EMPLOYMENT & HUMAN RESOURCES *newsletter*

Spring 2017

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Demographic Changes Ahead and Effects on the MN Labor Force.

Flex hours? Working from home? Technology policies? What is needed to update the handbook? These may all be questions that arise in a workplace that strives to accommodate baby boomers, millennial's and gen xers. Please join Gislason & Hunter LLP for the Spring Employment Law Conference which will feature Jeanne M. Boeh, Professor of Economics

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at Augsburg College who will share her vast research on the employment environment and how to prepare for changes in the economy and workplace.

Dr. Boeh, combines her research with a vast experience in a variety of industries. She has worked as an economist for the American Hospital Association, the Illinois Hospital Association and the investment research firm of Duff and Phillips. She has been a member of the Minneapolis Star Tribune Board of Economics and is a past president of the Minnesota Economic Association.

In addition to Dr. Boeh's presentation, the Employment and Labor attorneys at Gislason & Hunter will be presenting updates on a variety of topics including:

- **Hiring and Firing Procedures**
- **Animal Sabotage in the ag industry**
- **Cybersecurity**
- **General employment laws update**

A registration form is enclosed.

We hope to see you:
Tuesday April 25, 2017
Courtyard Marriott
Mankato

Jeanne M. Boeh is a Professor of Economics at Augsburg College where she has taught since 1990. She was Chair of the Economics Department for 15 years and has been Co-Chair of the Business, MIS and Accounting Department since 2013. Previously, she taught at Loyola University, University of Illinois at Chicago and the University of St. Thomas in Minnesota. She also has worked as an economist for the American Hospital Association, the Illinois Hospital Association and the investment research firm of Duff and Phelps. She has been a member of the Minneapolis Star Tribune Board of Economists and is a past president of the Minnesota Economic Association. Her research and teaching interests are applied microeconomics focusing on the fields of education and governance. She has a B.S., M.A. and a Ph.D. in Economics from the University of Illinois at Chicago.

Gislason & Hunter LLP

Spring Employment Law Conference

Tuesday April 25
Courtyard Marriott
901 Raintree Rd, Mankato, MN
11:30 Lunch Buffet
12:00 – 3:30 Conference

Registration: $50.00
Includes: Lunch, breaks, link to download materials

Name _____

Company _____

Email _____

To register online contact: jdonner@gislason.com – you will receive a call for credit card payment.

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TOPICS TO INCLUDE:

Millennials, Generation X and Baby Boomers Sharing the same Workspace. Demographic Changes Ahead and Effects on the MN Labor Force.

Flex hours? Working from home? Technology policies? What is needed to update the handbook? These may all be questions that arise in a workplace that strives to accommodate baby boomers, millennial's and gen xers. Please join Gislason & Hunter LLP for the Spring Employment Law Conference which will feature Jeanne M. Boeh, Professor of Economics at Augsburg College who will share her vast research on the employment environment and how to prepare for changes in the economy and workplace.

Sabotage in the Workplace - It is no secret that employees can be a company's biggest asset… and liability. In recent years, with employees using their cell phone cameras to take undercover photographs and videos allegedly showing abuse, employers need to be even more vigilant in their hiring and training practice

Hiring and Firing Procedures

Employment Case Law Update

The Dangers of Negligent Hiring and Retention of Employees

ARE YOU NEGLIGENTLY EMPLOYING SOMEONE?

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A number of recent Minnesota court decisions have brought an issue many employers are unaware of to the forefront: whether an employer is has negligently hired, or is negligently employing, someone who may cause harm to others. By way of background, Minnesota courts recognize three causes of action where a claimant sues an employer in negligence for injuries caused by one of its employees: negligent hiring, negligent retention, and negligent supervision.

In negligent hiring claims, the question is whether an employer, at a time it hires an employee, could reasonably have foreseen that the individual poses a threat of physical injury to others. That potential liability goes beyond whether injuries that happen within the "scope of employment" – meaning, that arise out of performance of the employee's work-related duties – and to any other harm an employee may cause. The employer's liability is limited, however, by the fact that it can only be responsible if it knew, or should have known, that

the employee was violent or aggressive. An employer "should have known" of dangerous propensities if they would have been uncovered by "reasonable investigation."

