

FLORIDA SHERIFFS ASSOCIATION



Protecting, Leading, Uniting Since 1893



FSA Headquarters • 2617 Mahan Drive • Tallahassee, Florida



**FLORIDA SHERIFFS ASSOCIATION
EXECUTIVE LEADERSHIP CONFERENCE
Employment Law Update
May 10, 2016**



**Wayne Evans
General Counsel, FSA
Allen, Norton & Blue, P.A.
906 North Monroe Street
Tallahassee, FL 32303
(850) 561-3503
revans@anblaw.com**



FITNESS FOR DUTY- FMLA

Employer must provide notice of fitness for duty certification if required for reinstatement with FMLA designation notice;

- essential job functions must be listed
(include job description with notice)**

29 C.F.R. § 825.300(d)(3)



FITNESS FOR DUTY- FMLA

Employers may contact health care provider for clarification or authentication of medical certification.

- human resources professional, health care provider, leave administrator or management official may contact employer's health care provider**
- direct supervisor may not contact the provider**

29 C.F.R. § 825.307(a)



FITNESS FOR DUTY- FMLA

Employers may not ask for additional information beyond that required by certification form

- Clarification means understanding the handwriting on the certification or the meaning of a response
- Employee's failure to provide HIPAA authorization may result in denial of FMLA leave

29 C.F.R. § 825.307(a)



FITNESS FOR DUTY- FMLA/ADA/WORKERS' COMPENSATION

If employee's serious health condition is an ADA disability, FMLA doesn't prevent employer from requesting medical information under ADA

29 C.F.R. § 825.306(d)

If concurrent with W.C. leave, FMLA doesn't preclude requesting information from W.C. health care provider (through the carrier)

29 C.F.R. § 825.306(c)



FITNESS FOR DUTY- FMLA

An employer may request recertification no more often than 30 days. Must wait for minimum duration

- If medical certification states employee can't work for more than 30 days, employer must wait until time period expires before requesting recertification**
- In all cases employer may request recertification every 6 months, even if medical certification indicated employee needs intermittent leave for more than 6 months (e.g., lifetime condition)**

29 C.F.R. § 825.308(a),(b)



FITNESS FOR DUTY- FMLA

Employer may request recertification for less than 30 days if;

- Employee requests leave extension**
- Significant change in circumstances described by previous certification (e.g., duration or frequency of absences)**
- Information casts doubt on continued validity of certification or employee's stated reason for absence**

29 C.F.R. § 825.308(a),(b)



FITNESS FOR DUTY- FMLA

If employer has reason to doubt validity of medical certification, employer may request 2nd opinion at employer's expense.

- **Employee continues to receive benefits pending receipt of opinion**
 - **Employer can designate medical care provider for 2nd opinion**
 - Provider must not be used on a regular basis, unless employer is in an area where access to health care is extremely limited
- 29 C.F.R. § 825.308(a),(b)**



FITNESS FOR DUTY- FMLA

If opinions of employer's and employee's health care providers differ, employer may request 3rd opinion which is final and binding

- **Employer's expense;**
- **Employer and employee must act on good faith to agree on 3rd opinion provider**

29 C.F.R. § 825.307(c)



FITNESS FOR DUTY- FMLA

- Failure of an employer to act in good faith results in medical certification binding employee;
- Failure of employee to act in good faith results in 2nd opinion binding on employee
- Employer can't require travel outside "normal" community distance except in very unusual circumstances
- Reasonable travel expenses must be reimbursed
29 C.F.R. § 825.307(c)



FITNESS FOR DUTY- ADA

Employer may require medical examination (or make inquiry) of an employee that is job-related and consistent with business necessity.

