlow is a labor and employment litigator in DRM's Brattleboro office. Before joining DRM, David was an attorney at one of the largest labor and employment law firms in the country. He has litigated cases on behalf of companies in a variety of industries, including finance, aerospace, retail and health care. David has substantial experience defending employers from claims of discrimination and retaliation under federal and state civil rights statutes. He also regularly defends employers before administrative agencies, including the Equal Employment Opportunity Commission and the Department of Labor. David has investigated and defended whistleblower claims arising under the Sarbanes Oxley Act, the Mine Safety and Health Act, and other federal and state laws. David also has substantial experience in ERISA benefits litigation. David has been published and has spoken publicly on the topic of pre-employment background checks. He has developed employee handbooks and policies for large corporations and small and medium-sized businesses.

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PAID SICK LEAVE



Paid Sick Leave

- **Effective Dates**
 - January 1, 2017 – 6 or more employees
 - January 1, 2018 – less than 6 employees
 - New employers – one year grace period
- **Who is covered?**
 - Employers “doing business” in Vermont.
 - Employees working an average of at least 18 hours a week
 - No distinction between full-time / part-time

Paid Sick Leave

- **Limited Exceptions**
 - Temporary and Seasonal workers
 - Working 20 weeks or fewer
 - Federal employees
 - Under 18-years-old
 - Certain “per diem” employees
 - Healthcare settings
 - Independent contractors

Paid Sick Leave

- **Basic Requirements**
 - Accrue one hour for every 52 hours worked
 - Minimum accruals:
 - 24 hours (3 days) – 2017 and 2018
 - 40 hours (5 days) – 2019 and thereafter
- **At the End of Each Year**
 - Carryover
 - Cash out
 - Provide a lump sum of leave at beginning of new year

Paid Sick Leave

- **Appropriate Uses**
 - Employee's own illness or injury, or attending medical appointments.
 - Illness or injury of a close family member, or accompanying family to medical appointments or appointments related to long-term care.
 - Arranging for social or legal services or obtaining medical care or counseling for a close family member who is a victim of domestic violence, sexual assault or stalking.
 - Caring for a close family member because his or her school or business is closed for public health or safety reasons (e.g., snow days).
- “Reasonable efforts” to schedule outside working hours; and must notify employer “as soon as practicable”

Paid Sick Leave

- **Application**
 - Modify Existing CTO / PTO / Other Leave Policy
 - Extend to covered employees
 - Clarify appropriate uses
 - Accrual and carryover issues
 - Time-keeping increments
 - Adopt a Separate Policy
- **Posting Requirements**
 - Poster to be published by VT DOL

Example 1

- In a single year, an employee of a Vermont catering company works 700 hours in Vermont but also works for the same employer for 500 hours in New Hampshire and 100 hours in Maine.
- How many hours are used in accrual of paid sick time?

Answer

- Answer: All 1300 hours count toward accrual, up to the maximum annual accrual amount.
- An employee is eligible to accrue and use earned sick time if the employee's "primary place of work is in Vermont"

Example 2

Your company has a Combined Time Off Policy that allows employees to accrue time off at a rate equal to that under the Paid Sick Leave Statute, and permits employees to use that time for vacation, illness, injury or medical appointments.

Question: Is that enough to comply with the paid sick leave law?

Answer

- No. A company CTO policy will comply with the law if it allows for an equal or greater accrual rate and it allows use of paid leave for all the permitted reasons: E.g., snow days, domestic violence treatments.

Example 3

- An eligible employee works for eight months and accrues sick leave during that period until he is laid off.
- He is then re-hired two months later by the same employer.
- Question: if the employer applies a one-year wait period, when can the employee use paid sick leave?

Answer

- The employee will need to work four more months to complete the 12-month wait period.
- An employee who is discharged prior to completing his or her waiting period and is re-hired by the same employer within 12 months after discharge, shall have the same time remaining in his or her waiting period as on the date of discharge.

OVERTIME

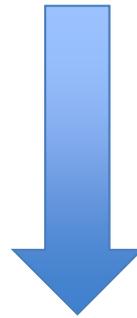


OT – FLSA Basics

- FLSA has 3 basic requirements:
 - Minimum Wage
 - Overtime Pay (1.5x) after 40 hours per week
 - Record keeping
- An **exempt** employee is ineligible for overtime.
- A **non-exempt** employee must be paid overtime.

