ALEXANDRA H. CLAUSS or “Alexa” is an attorney with Primmer Piper Eggleston & Cramer PC in Burlington. She regularly counsels clients on wage and hour issues, disability accommodations, leaves of absence, reductions in force, health care, and other laws affecting the workplace and employment relationship. She advises clients on best practices related to employee performance management, terminations, investigations, and safety, with the intention of avoiding litigation before it occurs. Alexa also reviews and prepares employment contracts, personnel policies, and separation agreements.

She was selected as a Super Lawyers® Rising Star® for 2014, 2015 and 2016 in Employment & Labor, and is a member of the Vermont Bar Association, the Society for Human Resource Management, and the Chittenden County Bar Association. Alexa received her Bachelor of Commerce from McGill University and her J.D. from Tulane University Law School.
Agenda

- Federal
  - U.S. Department of Labor Final Rule on Overtime
  - Poster updates
- Vermont
  - Earned Sick Leave
  - Ban the Box
  - Other recent updates
U.S. DOL Overtime Final Rule
Overview of Federal Fair Labor Standards Act (FLSA)

- Enterprise coverage
  - Enterprises with annual gross volume of sales made or business done of $500,000 or more; or
  - Certain entities regardless of the amount of gross volume of sales or business done: hospitals, businesses providing medical or nursing care for residents, schools (whether operated for profit or not for profit), and public agencies

- Under the FLSA, employers must pay non-exempt employees: (1) minimum wage; and (2) overtime for all hours worked over 40 in a workweek. An employee’s overtime rate is one and a half times their regular rate of pay. Employers must also maintain records of hours worked for all non-exempt employees.
Overview of FLSA & Overtime Final Rule

- The Overtime Final Rule updates regulations for determining whether white collar salaried employees are exempt from the FLSA's minimum wage and overtime pay protections.

- Employees are exempt if they are employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in the Department of Labor's regulations at 29 CFR part 541.
  - Often called “white collar exemptions”
  - Also exemptions for outside sales, computer-related occupations, and highly compensated employees

- Unless an employee meets the test to be exempt under the FLSA, the employee must be classified as non-exempt.
Components of Each White Collar Exemption

- **Salary Basis Test**
  - This means an employee regularly receives a predetermined amount of compensation each pay period (e.g., weekly or biweekly). The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee’s work.

- **Duties Test**
  - Each type of exemption has its own specific duties test defined by FLSA regulations.

- **Salary Level Test**
  - Until November 30, 2016, employees generally must be paid a minimum weekly amount of $455 on a salary basis.
Effect of Overtime Final Rule

- Salary Basis Test – No Changes
- Duties Test – No Changes
- Salary Level Test – Revised
New Salary Threshold Rules: Effective December 1, 2016

- Salary for Executive, Administrative, *some* Professional exemptions:
  - $455/wk ($23,660/yr) $913/wk ($47,476/yr)

- Salary for Computer Professional exemption:
  - $27.63/hr or $913/wk

- Salary for Highly Compensated Employee exemption:
  - $100,000/yr $134,004/yr
  - Which must include a minimum salary of $455/wk $913/wk plus non-discretionary bonuses and incentive payments to satisfy the remainder of the $134,004/yr requirement.

- Does not affect doctors, lawyers, teachers and those (e.g., outside sales employees) who don’t have salary basis
Physicians & Salary Basis

- Licensed, practicing physicians are excluded from salary basis/level requirements of the FLSA’s professional exemption.
- Under FLSA regulations, the term “physicians” includes medical doctors including general practitioners and specialists, osteopathic physicians (doctors of osteopathy), podiatrists, dentists (doctors of dental medicine), and optometrists (doctors of optometry or bachelors of science in optometry). 29 C.F.R. § 541.304(b).
- Regulations do not define “other practitioners.”
- Seek legal counsel with questions on whether types of practitioners not specifically listed above are exempt from salary basis.
Beyond December 1, 2016

- Automatic updates to salary threshold
- Every 3 years – beginning January 1, 2020
  - The DOL will post new salary levels 150 days in advance of their effective date
- Affected employers will need to plan for changes every three years
New Limited Use of Bonuses/Commissions

- The DOL will allow nondiscretionary bonuses and incentive payments (e.g., commissions) to satisfy up to 10% of the standard salary test requirement.
  - Such bonuses include, for example, nondiscretionary incentive bonuses tied to productivity or profitability (e.g. a bonus based on the specified percentage of the profits generated by a business in the prior quarter).