42 U.S.C §12112(d)(4)(A)



ACCOMMODATIONS - ADA

No duty to provide accommodations to employee without a disability when relative of employee is disabled

- No right to modify work schedule to care for spouse with disability**
- FMLA, if applicable, would provide leave entitlement.**

29 C.F.R. Pt. 1630.8 app. at 349 (1996)



PERFORMANCE EVALUATIONS - ADA

To be qualified for the position, the employee must be able to perform the essential functions of the job. Supervisors should evaluate the performance of employees against the tasks and standards. As a general rule, medical issues should not be raised when performance issues arise unless employee discusses first.



FITNESS FOR DUTY

Psychological examination is consistent with business necessity if employee exhibits even mild signs of paranoid or agitated behavior that causes employer to question employee's ability to perform essential job functions.

Brownfield v. City of Yakima, 612 F. 3d 1140, 1146 (9th Cir. 2010)



FITNESS FOR DUTY

An employee's behavior cannot be merely annoying or inefficient to justify an examination. There must be genuine reason to doubt whether the employee can perform a job or related functions.

Sullivan v. River Valley Sch. Dist., 197 F 3d 804, 811 (6th Cir. 1999)



FITNESS FOR DUTY

ADA doesn't require police dept. to forgo fitness for duty examination to wait until perceived threat becomes real.

Watson v. City of Miami Beach, 177 F. 3d 932, 935 (11th Cir. 1999)



FITNESS FOR DUTY

Failing to place employee on desk duty, contrary to past practices, pending fitness for duty evaluation provided evidence that the evaluation order was not consistent with job necessity.

Emails from supervisors indicating that case worker should continue her duties to avoid placing work on others indicated examination was unrelated to her ability to perform her job.

Wright v. Illinois Dep't. of Children and Families, 798 F. 3d 513, 525 (7th Cir. 2013)



FITNESS FOR DUTY

Placing restrictions on corrections officers unconditionally, cleared to return to duty, including possession of firearm and access to areas of jail where firearms are stored created factual issues concerning officer's perception of disability claim.

DeBacker v. City of Moline, 787 F. Supp. 3d 918, 927 (C.D. Ill. 2015)



FITNESS FOR DUTY

Failing to provide civil deputy process server medical exemption for stun gun training did not violate ADA

- Carrying TASERS was an essential job function
- TASER training deemed essential job function
- Sheriff wasn't required to exempt employee from essential job functions (TASER training)
- Reassigning to civilian position was a reasonable accommodation although no agency vehicle available.

Robert v. Carter, 819 F. Supp. 2d 832 (S.D. Ind. 2011)



FITNESS FOR DUTY

Failing to provide police officer, with a K-9 who could not smell, was not a denial of a reasonable accommodation.

***Agostino v. Collier Township* 2010 WL 1992548 (W.D. Pa. 2010)**



FITNESS FOR DUTY

Infinite extension of light duty is not a reasonable accommodation.

Reassignment to other unspecified position is not reasonable accommodation.

***Frazier-White v. Gee, 2016 WL 1376448
(11th Cir. 2016)***



FITNESS FOR DUTY

- Encouraging employee to contact risk manager to discuss accommodations and apply for vacant positions for which she was qualified satisfy duty to initiate interactive process.

*Frazier-White v. Gee, 2016 WL 1376448
(11th Cir. 2016)*



FITNESS FOR DUTY

Permanent light duty status is not a reasonable accommodation if employer doesn't maintain such a position.

ADA does not require new position to be created.

***Coachman v. Hyundai Mfg. Ala., LLC, 2012
WL 1058995 (M.D. Ala. 2012)***



CONFIDENTIAL MEDICAL INFORMATION – ADA

Medical records are confidential except that

- Supervisors and managers may be informed of necessary work restrictions and accommodations**
- First responders may be informed, when appropriate, if disability may require emergency treatment**
- To government officials in connection with investigation of ADA**

42 U.S.C. §12112(d)(B)



CONFIDENTIAL MEDICAL INFORMATION – PUBLIC RECORDS LAW

**Medical information relating to prospective,
current or former officer or employee which
would identify officer or employee is exempt
and confidential**

§119.071(4)(b)1., F.S.



