

LEGISLATIVE UPDATE

October 2019

THE U.S. DEPARTMENT OF LABOR ANNOUNCED THE FINAL OVERTIME RULE

On September 24, 2019, the Department of Labor (DOL) announced a final rule increasing the salary threshold for the Fair Labor Standards Act's (FLSA) minimum wage and overtime pay requirements. The final rule raises the "standard salary level" from \$455 per week to \$684 per week (equivalent to \$35,568 per year). Further, the total annual compensation level for highly compensated employees is raised from \$100,000 to \$107,432 per year. The increase accounts for growth in employee earnings since the thresholds were last updated in 2004. The final rule also allows the use of nondiscretionary bonuses and incentive payments (including commissions) paid at least annually to satisfy up to 10% of the standard salary level. The DOL estimates that approximately 1.3 million more workers will become eligible for overtime as a result of the salary threshold increase.

Of note, the rule change does not affect the application of the duties test under the law. To be considered exempt from the overtime provision of the rule, an employee must be salaried, earn more than \$35,568 per year, and meet the duties criteria for executive, administrative, or professional employees (white collar exemptions) as set forth in the rule.

This final rule has been submitted to the Office of the Federal Register for publication. The final rule becomes effective on January 1, 2020. It remains unclear whether the new rule will be the subject of litigation.

EMPLOYERS MAY BAR EMPLOYEES FROM ANSWERING MEDIA REQUEST



The National Labor Relations Board (NLRB) ruled earlier this month that a company's policy prohibiting employees from answering media requests was lawful.

The company's media rule provides that, "employees approached for an interview and/or comments by the new media, cannot provide them with any information. Our President, [], is the only person authorized and designated to comment on Company policies or any event that may affect our organization."

Section 7 of National Labor Relations Act (NLRA) "generally protects employees when they speak with the media about working conditions, labor disputes, or other terms and conditions of employment." The NLRB reasoned that because employees do not have a right under the NLRA to speak on behalf of their employer, such rule when reasonably interpreted would not potentially interfere with the exercise of Section 7 Rights. Further, the NLRB emphasized that the rule only bars employees from speaking on behalf of the company when "approached" by the media, but it does not bar employees from speaking to the Media about protected concerns.

Supreme Court Hears Oral Argument on LGBTQ Rights

On October 8, 2019, the United States Supreme Court heard oral arguments in three significant sex discrimination cases regarding Title VII's coverage of sexual orientation and transgender status discrimination. The argument was divided into two one-hour arguments. The first argument concerned Title VII's coverage of sexual orientation discrimination, an issue raised in *Altitude Express v. Zarda* (2nd Circuit Court of Appeals) and *Bostock v. Clayton Cty* (11th Circuit Court of Appeals). In *Zarda*, the court found Title VII protects sexual



orientation, whereas the *Bostock* court found just the opposite. The second argument addressed whether Title VII prohibits discrimination against transgender people based on their transgender status or sex stereotype. In *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, the 6th Circuit Court of Appeals ruled that discrimination based on an employee's transgender status is discrimination based on "sex" in violation of Title VII.

On the issue of sexual orientation, counsel for *Zarda* and *Bostock* argued the Supreme Court has recognized a variety of sex discrimination claims despite the fact that Congress may not have contemplated such claims when it enacted Title VII in 1964. The text of Title VII appeared to be the central focus of the arguments. Many of the Supreme Court Justices became engaged in questioning of all counsel, especially on the distinction between sex and sexual orientation. Justice Neil Gorsuch, a conservative appointee of President Donald Trump appeared sympathetic to the arguments supporting the LGBTQ community, although he posited whether the language of Title VII should be left to Congress, rather than the judiciary. Gorsuch later questioned whether a ruling favoring protection of transgender status could cause "massive social upheaval." Counsel for Aimee Stephens, the transgender woman terminated by the funeral home, responded that some courts have recognized these claims for as long as 20 years without "upheaval."

Based on the oral arguments, the four liberal members of the court (Justices Elena Kagan, Sonia Sotomayor, Stephen Breyer, and Ruth Bader-Ginsburg) appeared poised to vote in favor of protecting gay and transgender workers under Title VII. The conservative majority painted a far less clear picture. Justice Samuel Alito appeared strongly opposed to expanding the coverage of Title VII. Justices Roberts, who has been a surprising swing vote in the past, seemed concerned with the conflict between expanding Title VII and religious freedom. Justice Kavanaugh, a recent appointee asked merely one question during the arguments. Justice Clarence Thomas did not attend the arguments due to health reasons, but, will participate in the decision.

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