- For employers to credit nondiscretionary bonuses and incentive payments (including commissions) toward a portion of the standard salary level test, such payments must be paid on a quarterly or more frequent basis.
An Employer’s Options

- For all exempt employees who are subject to the salary basis/level tests and earn less than $913/wk, the employer must either:
  - Maintain exemption and raise salary to meet new salary threshold
  - Reclassify as non-exempt and pay overtime premium for overtime hours

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Practical Tips

- Audit all exempt positions currently earning under $47,476/yr and determine the amount of overtime hours worked by each employee, if any.

- Consider an audit of all exempt positions for compliance with duties tests.

- Consider whether to involve legal counsel in audit.
Practical Tips (cont.)

- Businesses may want to maintain exempt status for:
  - Employees earning just under the new salary threshold
  - Employees with substantial non-discretionary bonuses/commissions
  - Positions requiring a lot of overtime hours
Practical Tips (cont.)

- Businesses may want to reclassify an employee as non-exempt where:
  - Employee earning well below new threshold
  - No or minimal non-discretionary bonuses
  - Salary increase would cause significant pay compression with other employees
  - Employee does not work much overtime
  - Employee works consistent/predictable overtime
Considerations for Reclassifying to Non-Exempt

- Reverse-engineer the compensation package
  - Calculate the hourly rate with consideration of any bonuses and anticipated overtime so total compensation package of re-classified workers is about the same as when salaried exempt
- Reduce scheduled hours of non-exempt
- Hire additional personnel to spread out hours (reduce overtime)
- Transfer certain tasks up to exempt employee
- Be prepared to handle employee perceptions of demotion
Tips for Communicating Reclassification

- Develop consistent communication message to employees:
  - Required by law
  - Position still valued by company; not a demotion
  - Your pay will vary each week you work (if non-exempt)
  - Not as much flexibility
    - Need to record all hours worked
    - No “off the clock” work
Other Tips for Reclassification

- Review timekeeping policies
  - Train newly non-exempt employees and their supervisors. Reclassified workers may not be accustomed to tracking their hours.

- Communicate restrictions on work outside normal work hours, use of mobile devices, remote access, meal and break policies, travel time, whether approval required for overtime.

- Update offer letters, handbooks, and job descriptions to make hours expectations and classification status clear.

- After reclassification, consider internal audit to test compliance.
Common Misconceptions Regarding FLSA & Overtime Final Rule

- **It’s not just about paying an employee a salary** → To be classified as exempt, the employee must meet the tests set forth in FLSA regulations.
- **It’s not just about an employee’s job title or job description** → What the employee is actually doing determines whether she or he meets the duties test to be classified as exempt.
- **It’s not about what “everyone else” is doing** → This is not a defense to an FLSA violation.
- **Non-exempt employees must be paid for overtime even if it was not authorized** → Though employers can counsel or discipline employees for working unauthorized overtime.
- **An employee’s right to pay under FLSA cannot be waived**
- **Compensatory (or “comp”) time is not permitted for non-exempt employees of private employers**
- **There is no exception for part-time exempt** → All exempt employees subject to salary basis/level tests must make at least $913/wk.
Consequences of Misclassification

- Many employers mistakenly misclassify non-exempt workers as exempt.
- Potential consequences of misclassification are significant. Employers could be held liable for:
  - back pay;
  - liquidated damages;
  - attorneys’ fees;
  - litigation costs; and
  - civil monetary penalties.
- If an employer is unsure about whether it is classifying employees properly, consult with legal counsel.
Federal Employment Poster Updates
New Federal Posting Requirements

- The U.S. DOL recently updated its FLSA Federal Minimum Wage and Employee Polygraph Protection Act posters. The new versions are now available for download on the DOL’s website:
  - https://www.dol.gov/whd/resources/posters.htm
  - Revised versions of the posters were to have been posted as of August 1, 2016; all employers must update these posters.

