New Rules for the Fair Labor Standards Act

By Terri. L. Pastori, Beth A. Deragon, and Ashley D. Taylor

The Fair Labor Standards Act (the "FLSA"), which is enforced by the US Department of Labor (the "USDOL") has been around for over eighty years and continues to be the stalwart of federal wage and hour laws. The FLSA set the standard of the 40-hour work week, overtime, minimum wage, restricting child labor, mandating certain types of recordkeeping, and defining the categories of employees who are exempt from overtime and minimum wage.

The FLSA covers employees who either work for "enterprises" or are individually covered. Enterprises are defined as businesses with at least 2 employees that also either have (1) annual business or sales in excess of $500,000, or (2) are government agencies, hospitals, schools, or businesses otherwise providing medical or nursing services. Individuals are covered by virtue of their proximity to interstate commerce or if they are domestic service workers. Effectively, most employers are covered by the FLSA.

2020 has been a big year for the FLSA. Three new rules, representing the most substantial updates to the law in decades, have gone into effect in January and March. The first rule, which increases the salary threshold for exempt executive, administrative, and professional employees to $684.00, was effective on January 1st. The second rule updates the definition of "regular rate" of pay to clarify that certain employer-offered "perks" do not need to be included in the regular rate calculation for overtime and went into effect on January 15th. The third rule updates and revises guidance related to how "joint employer" status is determined and became effective on March 16th.

While many professionals who are paid on a salary basis are considered "exempt," being paid a salary alone does not exclusively establish exempt status. Employees' actual job duties and salary level must be considered. If an employee's primary job duties meet the criteria of one of the exemptions, as enumerated by the USDOL, the next step in the inquiry is to look at how much the employee is paid – the "minimum salary threshold."

Beginning January 1, 2020, employees must make $684.00 or more per week, annualized to $35,568.00 per year, in order to maintain exempt status (previous salary threshold was $455.00 per week). Employers may reclassify employees, limit overtime worked, and use nondiscretionary bonuses and incentive payments to satisfy up to 10% of the employee's salary to reach the new minimum salary threshold. The total annual compensation threshold for employees meeting the "highly compensated" exemption increased to $107,432.00 (from $100,000.00); $35,568.00 of which must be paid weekly on a salary or fee basis.

The FLSA requires that employers pay overtime to any non-exempt employee who works more than 40 hours in a given workweek. Overtime pay is "time and a half" or 1.5 times the employee's regular rate of pay for hours in excess of 40. The December 12, 2019 rule (which went into effect January 15, 2020) clarifies how the regular rate must be calculated, including whether certain soft benefits and payments can be excluded from calculation of an employee's regular rate of pay.

The final rule enumerates a variety of soft benefits (i.e. employee "perks") that are excludable from the regular rate of pay provided they are not connected to hours worked, services rendered, job performance, or other criteria linked to the quality or quantity of an employee's work. Examples of soft benefits include wellness programs, gym access, tuition benefits, adoption assistance, and employee discounts. Also excludable are perks such as coffee and snacks for free at work and raffle prizes which are considered gifts. Additionally, payments related to expense reimbursements, most paid meal breaks, and payouts of accrued paid time off are considered excludable under the new rule. "Show-up pay," which compensates employees sent home by their employer due

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also be mindful of state laws--RSA 354-A:6 and 354-A:7--which prohibit discrimination in the workplace based on sex, physical disability, or pregnancy, childbirth, and related medical conditions. While the issues have not yet been conclusively decided in New Hampshire, the cautious route is for employers to treat infertility as both a "[pregnancy] related medical condition" and a "disability" with schedule flexibility offered as a reasonable accommodation.

The Family and Medical Leave Act (FMLA) provisions may also kick in, depending on the nature of the medical treatment involved; for example, an employee undergoing a laparoscopic uterine surgery will likely be out of work for more than three days. Don't forget about another federal law, the Pregnancy Discrimination Act (PDA), which prohibits discrimination based on pregnancy, childbirth, and related medical conditions. You don't want to deny a flexible work schedule to an employee undergoing in vitro fertilization when other employees are granted flexibility for their medical appointments.

Mental Health Support: Infertility is emotionally challenging and mentally draining. We all know happy employees are better performing employees. So make it easy for employees to seek infertility-associated mental health treatment by offering scheduling flexibility for therapy appointments. Another source of emotional support can come from a peer support group, such as one of the New Hampshire based peer support groups run by Resolve New England. A large employer may consider offering its own peer support program. Employees should also be made aware of any existing employee assistance programs available. Some companies even offer "fertility coaches" as part of their benefit package—patient care advocates with expertise in the very complicated area of infertility.

