

Bond

Colin M. Leonard
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Dannible & McKee, LLP

Annual Construction Conference

Marriott Syracuse Downtown - Hotel Syracuse



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NEW YORK STATE WAGE & HOUR DEVELOPMENTS

Minimum Wage – Fast Food Workers

NYC		Rest of the State	
12/31/15	\$10.50	12/31/15	\$9.75
12/31/16	\$12.00	12/31/16	\$10.75
12/31/17	\$13.50	12/31/17	\$11.75
12/31/18	\$15.00	12/31/18	\$12.75
		12/31/19	\$13.75
		12/31/20	\$14.50
		7/1/21	\$15.00

Minimum Wage – Generally Applicable

- New York City

Large Employers (11 or more employees)		Small Employers (10 or fewer employees)	
12/31/16	\$11.00	12/31/16	\$10.50
12/31/17	\$13.00	12/31/17	\$12.00
12/31/18	\$15.00	12/31/18	\$13.50
		12/31/19	\$15.00

(cont'd)

Minimum Wage – Generally Applicable

- Nassau, Suffolk, and Westchester Counties:

12/31/16	\$10.00
12/31/17	\$11.00
12/31/18	\$12.00
12/31/19	\$13.00
12/31/20	\$14.00
12/31/21	\$15.00

Minimum Wage – Generally Applicable

- Employers in the remainder of the state:

12/31/16	\$9.70
12/31/17	\$10.40
12/31/18	\$11.10
12/31/19	\$11.80
12/31/20	\$12.50

- Thereafter, the minimum wage will continue to rise toward \$15.00 depending on its economic impact as determined by DOB (i.e. increases could be suspended if they are hurting the economy)
 - Assess economy in upstate NY to determine rate of increase that is best suited to grow the upstate economy

Minimum Wage Comparison - Upstate

Effective Date	Fast Food Employers	Employers Generally
12/31/15	\$9.75	\$9.00
12/31/16	\$10.75	\$9.70
12/31/17	\$11.75	\$10.40
12/31/18	\$12.75	\$11.10
12/31/19	\$13.75	\$11.80
12/31/20	\$14.50	\$12.50
7/1/21	\$15.00	

FLSA WHITE COLLAR EXEMPTION REGULATIONS

FLSA – Regulations

Overtime Exemption

- FLSA requires most employees to be paid at least federal minimum wage + overtime pay at time and one-half for all hours worked over 40 hours