Similarly, generally an employer has the duty to refrain from retaining employees with known dangerous proclivities, and thus can be held liable for "negligent retention" when they do so. To be held responsible, however, an employer must, during the course of employment (as opposed to negligent hiring before employment), become aware or should have become aware of problems with an employee that indicated his unfitness. The employer must also take necessary measures to ensure the safety of others, whether by discharging the employee, reassigning the employee, or otherwise making sure that no one will be harmed. Again, the harm at issue may arise outside of the scope of employment, and yet the employer can be held responsible.

To make out a successful claim for negligent supervision, on the other hand, an injured party must prove (1) the employee's conduct was foreseeable; and (2) the employer failed to exercise ordinary care when supervising the employee. Such claims do arise out of the doctrine of respondeat superior, which means that an employer will, for the most part, only be responsible for harm caused within the course and scope of employment. This ensures that an employer is only held responsible for acts of an employee when there is some connection between the bad act and the business, and that the type of bad conduct involved is a well-known industry hazard.

As noted, recent decisions bring these concepts to the forefront, and provide a good opportunity to remind employers to diligently ensure that their employees do not threaten harm to others. One, in particular, shows the seriousness with which employers should take their duties to properly vet employees, particularly those who will be in contact with the general public or, even more crucially, in contact with vulnerable individuals. In Marlene Gronholz vs SJ Zimmer Inc, d/b/a AAA Labor, a case venued in Hennepin County, the employer, SJ Zimmer, was operating as a temporary employment service. It sent a temporary employee, Danny Ray Fuston, to perform yard work at the home of Ms. Gronholz, a 74-year-old widow. Everything went well on the first day, and Mr. Fuston was invited back for a second day of work.

On his second visit to Ms. Gronholz's home, Mr. Fuston was invited in for lunch. While there, he became upset for reasons unknown, and struck Ms. Gronholz over the head with coffee mug. He proceeded to drag Ms. Gronholz into another portion of the home and cut open her throat. Miraculously, Ms. Gronholz survived.

Mr. Fuston had a low-level criminal history that included convictions for theft, including car theft, and drunken driving. There is no suggestion he had ever acted violently prior to his employment by SJ Zimmer, or while working for the company. Nevertheless, when Ms. Gronholz sued those companies on a theory of negligent hiring and negligent supervision. Believing that it had a strong defense to the negligent hiring claim because Mr. Fuston's acts were not foreseeable, and to the negligent supervision claim both for that reason and because Mr. Fuston's acts were outside of the scope of employment, SJ Zimmer defended the case through trial.

The jury agreed that SJ Zimmer had not negligently hired Mr. Fuston, but found that it was negligent in supervising him (and thus determined that his actions were a risk well-known in the industry). It returned a verdict of $5.65 million in Ms. Gronholz's favor, a significant award obviously reflecting the seriousness of the attack upon her. Significantly, Ms. Gronholz's attorneys argued that the position he was placed in, at the home of an elderly woman, stands in contrast to other workplaces, such as a factory position or retail, where one is monitored more closely. They further argued that SJ Zimmer had only interviewed Mr. Fuston for three minutes before sending him to the job, and that more care was needed when sending him into situation with a vulnerable adult.

The lesson of this and other cases is fairly straightforward: within the bounds of law, an employer must appropriately vet those individuals it plans to hire. Upon hiring someone, if it receives information that someone is a danger to others, it is vital that an employer take steps to minimize the threat that employee poses to coworkers or the public at large, and depending on the seriousness of the conduct, termination should be considered. Finally, despite limitations on liability such as those set forth by the scope of employment, employers should vigilantly ask whether a jury may consider the possibility of assault or other harm to others to be a well-known risk of a particular industry, and if so, ensure that all employees in contact with the public, especially vulnerable individuals.

STRATEGIC HIRING OF FARM WORKERS

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In country western songs, farmers find their "hired man" when he walks down the lane looking for a job. In reality, employers need to be vigilant in their hiring and training practices. With employees using their cell phone cameras to take undercover photographs and videos allegedly showing animal abuse or employer misconduct. Employers need to ensure they are hiring employees who share the employer's values and goals of caring for the health and well-being of their animals. Once hired, employers need to properly train employees on the employer's policies to prevent animal abuse.