CONFIDENTIAL MEDICAL RECORDS – HIPPA

Covered entities: health plans, healthcare clearing houses, healthcare providers who conduct transactions electronically

- Sheriff's Office is not a covered entity for employees**

45 C.F.R. §164.104



FAIR LABOR STANDARDS ACT

- DOL's final FLSA rule will impact overtime pay:
 - These changes will increase minimum salary requirements for exempt employees;
 - The proposed minimum salary will be annually recalculated to ensure that the salary level keeps up with inflation;
 - OMB will likely submit the final rule to Congress before May 16, which is the latest it can be submitted in order to be implemented under Obama.



FLSA: CURRENT STANDARD

■ White Collar Exemptions:

- Exemption allows an employer to exclude certain executive, administrative, and professional employees from the federal minimum wage and overtime requirements
- To qualify for the exemption an employee generally must:
 - Be paid on a salary basis and not on an hourly basis (except for certain professionals);
 - Earn more than \$455/week (\$23,660 annually);
 - Perform primarily executive, administrative, or professional duties as defined under the DOL regulations.



FLSA: CURRENT STANDARD

- **Highly Compensated Employee Exemption:**
 - This exemption applies to employees earning salary of over \$100,000
 - To qualify for the HCE exemption an employee must:
 - Earn at least \$100,000 annually
 - An employer could pay the employee a year end bonus to allow them to qualify for the exemption
 - Take home at least \$455/week paid on a salary or fee basis
 - Perform duties consisting primarily of office or non-manual work
 - Customarily and regularly perform at least one of the exempt duties of an exempt administrator, professional, or executive



FLSA: PROPOSED CHANGES

- **White Collar Exemptions – Salary Increase**
 - The proposed changes to the regulations would more than double the minimum salary requirements applicable to the executive, administrative and professional exemptions
 - The DOL projects this amount to be \$970/weekly or \$50,440 annually in 2016 (an increase from \$455/weekly or \$23,660).
 - This was calculated as the top 40th percentile of full-time salaried workers.



AUTOMATIC ANNUAL SALARY UPDATES

- To prevent the salary levels from becoming outdated due to inflation, the DOL proposed a mechanism to automatically update the required minimum salary level using either one of two measures:
 - The Consumer Price Index for All Urban Consumers (CPI-U)
 - In 2014, the CPI-U annual rate was 0.8%
 - Between 2003 and 2013, the average rate was 2.6%
 - Pegging the minimum salary to the 40th percentile of all full-time salaried employees



FLSA: AUTOMATIC ANNUAL SALARY UPDATES

- DOL proposes to calculate annual updates and provide at least 60-days lead time before new rates will be effective each year;
- Automatic annual updating was proposed in the 1970 and 2004 rulemaking, but the DOL did not adopt it;
- This is an aspect of the rule that could be subject to court challenges.



FLSA: NON-DISCRETIONARY BONUSES AND INCENTIVE PAY

- The DOL has also requested comments on allowing non-discretionary bonuses and incentive payments, such as bonuses tied to productivity and profitability, to count toward 10% of the minimum weekly salary level for the executive, administrative, and professional exemptions.
 - Currently, such bonuses are only included in calculating total annual compensation under the Highly Compensated Employee exemption.
- The bonuses would have to be non-discretionary and employees would need to receive the bonuses more frequently than annually (i.e., monthly or quarterly).



FLSA: PROPOSED CHANGES FOR HCEs

- **Highly Compensated Employees**
 - For HCE, the changes increase the minimum salary requirements from \$100,000 to \$122,148 (as of 2013)
 - To calculate this number, the DOL used the 90th percentile of earnings for all full-time salaried workers
 - The DOL did not include a projected calculation for 2016
 - The minimum salary for the HCE exemption will also be updated annually using one of the two proposed methods (CPI or 40/90 test)



FLSA: WHEN WILL THE CHANGES TAKE EFFECT?