Three Tests – Three Exemptions

- The Tests*

- Salary basis
- Salary level
- Duties

* all three must be satisfied for employee to be exempt

- The Exemptions

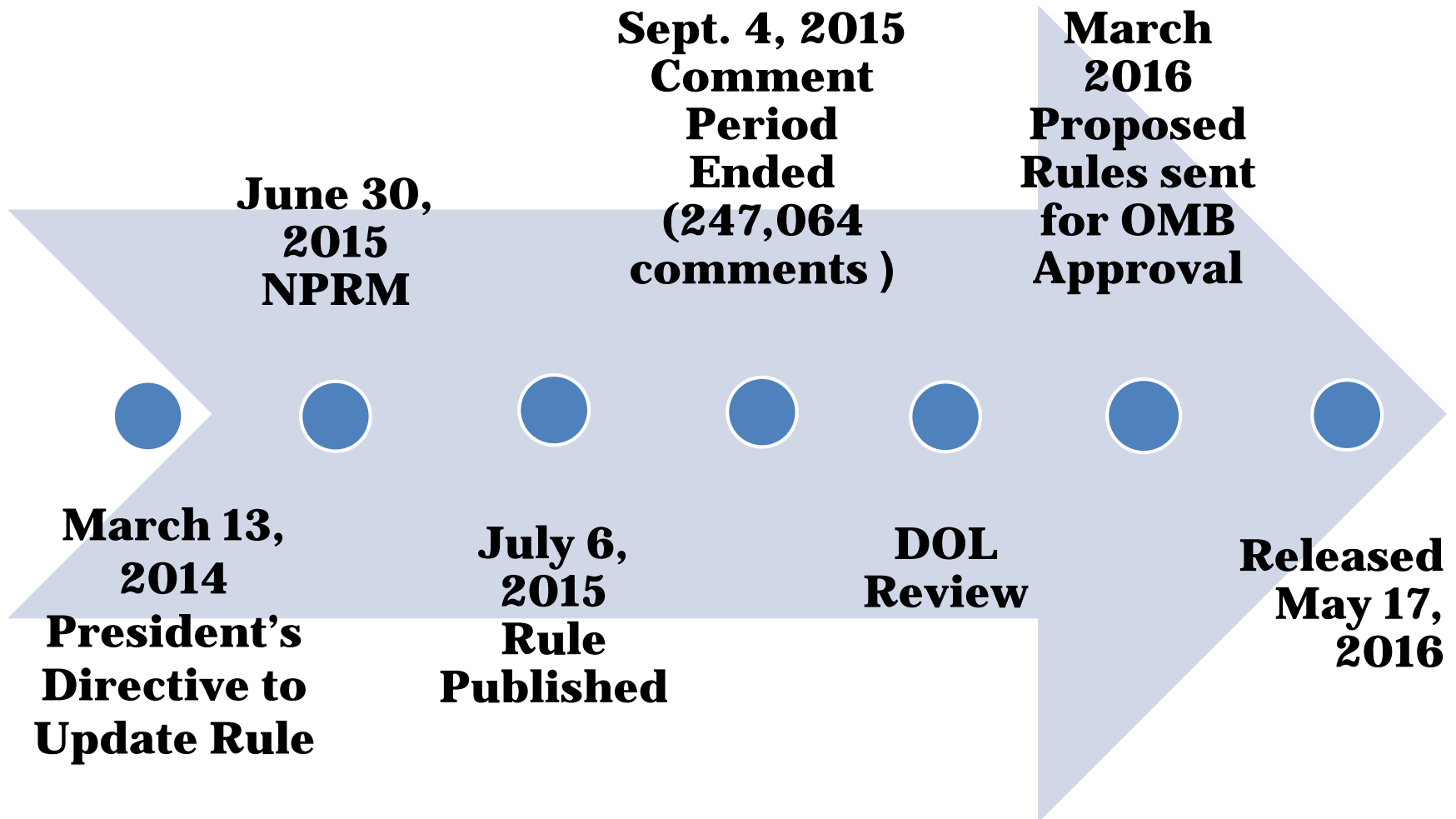
- Executive
- Administrative
- Professional

“Salary Level” Test

- New York Labor Law (“NYLL”)
 - **Currently: \$675 per week (\$35,100 per year)**
 - Increase from \$656.25 per week (\$34,125 per year)
- FLSA Minimum Salary Level
 - Currently: \$455 per week (\$23,660 per year)
 - **Effective 12/1/16: \$913 per week (\$47,476 per year)**

Remember: There is no NYLL salary minimum for bona fide “professional” employees.

The Timeline



Effective Date

December 1, 2016

~~Effective Date
December 1, 2016~~

Indexing & Automatic Increases

- New regulations provide for automatic updating every three years based on percentile of earnings
 - 40th percentile of the average salary for full-time workers in the lowest wage census region (currently the South)
- Analysts predict the first increase in salary level in 2020 could raise the salary threshold to \$51-52,000

Impact of Increase in Salary Threshold

- US DOL expects the proposed increase to the salary thresholds will render 4.6 million (25%) of the currently exempt employees ineligible for exempt status
 - Expected to cost private employers about \$1.8 billion in the first year
- Over the next ten years, increases in the salary thresholds would cause an additional 500,000 to 1 million currently exempt employees to become ineligible for exempt status

So, what happened in Texas?

Nevada v. U.S. Department of Labor

- 21 states joined together to block the new FLSA rules
- Court issued its decision on November 22, 2016

Nevada v. U.S. Department of Labor

- Court granted a preliminary injunction issuing a nationwide ban on the rule taking effect

Nevada v. U.S. Department of Labor

- Obama Administration could:
 - Appeal to Fifth Circuit Court of Appeals?
 - Do nothing?
- Trump administration actions?

What to do?