- There is an OSHA “It’s the Law” poster change effective Nov. 1, 2016.
  - https://www.osha.gov/Publications/poster.html

- The Family and Medical Leave Act (FMLA) poster was also revised as of April 2016; this update optional.
Vermont’s New Earned Sick Leave Law
21 V.S.A. §§ 481-486
Vermont’s Earned Sick Leave

- Key provisions
- Key dates for compliance (Jan. 1, 2017)
- Frequently asked questions and answers
- Proactive steps
Employer Coverage

- All employers doing business in or operating in the State of Vermont.
- Employers with >5 employees who work on average 30+ hours per week must start providing earned sick time on January 1, 2017.
- Employers with 5 or fewer employees, who are employed for an average of 30 or more hours per week, must start providing earned sick time on January 1, 2018.
- After Jan. 1, 2018, no exemption for small employers.
Employee Coverage

○ A covered “employee” is a person who, in consideration of direct or indirect gain or profit, is employed for an average of no less than 18 hours per week during a year.

○ The following are not covered employees for purposes of earned sick leave:
  - An individual who is employed by the federal government.
  - An individual who is employed by an employer:
    ○ for 20 weeks or fewer in a 12-month period; and
    ○ in a job scheduled to last 20 weeks or fewer.
  - An individual that is employed by the State that meets certain requirements.
  - An employee of a health care facility as defined in 18 V.S.A. § 9432(8) or a facility as defined in 33 V.S.A. § 7102(2) if the employee only works on a per diem or intermittent basis.
  - Certain employees of a school district, supervisory district, or supervisory union.
  - An individual who is under 18 years of age.
Employee Coverage

- The following are **not** covered employees for purposes of earned sick leave:
  - An individual that is either
    - a sole proprietor or partner owner of an unincorporated business who is excluded from the definition of “employee” for purposes of workers compensation coverage; or
    - an executive officer, manager, or member of a corporation or a limited liability company for whom the Commissioner has approved an exclusion from workers compensation coverage.
  - An individual that:
    - works on a per diem or intermittent basis;
    - works only when he or she indicates that he or she is available to work;
    - is under no obligation to work for the employer offering the work; and
    - has no expectation of continuing employment with the employer.
Accrual

- Covered employees must accrue at least one hour of earned sick time for every 52 hours worked.
  - For non-exempt employees, all hours actually worked will count towards the accrual of earned sick time. (subject to permitted caps)
  - For exempt employees, an employer can limit to 40 the number of hours in a workweek that will count towards the accrual of earned sick time. (subject to permitted caps)
- Translates to a factor of approximately 0.01923 of earned sick time per hour worked.

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Caps & Carry-Over

○ In 2017 and 2018:
  ● Regardless of the number of hours worked by an exempt or non-exempt employee, employers can limit the amount of earned sick time an employee can accrue to **24 hours** in a 12-month period.

○ In 2019 and thereafter:
  ● Employers can limit the amount of earned sick time an employee can accrue to **40 hours** in a 12-month period.

○ Earned sick time that remains unused at the end of every annual period is carried over to the next annual period.
  ● An employer can limit the total earned sick time an employee may *use* during an annual period to the above caps.
Alternatives to Carry-Over

- If an employer offers a paid time off policy and provides an employee with at least the full accrual of earned sick time at the beginning of each annual period, carry-over does not apply.

