HR Compliance in 2019

What You Need to Know

May 29, 2019
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Agenda

• Proposed Changes to DOL Overtime Rule
• Medical and Recreational Marijuana
• NJ Ban on Non-disclosure Provisions
• NJ Family Leave Expansion
• NJ Minimum Wage Increase
• NJ Pre-tax Commuter Benefit Law
• Independent Contractors in NJ
• Q&A
<table>
<thead>
<tr>
<th>The Beginning</th>
<th>The End</th>
<th>The Rebirth</th>
</tr>
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<tbody>
<tr>
<td>July 6, 2015</td>
<td>November 22, 2016</td>
<td>March 7, 2019</td>
</tr>
<tr>
<td>Proposed Rule</td>
<td>Preliminary Injunction</td>
<td>New Proposed Rule</td>
</tr>
<tr>
<td>May 23, 2016</td>
<td>August 31, 2017</td>
<td>January 1, 2020</td>
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<tr>
<td>Final Rule Released</td>
<td>Ruled Invalid</td>
<td>Projected Effective Date</td>
</tr>
<tr>
<td>December 1, 2016</td>
<td>November 2, 2017</td>
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<tr>
<td>Effective Date</td>
<td>DOL Appeals</td>
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# Proposed Changes to DOL Overtime Rule – Salary Thresholds

<table>
<thead>
<tr>
<th>CURRENT</th>
<th>ATTEMPTED 2016</th>
<th>PROPOSED 2020</th>
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<tbody>
<tr>
<td>$23,660/year ($455/week)</td>
<td>$47,476/year ($913/week)</td>
<td>$35,308/year ($679/week)</td>
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<tr>
<td>Highly Comped $100,000/year</td>
<td>Highly Comped $134,004/year</td>
<td>Highly Comped $147,414/year</td>
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Proposed Changes to DOL Overtime Rule

$35,308 = 90% base salary + 10% incentive pay

Example: Base Salary $31,777.20 qualifies if $3,530.80 provided in incentive pay

Incentive Pay could include:
- Commissions
- Non-discretionary bonuses
- Other incentive payments
Proposed Changes to DOL Overtime Rule

- Total salary must be met annually
- Catch-up payment may be made 1\textsuperscript{st} pay period following 52-week period
- Salary thresholds determined by 20\textsuperscript{th} and 90\textsuperscript{th} percentiles of salaried wage-earners (2004 method)
- Periodic increases every 4 years
- Different salary thresholds based on region and white-collar exemption considered but dismissed
- Check state-specific overtime exemption rules (California, New York, Maine)
Medical and Recreational Marijuana – Current Status

• Still illegal under Federal Law (Controlled Substances Act)

• ADA does not protect illegal drug use

• Medical Marijuana – legal in 29 states (NJ is one of them)

• Recreational Marijuana – legal in 10 states plus D.C. (NJ not yet)
NJ Medical Marijuana

- January 2010 – **NJ Compassionate Use Medical Marijuana Act (NJCUMMA)** signed into law
  - States that there is no requirement for government or insurers to reimburse for medical marijuana costs, or for “an employer to accommodate the medical use of marijuana in the workplace”

- 2016 – Two pending bills to amend NJCUMMA (AB 2482 and SB 2161)
  - Amendment would provide prohibit employers from taking adverse employment action against an employee registered as a medical marijuana user
  - So would not be able to take negative employment actions based on employee’s status as a registered MM cardholder or employee’s positive drug test
NJ Recreational Marijuana

• Legalization pending for persons 21 years of age and older (SB 830/AB 1348)

• Vote was scheduled for March 25\textsuperscript{th} but called off due to lack of support

• Governor Murphy is giving state legislature until end of May to pass a bill to legalize marijuana

• If not passed, Gov. Murphy is expected to expand medical marijuana laws further
NJ Recreational Marijuana

UPDATE:

• In May 2019, the state senate announced that recreational marijuana will not be passed; instead, it will be on the ballot for voters in November 2020

• 2 pending bills proposed to expand marijuana rights
  • S10 – increase amount of cannabis patients could get, expand list of conditions, add dispensaries, and increase number of professionals permitted to prescribe it
  • A4498 – expungement of criminal records for people cleared of small marijuana-related convictions (must have 10 years completed from date of release, probation and parole)
Complying with Federal vs. State Marijuana Laws

The big question... How do you balance opposing requirements?

Employers have a duty to provide a safe and productive workplace

vs.

Employers must accommodate disabilities that may require use of medical marijuana
Complying with Federal vs. State Marijuana Laws

• Follow case law (*Barret v. Robert Half Corporation*, *Wild v. Carriage Funeral Holdings*)
  o Even though no requirement to accommodate under NJCUMMA, employee may still be protected for a disability under NJLAD

• Not much case law yet – if you choose to follow federal law, will your company be the next “test case”?