- DOL submitted its Final Rule to OMB on March 14, 2016 (OMB turnaround is four to six weeks)
- Must be submitted to Congress with at least 60 session days remaining on the legislative calendar – "deadline" is May 16 or it goes to the next Congress and incoming President
- The Final Rule will likely become effective this year
 - A minimum of 60 days notice of effective date is typically required



FLSA: IMPACT OF CHANGES GLOBALLY

- The DOL estimates that after these rules become effective, 4.6 million exempt employees will become non-exempt.
- The DOL estimates that the rule change will result in “direct employer costs” between \$239.6 million and \$255.3 million per year.
- The DOL further estimates that the rule will also result in the transfer of income from employers to employees in the range of \$1.18 billion to 1.27 billion per year.
- The DOL believes it will reduce FLSA litigation.



FLSA: PRACTICAL TIPS – WHAT TO DO NOW

- While the Final Rule likely will likely not become effective until 2016, employers should not hesitate to analyze their employee classifications now
- Employers should take this opportunity to review its wage and hour practices and prepare to make changes to comply with anticipated revisions to regulations and to ensure compliance with existing rules



FLSA: PRACTICAL TIPS – WHAT TO DO NOW

- **Conduct an audit of affected employees:**
 - How many currently exempt employees make less than \$50,440?
 - How many currently exempt employees make just under \$50,440?
 - How many currently exempt employees make just over \$50,440?
 - Should employees making just under the minimum be afforded salary increases (potentially each year) to keep them exempt or should they be converted to non-exempt?
 - What about employees in similar positions, some of whom are above the minimum salary and some of whom are below it?



FLSA: PRACTICAL TIPS – WHAT TO DO NOW

- **For employees who will be converted to non-exempt:**
 - Do you know how many hours the employee is working (including any hours worked at home, on weekends, etc.)? Should you ask?
 - The employer must begin tracking the employee's actual time worked and computing overtime accordingly.
 - Anticipate “morale” problems (i.e., perceived demotion by employee).
 - Should scheduling and working practices be adjusted to minimize overtime worked?
 - Policies should be reviewed to keep employees from working off the clock.



PRACTICAL TIPS – WHAT TO DO NOW

- For employees who will be converted to non-exempt:
 - Decide whether to pay the non-exempt employee on an hourly basis or to continue to pay a salary (plus overtime)
 - You can still pay a salary to a non-exempt employee, but you must supplement the salary if the employee works over 40 hours
 - Salary acts as a minimum compensation amount
 - Salary can be for normally scheduled hours (hours worked over forty are paid at half-time rate and hours paid over the normal schedule at 1.5 rate)
 - Salary can be for fluctuating workweek schedules, too (hours worked over forty are paid at half-time rate)



PRACTICAL TIPS – WHAT TO DO NOW

- For employees who will be converted to non-exempt:
 - You can reduce the non-exempt employee's pay rate so that, with overtime compensation, the total compensation is equivalent
 - EXAMPLE: Assume an exempt employee normally works 50 hours per week earning a weekly salary of \$800 (i.e., \$41,600/year and \$16/hr)
 - If you convert to non-exempt and did not change the compensation rate (\$16/hr), the employee would receive \$880/wk (\$45,760) after being paid overtime for the ten OT hours worked each week.
 - However, if you reduce the employee's hourly rate to \$14.55/hr, the employee's total weekly compensation with overtime is \$800.25
 - $(\$14.55 \times 40 \text{ straight-time hours} + \$14.55 \times 1.5 \times 10 \text{ OT hours})$



FLSA: MORE PRACTICAL TIPS

- Once you identify if the regulatory changes affect you, you should consider the following:
 - Operations and Budget
 - Will you reduce hours to avoid overtime?
 - If you reduce hours, will you be required to hire more workers?
 - Anticipate employee morale issues (need to have clear message and plan of action to convey the plan to affected employees)
 - Should you educate newly-nonexempt employees whose wage rates have been lowered but whose total pay should not be adversely affected (consider comparison pay sheets with actual paystubs)



