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## Employment Law Update

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## Fair Labor Standards Act

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- The FLSA is the federal law that sets minimum wage, overtime requirements, equal pay, record keeping, and child labor standards for employers covered by the Act.
- Applies to municipal employees. 29 U.S.C. § 203(S)(1)(c)

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## Fair Labor Standards Act

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- Overtime
  - 1.5 times the regular rate for hours over 40 per week
- Exemptions
  - White Collar Exemptions (focus of DOL regulations)
  - Other Exemptions

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## Fair Labor Standards Act

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- Three requirements of White Collar Exemptions
  - Duties Test (no changes)
    - Considers employees' "primary duties"
  - Salary Basis Test (no changes)
    - Paid full salary for week they perform work
  - Salary Level Test (significant changes)

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## Fair Labor Standards Act

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- Changes to Salary Level Test
  - Current minimum weekly salary requirements
    - \$455/week (\$23,660 annually; \$11.38/hr)
  - Proposed weekly salary requirements
    - \$913/week (\$47,476 annually; \$22.83/hr)
- Amount to change every three years

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## Fair Labor Standards Act

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- How do I deal with the increased salary requirement?
  - Evaluate exempt status
    - Meet duties test?
    - How many hours are they actually working?
  - Raise salary v. convert to hourly

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## Fair Labor Standards Act

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- Challenges to DOL's changes to salary threshold
  - Filed in E.D. Texas on September 20, 2016
  - 50 business groups and 21 states
  - Challenges constitutionality of final DOL rule

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## "Comp. Time"

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- Only applies to public employees
- Offered in lieu of overtime for non-exempt employees
- Must be the same rate as overtime
  - 1.5 hours of comp. time for each hour of overtime
- Employees must agree
- Capped at 240 hours

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## Minimum Wage in Colorado

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- FLSA minimum wage - \$7.25/hr
- Colorado Minimum Wage Order 32 - \$8.31/hr
- Proposed Amendment 70 to Colorado Constitution
  - Raises minimum wage to \$12/hr by 2020
  - On the ballot in November

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## EEOC Strategic Enforcement Priorities

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- Addressing Emerging and Developing Issues
  - EEOC will target emerging issues in equal employment law, including issues associated with significant events, demographic changes, developing theories, new legislation, judicial decisions, and administrative interpretations.

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## EEOC's Retaliation Guidance

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- *Proposed* guidance – comment until July 5, 2016
- First guidance since 1998
- Reviews each element of the claim
- Best practices

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## Transgender Employees

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- In 2015, the EEOC received 1,412 charges involving allegations relating to sexual orientation and/or gender identity and transgender status
  - 34% increase from 2014
- Title VII – prohibition of sex discrimination
- Stereotyping discrimination
  - *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)

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## Sexual Orientation Discrimination

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- Circuit Decisions
  - *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002)
    - Sexual orientation discrimination not actionable under Title VII, but physical assault might be because of sex and so violate Title VII.
  - *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009)
    - Sexual orientation discrimination not actionable under Title VII but name calling might be because of sexual stereotyping.

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## Sexual Orientation Discrimination

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- Circuit Decisions
  - *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).
    - “Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”

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## Sexual Orientation Discrimination

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- *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007).
  - Requiring employees to use restrooms that matched their biological sex was a legitimate non-discriminatory reason, and Ms. Etsitty failed to show pretext.
- *Rice v. Deloitte Consulting*, 2013 WL 3448198 (D. Colo. 2013).
  - No sex stereotyping claim based on comments that plaintiff looked unprofessional, had unruly hair, a style of dress that appeared disheveled, and that she had “unique/odd mannerism, style and interactions.”

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## Sexual Orientation Discrimination

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- Two new cases:
  - *EEOC v. Scott Medical Health Center* (W.D. Pa.).
  - *EEOC v. Pallet Companies* (D. Md.).
- Allegation:
  - “[The] aforementioned conduct . . . was motivated by [the aggrieved individual’s] sex in that sexual orientation discrimination necessarily entails treating an employee less favorably because of his sex.”

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## Sexual Orientation Discrimination

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- Future of transgender cases?
  - EEOC Interpretation
- Constitutional considerations
  - 42 U.S.C. § 1983

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## Q&A

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