• Review Drug Testing Policies and determine how you will handle marijuana testing
  o Urine drug tests cannot detect when drug was used (ranges few days to 1 month prior, depending on level of usage)
  o Too much variance among individuals to establish “impairment limits”
  o Legal, off-work usage may still result in a positive test
  o Employees subject to DOT regulations do need to have accommodation

• Always follow ADA rules and engage in interactive process
Complying with Federal vs. State Marijuana Laws

If you receive an accommodation request for marijuana use, consider the following:

- Can the employee perform the essential functions of their job?
- What is the nature of the employee’s illness?
- How often must the employee use marijuana?
- Does the employee hold a safety-sensitive position? (weigh risk of not complying with state law to accommodate vs. known user causing an accident that injures/kills others)
- How risk-averse is your company?

Best Practice:
1. Always engage in the interactive process
2. Focus on and document observable behaviors that indicate impairment (no law requires you accommodate impairment at work)
NJ Ban on Non-Disclosure Provisions

• Amendment to NJLAD signed by Governor Murphy on March 18, 2019
• Makes non-disclosure agreements in employment contracts and settlement agreements unenforceable when related to claims of discrimination, harassment or retaliation
• Also prohibits any waiver of employee right to a “substantive or procedural right or remedy” (e.g. requiring an employee to waive a jury trial or arbitration)
• May still enter into such agreements if both parties are willing
• Anti-retaliation provision added to prevent employers from retaliating against employees that do not choose to enter into such agreement
• If the employee publicly reveals information that would reasonable identify the employer, the non-disclosure provision is no longer enforceable (basically a one-sided non-disclosure agreement)
NJ Ban on Non-Disclosure Provisions

- New law does not prohibit non-compete agreements or confidentiality agreements that restrict disclosure of proprietary information
- Employer responsible for reasonable attorney fees and costs if attempt is made to enforce a prohibited provision under the new law
- Applies to contracts entered into, renewed, modified or amended on or after March 18, 2019
  - However, could be argued that pre-existing agreements are against public policy and thus unenforceable
- Potential conflict with Federal Arbitration Act (FAA)
  - *AT&T Mobility LLC v. Concepcion* – demonstrated that federal FAA rules take precedent when state law prohibits arbitration
- Large opposition on both employee and employer sides
  - Could lead to less settlements and lower settlement values
1. Ensure policies and procedures are in place to prevent harassment, discrimination and retaliation in the first place (#metoomovement)

2. Consult with an attorney before entering into any employment contracts or agreements

3. Review and revise settlement agreements, employment contracts, employee handbook, and any other agreements to comply with this new law
NJ Family Leave Expansion

On February 19, 2019, Governor Murphy signed legislation to expand NJ Family Leave benefits under the NJ Family Leave Act (NJ FLA) and NJ Family Leave Insurance (NJ FLI)

- NJ FLA – changes effective June 30, 2019
- NJ FLI – changes effective July 1, 2020

Refresher:

NJ FLA = currently 12 weeks of protected time off for an employee to bond with a newly born/adopted child or care for a sick family member

NJ FLI = currently 6 weeks of wage benefits through the state while out of work to bond with a newly born/adopted child or care for a sick family member
NJ Family Leave Expansion – NJ FLA Amendments

Current Definition of Covered Employer = 50+ employees for 20 or more calendar weeks in the current or preceding calendar year

New Definition of Covered Employer (effective June 30, 2019) = 30+ employees for 20 or more calendar weeks in the current or preceding calendar year

• Covered Employee Definition remains unchanged =
  o 1,000 hours worked in the last 12 months
  o 12 months of service (in NJ)
  o Qualifying Event

Additional Changes
• 42 days of intermittent leave → 56 days of intermittent leave
  o Effective July 2020
  o Job protection provided within a 12 month period
NJ Family Leave Expansion – NJ FLA Amendments

- Expands definition of family member for covered leave
  - Pre-amendment: 1) newly born or newly adopted child; 2) parent; 3) child under 18; 4) spouse or civil union partner
  - Post-amendment: 1-4 above, PLUS: 5) foster child; 6) child born pursuant to valid written agreement between parent and gestational carrier; 7) parent-in-law; 8) sibling; 9) grandparent/grandchild; 10) domestic partner; 11) any blood relative; 12) anyone with a close association to the employee that is equivalent to a family member

- Includes Domestic and Sexual Violence
  - Protected time off under NJFLA if employee is the victim of domestic or sexual violence, or to care for a family member that is such a victim

- Anti-retaliation provisions added
NJ Family Leave Expansion – NJ FLI Amendments

- Doubles the amount of time that an employee can collect
  - 6 weeks → 12 weeks in a 12 month period (beginning July 1, 2020)

- Increases the weekly benefit rate
  - $66 \frac{2}{3}\% \rightarrow 85\%$ of an employee’s average weekly wages

- Weekly max benefit is increasing (effective July 1, 2020)
  - Based on 2019 data, weekly max will increase from $650/week → $860/week