- Also, at an employer’s discretion, it can pay out accrued but unused earned sick time at the end of an annual period, and then the amount for which the employee was compensated does not carry over.
An employer may require a waiting period for newly hired employees of up to one year. During this waiting period, an employee shall accrue earned sick time pursuant to this subchapter, but shall not be permitted to use the earned sick time until after he or she has completed the waiting period.
Length of Absence

- If an employee’s absence is shorter than a normal workday, the employee must be permitted to use earned sick time in the smallest time increments that the employer’s payroll system uses to account for other absences or that the employer’s paid time off policy permits.
  - Employers are not required to permit an employee to use earned sick time in increments that are shorter than one hour.
Qualifying Reasons for Use of Earned Sick Leave

An employee can use earned sick time for any of the following reasons:

(i) the employee is ill or injured;
(ii) the employee obtains professional diagnostic, preventive, routine, or therapeutic health care;
(iii) the employee cares for a sick or injured parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child, including helping that individual obtain diagnostic, preventive, routine, or therapeutic health treatment, or accompanying the employee’s parent, grandparent, spouse, or parent-in-law to an appointment related to his or her long-term care;
(iv) the employee is arranging for social or legal services or obtaining medical care or counseling for the employee or for the employee’s parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child, who is a victim of domestic violence, sexual assault, or stalking or who is relocating as the result of domestic violence, sexual assault, or stalking;
(v) the employee cares for a parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child, because the school or business where that individual is normally located during the employee’s workday is closed for public health or safety reasons.
Rate of Pay

- Earned sick time must be compensated at the rate that is equal to the greater of either:
  - the normal hourly wage rate of the employee; or
  - the Vermont minimum wage rate.
No Payout Required at Termination

The law states:

“Upon separation from employment, an employee shall not be entitled to payment for unused earned sick time accrued pursuant to [this subchapter] unless agreed upon by the employer.”
What if an employee is rehired?

- An employee who is discharged after he or she has completed a waiting period and is subsequently rehired by the same employer within 12 months after the discharge shall begin to accrue and may use earned sick time without a waiting period. However, the employee shall not be entitled to retain any earned sick time that accrued before the time of his or her discharge unless agreed to by the employer.

- An employee that voluntarily separates from employment after he or she has completed a waiting period and is subsequently rehired by the same employer within 12 months after the separation shall not be entitled to accrue and use earned sick time without a waiting period unless agreed to by the employer.
Employee Obligations

- An employer may require an employee planning to take earned sick time to:
  - make reasonable efforts to avoid scheduling routine or preventive health care during regular work hours; or
  - notify the employer as soon as practicable of the intent to take earned sick time and the expected duration of the employee’s absence.
Employer Posting and Notice Requirements

- Employers will have a posting requirement. The VT DOL is expected to issue this poster prior to Jan. 1, 2017.
- Employers are also required to notify employees concerning earned sick leave at the time of the employee’s hiring.
Recordkeeping

- Unless an employer otherwise has a compliant “paid time off” policy, an employer must calculate the amount of earned sick time that an employee has accrued either:
  - as it accrues during each pay period; or
  - on a quarterly basis, provided that an employee may use earned sick time as he or she accrues it during each quarter.
Requests for documentation of reason for leave?

- This is an open question.
- The law is silent, meaning there is no express prohibition on requesting documentation.
  - Use caution before taking adverse action against an employee who fails to submit documentation.
  - Determine whether there is support for requesting documentation under another law (e.g., FMLA, VPFLA, ADA)
Existing Paid Time Off Policies

- An employer is not required to provide additional earned sick leave under the law if it:
  - Has an existing paid time off policy;
  - Employees may use paid leave for the same reasons under the law; and
  - Paid time off accrues and may be used at a rate that is equal or greater to the rate in the law.
Proactive Steps – Existing PTO

○ Status quo is likely insufficient.
○ To be compliant, an existing policy must meet the use and accrual requirements of the law.
○ Policy amendments will be necessary.
○ All employers must still follow notice and posting requirements.
Employee Protections

- Employer must not require employees to find a replacement for absences, including absences for professional diagnostic, preventive, routine, or therapeutic health care.