In addition, consider participating as a workplace in National Infertility Awareness Week and/or the New England Walk of Hope. Spreading awareness of infertility among co-workers benefits everyone in the long run and shows employees struggling with infertility that they are valued members of the team. Maybe you can grant paid or unpaid leave for your employees to attend Resolve's yearly Advocacy Day in Washington, D.C.? If your company participates in a charitable giving program, consider adding a local infertility-focused non-profit (such as Resolve New England) as a recipient. Even better--match the gifts made by employees. Another local option is to form an employee team to run a road race on behalf of AGC Scholarships, which provides funding for patients undergoing infertility treatments. Some employees may choose to self-identify as struggling with infertility, while others may prefer to keep their medical situation private, but they all will know that they have employer support with their pregnancy struggles.

Pregnancies at the Workplace: Pregnancy announcements at work will continue to happen. Co-workers often want to express their excitement to the new mom (or dad) with an in-office baby shower or other celebration. Employers need to understand that these seemingly innocuous events can be a tremendous trigger for infertile individuals. Therefore, employers should think carefully about how to balance the desire of some employees to celebrate with not making things worse than they need to be for the employee struggling with infertility. When coming up with a policy appropriate for your company, keep in mind that the infertile person should be told in private of any pregnancy announcements or baby showers. This gives the employee the space she/he needs to grieve instead of having to plaster on a smile in front of the whole department. And don't make attendance at baby showers mandatory. For some people struggling with infertility, that's just too much to handle emotionally.

Donors & Surrogates: Are donors and surrogates covered by FMLA? What about the ADA? The PDA? The answer is an easy one: it simply doesn't matter because a fertility-friendly workplace will give donors and gestational surrogates the leave time they need for medical purposes, including recovery time. You don't want to be known as the employer who refused to give a uterus donor time off from work. And you definitely don't want to be seen defending that decision in court. By the way, the answers are: depends, maybe, yes.

Don't Forget About the Guys: Infertility is not just a women's problem. Male infertility is responsible, in whole or in part, for 2/3 of all cases of infertility. New Hampshire's fertility insurance law expressly recognizes the fact that infertility can result from either male or female factors. In addition, irrespective of a given couple's medical diagnosis, a male employee is also impacted when his dreams of having a family with his partner are shattered. Also, it's important to remember that gay male couples and hopeful single dads also must turn to fertility treatments to conceive. While the dynamics of a gay couple's experience may be different than that of a straight couple's experience, the bottom line is that workplace policies and programs should keep in mind that men are part of the fertility equation.

Savvy employers know that happy employees make better employees. Striving toward a fertility friendly workplace should be the goal for all employers.

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to a lack of work for them, and "call-back pay" may also be excludable. Show-up pay is excludable as long as it occurs infrequently and sporadically, and call-back pay is excludable provided the payments were not prearranged, which is determined by a factual inquiry into whether the work could have reasonably been anticipated and scheduled in advance. However, pay for employees who are "on-call" for work pursuant to relevant scheduling laws, but do not get called into work must be included in the regular rate of pay.

This rule also provides updated guidance for employers to determine whether a bonus is truly discretionary and excludable from the regular rate, or if it is non-discretionary and must be included. A bonus will only be considered discretionary when three statutory requirements are met: (1) the employer has sole discretion to determine whether to pay the bonus; (2) the employer has the sole discretion to determine its amount; and (3) the bonus payment is not made according to any prior contract, agreement, or promise causing the employee to expect such payment regularly. Examples of discretionary bonuses include bonuses for overcoming a challenging or stressful situation, bonuses to employees who made unique or extraordinary efforts not awarded according to pre-established criteria, employee-of-the-month bonuses, and severance bonuses.

Last but not least, the USDOL's January 12, 2020 final rule (which went into effect on March 16, 2020) revises how joint employer status is determined. Specifically, a joint employer is a person or entity who is simultaneously benefited by an employee's work for their primary employer while the joint employer acts directly or indirectly in the interest of the primary employer. The rule clarifies that business model, franchise status, employment agreements, and the employee's economic dependence on the joint employer are not dispositive factors in determining joint employer status. Instead, the USDOL provided a 4-factor balancing test. If joint employment is determined, then the hours that the employee worked at each employer must be aggregated which could trigger payment of overtime.

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