OT – “White Collar” Exemption

Salary Basis Test



Duties Test

Administrative, Professional, Executive,
Computer Professionals, and Outside Sales Employees

OT – Standard Salary Basis

Current Rule

\$455 per week (\$23,660 per year)

New Rule

\$913 per week (\$47,476 per year)

- No proration for part-time employees
- Why \$913?
 - 40th percentile of salaried workers in the lowest-wage Census region (currently the South)

OT – Highly Compensated Employees

Current Rule

\$100,000 per year

New Rule

\$134,000 per year

- Why \$134,000?
 - 90th percentile of salaried workers nationally

OT – Effective Date

December 1, 2016

- Beginning January 1, 2020, automatic updates every three years
 - Standard Salary – pegged to 40th percentile in the lowest-wage Census region
 - Estimated to be \$51,168 in 2020
 - Highly Compensated Employees – pegged to 90th percentile nationally
 - Estimated to be \$147,524 in 2020

OT – What is Included in “Salary?”

- **Non-Discretionary Bonuses, Incentive Pay, and Commissions**
 - Current Rule –
 - Cannot Include
 - New Rule –
 - Can count towards 10 percent of salary
 - Must be paid on at least a quarterly basis

Lawsuits Challenging New DOL Overtime Regulations

- September 20, 2016 – 2 lawsuits filed to challenge the changes to the new DOL Overtime Regulations.
 - **Lawsuit #1.** A group of 21 states (not including Vermont) filed a Complaint for Declaratory and Injunctive Relief against the DOL in federal court in Texas.
 - **Arguments:**
 - New regulations exceed Constitutional authority by “imposing the federal Executive’s policy wishes on State and local governments”.
 - The automatic salary increases in the regulations are contrary to the FLSA and require advance public notice and comment.

Lawsuits Challenging New DOL Overtime Regulations

- **Lawsuit #2.** The U.S. Chamber of Commerce and other business groups filed a lawsuit in the same federal court in Texas. On the same day.
 - **Arguments:**
 - The new regulations violate the Administrative Procedures Act by, essentially, making the salary basis test so high that it eviscerates the meaning and statutory intent of the exemptions under FLSA.
 - “The cost of compliance will force many smaller employers and non-profits operating on fixed budgets to cut critical programming, staffing, and services to the public....Millions of employees across the country will be reclassified... to the detriment of their employers, their customers , and their own careers.”

But don't hold your breath....

- It seems unlikely that the lawsuits will change or stop the new DOL rules from taking effect.
- So... plan for them, even if you don't like them.

OT – What are the Options?

A. Raise workers' salaries

B. Pay time-and-a-half for overtime work

C. Limit workers' hours to 40 per week

OT – What to Consider?

- **Hidden overtime costs**
- Most exempt employees do not track their hours.
- No data on the number of hours exempt employees are working.
- When exempt employees are re-classified as non-exempt (because they no longer meet the salary level test), their hours will need to be tracked and any hours over 40 in a work week will be considered overtime.

OT – What Should I do?

- Review exempt employees to determine who falls short of the salary basis test.
- Estimate costs of overtime
- Review budgets and choose a course of action
 - Keep automatic updates in mind
- Develop a communications plan
 - Erase the “hourly” stigma

OT – What Else?

- “Duties Test” is not changing, but ...
- Use this as an opportunity to confirm employees are properly classified as exempt.
- Misclassified employees can be owed 2-3 years of back overtime, plus court costs and legal fees.
- Employers may be able to avoid questions about back pay by reclassifying employees now.

OT – e.g., Administrative Exemption

- Primary duty is the performance of office or non-manual work directly related to the **management or general business operations** of the employer or the employer's customers .
- Primary duty includes the exercise of **discretion and independent judgment** with respect to **matters of significance**.

OT – e.g., Administrative Exemption

- **Job titles are not enough**
 - **Assistant Store Manager 1 (Running the Business)**
 - Hiring / Firing Authority
 - Manages Employee Leave Requests
 - Works on Payroll
 - **Assistant Store Manager 2 (Doing the Business)**
 - Cashier
 - Stocks Shelves
 - Custodial Tasks

Thank you for joining us!

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