- Group insurance benefits must continue during an employee's use of earned sick time at the same level and conditions that coverage would be provided as for normal work hours.
  - The employer may require that the employee contribute to the cost of the benefits during the use of earned sick time at the existing rate of employee contribution.
Employee Protections

- The law protects employees from discharge and retaliation for lodging a complaint of a violation of the earned sick time provisions, cooperating with the Vermont Commissioner of Labor in an investigation of a violation, or if the employer believes the employee may lodge a complaint or cooperate in an investigation of a violation.
Enforcement

- Employers who violate provisions on earned sick time will be subject to the same penalties as for nonpayment of wages and benefits under Vermont law.
  - $5,000 fine for a violation
    - Where the employer is a corporation, the president or other officers who have control of the payment operations of the corporation shall be considered employers and liable to the employee for actual wages due when the officer has willfully and without good cause participated in knowing violations.
  - Employers who fail to provide earned sick time as required by law and/or in an employment agreement are liable to the employee for actual damages caused by the failure to pay for the benefits.
FAQ

- What if an employee is absent for qualifying reasons and says they don’t want to use their earned sick time?
  - Ok with mutual agreement.
  - Employers can require that employees utilize earned sick leave in connection with any qualifying absence.
Practical Steps

- Either review and revise existing paid time off or paid sick leave policies and procedures for compliance with the law or develop a new Vermont earned sick leave policy that complies with the law.
- Train managers and HR personnel on the law.
- Monitor the VT DOL’s website for regulations, posting requirements, and other guidance.
- Consult with counsel for a legal review of policy.
CRIMINAL HISTORY RECORDS; EMPLOYMENT
21 V.S.A. § 495j
Vermont’s Ban the Box Law Becomes Effective July 1, 2017

- Employers will be prohibited from asking about an individual’s criminal history record on initial employment applications.
- Employer can inquire about a prospective employee’s criminal record:
  - During an interview
  - OR once the prospective employee has been deemed otherwise qualified for the position.
Criminal History Records

- If applicant divulges criminal history in response to employer inquiry, employer is required to offer applicant the opportunity to explain the circumstances if criminal history record does not disqualify applicant under federal or state law.
  - The statute does not require the employer to hire the person.
Exceptions

○ There are a few instances where the new law allows an employer to inquire about criminal convictions on an initial employee application:
  ● If the employee is applying for a position that state or federal law disqualifies candidates with a conviction
    ○ Could be complicated, depends on industry
    ○ Exception is narrowly tailored to types of criminal offenses that create legal disqualification for particular position
Example of Tailored Inquiry

- VT’s Licensing and Operating Rules for Nursing Homes disqualifies individuals with particular offenses from employment
  - Nursing home’s initial employment application can still ask:

  Have you ever (i) been found guilty by a court of law of abusing, neglecting, exploiting or mistreating any individual admitted for care in a facility; or (ii) had a finding entered into the Vermont State Nurse Assistants Registry or the Vermont Adult Abuse Registry concerning abuse, neglect, exploitation or mistreatment of any individual admitted for care in a facility or misappropriation of their property?  ___Yes ___ No.
Areas of Potential Concern

- Law does not address whether it is limited to applications or whether it more broadly prevents employers from checking criminal history in a background check before an interview. Employers should not seek background checks on an applicant until after an interview occurs or the employee is deemed qualified for the position.
- $100 penalty for each violation.
- **Practical Steps:**
  - review applications for impermissible inquiries regarding criminal records;
  - train employees who conduct interviews on handling criminal history questions and disclosures; and
  - Establish consistent practices for handling criminal history information.
Flexible Working Arrangements