MORE PRACTICAL TIPS

- Policies
 - How will you implement and communicate new policies for tracking hours worked?
 - Will you implement new policies to reduce off-the-clock exposure?
 - Access to computer networks, email, company-paid mobile devices
- Consider whether there are there collective bargaining obligations with a union, particularly where you are changing pay rates, schedules, etc.?
- Consider involving attorneys in wage and hour audit process
 - Attorney/Client privilege can be asserted



WHAT NOT TO DO

- Don't stick your head in the sand!
- Don't convert employees to independent contractors
- Don't just assume newly-nonexempt employees only work 40 hours
- Don't assume all employees who make over minimum salary are exempt (still must satisfy duties test)
- Don't raise salaries to satisfy new exemption amount and then make impermissible deductions to save money
- Don't panic!



FLSA: 7(K) EXEMPTION

LAW ENFORCEMENT EMPLOYEES

- **Law Enforcement Employees must be paid overtime for all hours worked in excess of work period maximum**
 - 7-day work period = 43 hours
 - 14-day work period = 86 hours
 - 21-day work period = 129 hours
 - 28-day work period = 171 hours
- **Civilians must be paid overtime for hours worked over 40 in a 7-day workweek**
 - Includes dispatchers



FLSA: VOLUNTEERS AND RIDE-ALONGS

- **Individuals can volunteer time to public employer with one exception – an individual cannot volunteer to perform the same work for which they are employed**
 - Key consideration: Is the employee performing the same work for which she is employed?
 - Civilian may volunteer as an auxiliary deputy
 - Deputy may volunteer to cook food at charity event
 - Deputy cannot volunteer to direct traffic at charity event
- **Ride-Alongs may be compensable**
 - Corrections officers should be compensated
 - Civilians need not be compensated



FLSA: PAID HOLIDAYS

- Only need to pay overtime for "sweat time"
- Sweat time = time actually worked beyond the prescribed threshold
- Subject to union contract



FLSA: LECTURES AND TRAINING

- Not Compensable if Four factors are met:**
 - Activity is outside of normal working hours
 - Attendance is voluntary
 - Activity is not job related
 - No productive work performed

- If ALL four factors are not met the time is compensable**



FLSA: SECONDARY EMPLOYMENT

- Time working for secondary employer is not generally compensable time for primary employer
- But if deputy makes an arrest while working secondary job it may become compensable



FLSA: TRAVEL TIME

- Must compensate employee for:**
 - "All in a Day's Work" - travel between job sites as part of principal activity during normal work day
 - Home to work travel for a one-day special assignment in another city (may exclude time employee normally spends commuting)
 - Travel away from home that cuts across workday or during working hours on non-workday
- Do not compensate employee for:**
 - Ordinary home to work travel
 - Travel time outside of working hours as a passenger



FLSA: PART-TIME EMPLOYEES

- FLSA does not distinguish part-time employees.
- Any employee who works over 40 hours (or overtime under 7(k) must be paid overtime.
- But remember 30-hour threshold under Obamacare



POLITICAL RETALIATION

- *Heffernan v. City of Patterson*, N.J. Case No. 14-1280 (April 26, 2016) Perceived exercise of free speech (political support of candidate) protected from retaliation under 1st Amendment.



WORKERS' COMPENSATION

Castellanos v. Next Door Company, et.al.,

Case No. SC13-2082 (Fla. April 28, 2016)

Section 440.34, F.S. mandating conclusive fee schedule for awarding attorneys' fees to claimant is unconstitutional.

- Claimant's attorney may seek fee award outside fee schedule regardless of benefits secured.
- Result = increased fees, benefits and premiums?
- Attention to W.C. deadlines important to avoid increased litigation and fee award.



QUESTIONS?

**Wayne Evans
General Counsel/FSA
Allen, Norton & Blue, P.A.
906 North Monroe Street
Tallahassee, FL 32303
(850) 561-3503
revans@anblaw.com**