- Already raised exempt employees to new level (\$913/week)?
- Made formerly exempt employees non-exempt (did not raise to \$913/week)?
- Communicated pending changes but did not yet implement?
- Did nothing?

New York Wrinkle

- Proposed regulations to be effective December 31, 2016
 - Employers outside NYC, Nassau, Suffolk and Westchester Counties must pay at least \$727.50/week to meet the executive and administrative exemptions
 - Higher salary levels in NYC, Nassau, Suffolk, and Westchester Counties

Takeaways

- Keep an eye on New York regulations to be effective December 31, 2016
- Watch out for next steps in *Nevada v. U.S. Department of Labor*
- Examine Trump administration efforts early in 2017

INDEPENDENT CONTRACTORS

New York's highest court issues important decision on independent contractors

Yoga Vida v. Commissioner of Labor, No. 130 (N.Y. October 25, 2016)

- Concludes that nonstaff instructors at Manhattan yoga studio are properly classified as independent contractors

Factors:

- Made their own schedules
- Chose how to be paid (hourly or percentage)
- Paid only if certain number of students arrived (unlike staff instructors)
- No restrictions on teaching at other studios
- Not required to attend staff meetings or trainings

JOINT EMPLOYER ISSUES

Joint Employer

Browning-Ferris (2015)

- NLRB significantly expanded who may be considered a joint employer
- “Indirect control” over terms and conditions of employment may be enough, even if control not actually exercised
- Includes more terms and conditions of employment as relevant in the analysis
- Joint employers may have bargaining obligations and potential joint liability for unfair labor practices

Joint Employer – *Browning-Ferris*

- Browning-Ferris' recycling plant relied on a staffing company (Leadpoint) to provide workers to sort recycling materials
- Leadpoint decided who it would hire and fire, salaries, and shifts/schedules
- Leadpoint had human resources manager and multiple on-site managers located at the Browning-Ferris facility
- Browning-Ferris decided what hours to run the plant and monitored Leadpoint's quality and performance

Joint Employer

- Implications:
 - Potentially impacts businesses that use subcontractors, temporary services agencies, any company that negotiates specific quality or product requirements
 - Complicates bargaining relationships
 - Could lead to unfair labor practice liability
 - Subject employers to secondary boycotts

Impact Beyond the NLRB?

- No other federal agency has adopted the NLRB's new joint employer standard ... so far
 - EEOC filed an amicus brief in *Browning-Ferris*, suggesting that it might look to apply a similar standard
- USDOL issued Administrator's Interpretation emphasizing its intent to apply joint employer status broadly under the FLSA
- OSHA – Signs points to OSH Administration adopting a similar joint employer standard
- *Takeaway*
 - *Revisit business relationships to assess and address joint employment concerns*

New York's Paid Family Leave



The Basics

- Signed into law on April 4, 2016
- Known as the “The Paid Family Leave Benefits Law”
- Will be phased in over a four-year period, starting on January 1, 2018
- Currently the most comprehensive paid family leave program in the nation

Essential Elements

- Once it is in full effect, all employees in New York State will be entitled to 12 weeks of paid family leave time for “qualifying events”
- Employee must work with employer for 26 consecutive weeks in order to qualify
 - However, there is no minimum hours requirement like there is under the FMLA

Covered Employers

- No minimum number of employees like there is under the FMLA
- Applies to any employer covered by the New York State Workers' Compensation Law
 - So, basically, this will apply to all employers in New York State

So What is a “Qualifying Event”?

- Providing care for a family member with a serious health condition
- Bonding with a new child
- Qualifying exigency as defined by the FMLA

Summary of Paid Family Leave Benefits

Effective Date	Benefit	Length of Paid Leave
1/1/18	50% of Average Weekly Wages (AWW)	8 weeks
1/1/19	55% of AWW	10 weeks
1/1/20	60% of AWW	10 weeks
1/1/21	67% of AWW	12 weeks

Effective Date	Maximum Weekly Benefit Amount
1/1/18	50% of Statewide Average Weekly Wages (SAWW)
1/1/19	55% of SAWW
1/1/20	60% of SAWW
1/1/21	67% of SAWW