21 V.S.A. § 309
Vermont Employers and Flexible Working Arrangements

- Effective January 1, 2014
- All Vermont employers covered.
- Vacations, routine scheduling of shifts, and other forms of leave are excluded from the definition of “flexible working arrangement.”
- Employers must engage in good faith discussions concerning employee requests for flexible working arrangements.
- Employers are obligated to respond to employee requests at least twice per calendar year.
Flexible Working Arrangement Requests

- An employer has discretion to deny a request when it is inconsistent with business operations.
- The statute lists eight possible reasons denial may be appropriate, including situations where a request: imposes additional costs, has a detrimental effect on aggregate employee morale or the ability to meet consumer demand, or there is an inability to reorganize work among existing staff.
Flexible Working Arrangement Requests

- If an employee requests a flexible work arrangement in writing and the employer denies any part of the request, the employer must provide a written denial.
- Retaliation against employees who exercise their rights under this law is prohibited.
- Employees do not have the right to bring a private action, but the Attorney General or a state’s attorney may enforce the law through investigation or by bringing an action against a private employer.
Practical Steps

- It is important supervisors are aware of these obligations in order to recognize and respond to requests.
- Next, to guard against claims, employers should implement internal procedures to thoroughly document employee requests and efforts taken to evaluate and respond to requests.
- When written responses are provided to employees, if applicable, it is advisable to include a disclaimer that granting a flexible working arrangement does not alter the at-will nature of an individual’s employment.
Practical Steps (Continued)

- Where a position requires a specific schedule, a best practice would be to add scheduling requirements to the job description.
- Lastly, employers must ensure that its decision-making is fair, non-discriminatory, and consistent with the law.
Employee Wage Discussions

21 V.S.A. § 495
Employee Wage Discussions

- Effective July 1, 2013, the equal pay act added a new section to 21 V.S.A. § 495, Unlawful Employment Practice
- It applies to all employers in Vermont.
- Employers must not:
  - require an employee to refrain from disclosing the amount of his or her wages or from inquiring about or discussing the wages of other employees.
  - retaliate against any employee who has or is believed to have disclosed his or her wages, inquired about, or discussed the wages of other employees.
- Conduct already protected by federal National Labor Relations Act
Retaliation is prohibited against employees who oppose practices prohibited by the law or against an employee who lodges or is about to lodge a complaint or participate in a complaint in any manner.

Employers are not required to disclose the wages of an employee in response to an inquiry by another employee, unless the failure to do so would otherwise constitute unlawful employment discrimination.

Employers may also prohibit human resources managers from disclosing employee wages, unless otherwise required by law.
Practical Steps

- Employers should review and revise any policies or agreements that restrict or could reasonably be interpreted to restrict employee discussion or disclosure of wages.
- Employers must use caution not to retaliate in any way against employees who discuss or inquire about their wages or other employees’ wages.
Credit Checks
21 V.S.A. § 495i
Credit Checks

- Vermont law passed in 2011
- Prohibits employers from inquiring into an applicant or employee’s credit report or credit history except if certain conditions are met:
  - the information is required by law;
  - the position involves access to confidential financial information, a financial fiduciary duty to the employer, access to payroll information; or
  - the employer can demonstrate the information is a “valid and reliable predictor of employee performance in the specific position of employment”
Credit Checks (Continued)

- If an employer will obtain a credit history or act on a credit history, it must:
  - obtain written consent each time;
  - disclose in writing the reasons for accessing the credit history;
  - disclose in writing the reason for adverse action, if any;
  - not charge the employee for the cost associated with obtaining a credit history;
  - keep the information confidential; and
  - if the applicant is not hired, either destroy the credit history in a secure manner or give it to the applicant.
Practical Steps:

○ Employers should confirm that any third party agency engaged to perform background checks is not performing credit checks, unless specifically instructed by the employer, within the limited conditions allowed by Vermont law.

○ Where credit checks permissible, employers must meet requirements of the law.
Questions? Contact Info

- Alexandra Clauss, Esq.
  - (802) 864-0880 x 1221
  - aclauss@primmer.com

www.primmer.com
Thank You

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