- One week waiting period is waived (effective for leaves beginning July 1, 2019)
  - Eligible employees will receive benefits as of first day of leave
  - Current 7-day waiting period only gets paid if leave is 21 days or longer

- Can no longer require employees to use paid time off before collecting FLI (effective immediately)
NJ Family Leave Expansion – NJ FLI Amendments

NO CHANGE – FLI must run concurrent with any federal or state leave protection (e.g. NJ FLA or NJ Safe Act leave)

Who is footing the bill?
Employees are funding this through taxes withheld for NJ SUI/SDI
NJ Minimum Wage Increase

Current Minimum Wage

$8.85 per hour

Effective January 1, 2019

Governor Murphy signed a bill to raise minimum wage to $15.00 per hour by 2024

Federal Minimum Wage remains unchanged at $7.25 per hour (last updated July 2009)
<table>
<thead>
<tr>
<th>Date</th>
<th>Rate</th>
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<tbody>
<tr>
<td>July 1, 2019</td>
<td>$10/hour</td>
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<tr>
<td>January 1, 2020</td>
<td>$11/hour</td>
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<tr>
<td>January 1, 2021</td>
<td>$12/hour</td>
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<tr>
<td>January 1, 2022</td>
<td>$13/hour</td>
</tr>
<tr>
<td>January 1, 2023</td>
<td>$14/hour</td>
</tr>
<tr>
<td>January 1, 2024</td>
<td>$15/hour</td>
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NJ Minimum Wage Increase

Exceptions:

- **Seasonal Workers and Employers with fewer than 6 employees**
  - Slower path to $15/hr by 2026
  - Next increase $10.30/hr effective Jan 1, 2020

- **Agricultural Employees**
  - Slower path to $15/hr by 2027
  - Next increase $10.30/hr effective Jan 1, 2020

- **Tipped Employees**
  - Increase to $5.13/hr by 2022
  - Next increases $2.63/hr July 1, 2019 and $3.13/hr Jan 1, 2020

- **Qualified Trainees**
  - Pay 90% of minimum wage for first 120 hours (beginning Jan 1, 2020)
  - Worker cannot displace existing employees and reasonable effort must be made to continue employment after qualified training period
NJ Pre-Tax Commuter Benefit Law

On March 1, 2019, Governor Murphy passed a law requiring NJ employers with 20 or more employees to offer pre-tax commuter benefits, starting March 1, 2020.

**Highlights:**
- Must allow employees to contribute on pre-tax basis
- Applies to companies with 20 or more employees
- Benefit offering must allow for the following qualified expenses:
  - **Qualified Parking** (parking near place of work, or parking near mass transit)
  - **Transit Passes** (mass transit – bus, rail, ferry)
  - **Vanpooling** (commuter highway vehicle for 6 or more passengers)
- Follow federal tax limits for maximum monthly contributions
  - Two buckets:
    - Qualified Parking = $265/month
    - Transit Passes + Vanpooling (combined) = $265/month
- Employees covered under CBA initially excluded (offer when CBA in effect ends or federal employees also subject to federal law).
Independent Contractors in NJ

On May 3, 2018, Governor Murphy signed Executive Order No. 25, which established a Task Force to target misclassified employees.

Why do Employers use Independent Contractors?
- Easier relationship to manage
- Perceived as less risk
- Less taxes
- Technology allows for more remote/project-based work
- Need for unique skills

How to determine worker classification?
- IRS 20 Factor Test vs. ABC Test
  - ABC Test is more difficult
  - NJ DOL uses ABC Test
Independent Contractors in NJ

ABC Test:

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<tr>
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<tbody>
<tr>
<td><strong>A</strong></td>
<td>Such individual has been and will continue to be free from control or direction over the performance of such service</td>
</tr>
<tr>
<td><strong>B</strong></td>
<td>Such service is outside the employer’s usual course of business or places of business;</td>
</tr>
<tr>
<td><strong>C</strong></td>
<td>Such individual is engaged in an independently established trade, occupation or business.</td>
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- All 3 conditions (A, B and C) must be met to qualify as an Independent Contractor
- If any conditions are not met, the test is over and the worker is a W2 Employee
- Condition “C” (e.g. paying an LLC) is not enough to satisfy the requirements
Independent Contractors in NJ

Analysis Questions to Ask:
• Does the worker have detailed knowledge about your business?
• Does your company have a high level of control, or need to have more control, over their work?
• Is training required for this worker?
  o CAUTION: more technical skills lead to more training (i.e. Systems, etc.)

Trucking Industry –
• 85% of Owner-operators serving NJ/NY are independent contractors
• Owner-operators now required to produce either:
  1. IRS letter stating they are an Independent Contractor
  2. IRS audit showing they are exempt from federal taxes
What’s Next???

Trends:
• Mandatory harassment training
• Salary history ban
• Expanded leave benefits (additional states/jurisdictions)
• State-specific laws
Q & A