NY Paid Family Leave

- How is Paid Family Leave going to be funded?
 - Funded entirely by employees: \$0.70 to \$1.40 per week (phased in)
 - Contributions to begin 1/1/18
 - Zero employer contribution

Takeaways

- Prepare a policy that will be ready to go into effect on January 1, 2018
- Begin training managers and supervisors on how to implement this new law
- Keep a lookout for regulations to be promulgated by the Chair of the Workers' Compensation Board

OSHA DEVELOPMENTS

OSHA Developments

- Currently, most employers are required to maintain injury/illness records on OSHA Form 300
- Post summary information on OSHA Form 300A at workplace from February 1 to April 30 each year
- NEW: Employers are required to submit this information to OSHA, which it will then publicly post on OSHA's website

OSHA Developments

- Phase in for large (250 or more employees) beginning July 1, 2017
- Even if 20 – 249 employees, if in a “high hazard” industry (including manufacturing) must submit information (though slightly less) beginning July 1, 2017

OSHA Developments

- All employees must develop and publish “reasonable” procedures for reporting work-related injuries and illnesses
- Safety Incentive Plans – under attack

EXECUTIVE ORDER #13665

OFCCP's New Pay Transparency Rule

- Executive Order 13665 prohibits Federal contractors from discharging or discriminating against employees or applicants who inquire about, discuss or disclose their compensation or the compensation of another employee or applicant
- On January 11, 2016, OFCCP adopted a Final Rule implementing this requirement

(cont'd)

OFCCP's New Pay Transparency Rule

- Rule applies to Federal contractors who enter into or modify existing Federal contracts worth \$10,000 or more on or after January 11, 2016
- Requires Federal contractors to:
 - Revise the EEO clause in contracts, subcontracts and purchase orders to include new non-discrimination provisions; and
 - Incorporate an OFCCP-prescribed non-discrimination provision into existing employee manuals/handbooks and disseminate to employees and applicants

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Takeaways

- *Federal contractors must ensure their*
 - *contracts, subcontracts, purchase orders contain the required language; and*
 - *the OFCCP sanctioned non-discrimination provision is included in your employee manual/handbook*

FEDERAL CONTRACTORS – PAID SICK LEAVE

Paid Sick Leave Requirements for Federal Contractors

- Executive Order 13706 was signed in September 2015, requiring certain federal contractors to provide at least seven (7) paid sick days per year to employees working on federal contracts
- On September 30, 2016, US DOL published final regulations implementing the Executive Order

(cont'd)

Paid Sick Leave Requirements for Federal Contractors - Coverage

- Applies to new contracts and replacements for expiring contracts with the Federal Government that result from solicitations issued on or after January 1, 2017 (or that are awarded outside the solicitation process on or after January 1, 2017)
 - Contracts covered by the Service Contract Act or the Davis-Bacon Act, concessions contracts, and service contracts in connection with federal property or lands

(cont'd)

Paid Sick Leave Requirements for Federal Contractors - Accrual

- Employees will accrue 1 hour of paid sick leave for every 30 hours worked on or in connection with a covered federal contract, up to 56 hours (7 days) in a year or at any point in time
 - Alternatively, contractors may provide an employee with at least 56 hours of paid sick leave at the beginning of each accrual year
- Accrual is calculated, and employees are to be notified in writing of the amount of paid sick leave they have available at the end of each pay period or each month, whichever interval is shorter

(cont'd)

Paid Sick Leave Requirements for Federal Contractors - Use

- Required to allow paid sick time not only for an employee's own illness or medical appointments, but also for those of a family member, which is defined broadly
- Use of this leave cannot be tracked in increments greater than one (1) hour

(cont'd)

Paid Sick Leave Requirements for Federal Contractors

- Unused time must be carried over into the new calendar year
- If using accrual method - contractors may limit the amount of paid sick leave employees have accrued to 56 hours at any point in time
- Contractors are not required to pay employees for accrued, unused paid sick leave at the time of a job separation (“cash-out”)

(cont'd)

Takeaways

- *If you contract with the federal government, determine if you will be covered*
- *If covered, take steps to come into compliance before January 1, 2017*

Questions?

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