1. Hiring the Right Person

When it comes to background checks and investigating potential employees, in general, the law does not require employers to perform background checks. However, if an employer chooses to conduct a background check on employees, the law does define and limit what the employer can research. Many employers conduct a cost-benefit analysis of the level of research to perform on potential employees. While conducting that analysis, employers should keep in mind that it takes a lot less time and money to research employees on the front end than to wage a public relations war after the fact. The following hiring practices may assist an employer in making educated and sound hiring decisions.

First, be consistent across the board when researching applicants and hiring. Make sure you are asking the same base questions of all applicants. For example, you cannot ask only certain applicants if they have been involved with animal rights groups, you have to ask everyone.

Second, make sure your application asks the right questions. With respect to membership organizations, an employer should not ask an applicant a general, overreaching question requesting all clubs, societies, lodges, etc. to which the individual belongs. The general thinking is that by posing the general questions about organizations, it may indirectly solicit information about a person's economic or social class, race, color, creed, sex marital status, religion, national origin, or other protected class. However, inquiring about membership in organizations, the names of which do not point to or indicate the applicant is a member of a protected class is acceptable. Therefore, you can ask whether the applicant in a member of PETA or the Humane Society.

Furthermore, in your application, have applicants swear they have told the truth on their employment application under penalty of perjury. Including this on the written application and having a policy that allows for disciplinary action, up to and including termination, if false information is provided, gives the employer grounds for termination if an applicant is not truthful.

Third, do not rely solely on the application. Do your own research. When checking references, make sure the phone numbers provided for references actually go to the company where an applicant says they previously worked. Call the main office number and ask to be transferred to the reference, rather than calling the direct number the applicant provided. When speaking to references ask the hard questions, don't just confirm employment. Verify prior employment on an applicant's resume and question gaps between jobs. Also, consider having a professional conduct a background check.

A conflict of opinion arises when it comes to researching a potential candidate on the internet and through social media. As discussed above, it is important to not solicit information about whether an applicant is a member of a protected class. However, by conducting internet and social media searches, an employer may discover that an applicant is a member of a protected class. If the applicant is then not hired, an argument may be made that the failure to hire the applicant was discrimination. Conversely, internet and social media searches can reveal connections with animal rights organizations, potentially preventing a public relations fiasco. It is important for an employer to consciously decide whether an internet and social media search will be conducted and, if so, to consistently conduct the search for all applicants to guard against claims of discrimination.

Once the data has been collected on an applicant, watch out for:

- Applicants applying for work below his or her skill level;
- Applicant with prior employment unrelated to agricultural work; and
- Applicants who offer to work for little or no pay, after hours or the work no one else likes to do.

2. Policies to Prevent Animal Abuse

After putting so much time and energy into researching employees, you should adopt policies and train employees to support the company's values.

Employers should enact policies in their own barns prohibiting the photography or videography of livestock. Policies should limit the use of cell phones while on the job or even require cellphones to be left in vehicles or lockers. Employers may also implement policies that unauthorized photographs or videos taken while on the employer's premises are property of the employer.

A handful of states have enacted laws over the recent years prohibiting the photography or videography of livestock without the consent of the owner. Those laws have been challenged in some states as a violation of the First and Fourteenth Amendments. Even if you are in a state with such a law, it is important to also have a policy in the employee handbook and to post the policy at all of your facilities. Taking these steps ensures that all employees are aware of the law and policy and the consequences of violation.

Once these policies are set an employer must strictly enforce the policies, as well as any other rules and regulations for the humane treatment of animals. Make sure to post policies against animal neglect and abuse, including phone numbers to call to report animal neglect. Have long-time, loyal employees keep a lookout for problems such as animal abuse, neglect or maltreatment or employees taking videos of the animals. If you see employees on the premises when they shouldn't be or in areas where they shouldn't be, question the employee.

Taking these actions before a problem arises, will place employers in the best position to efficiently and effectively handle publicity issues if an employee makes an allegation of abuse.

THE FAIR LABOR STANDARDS ACT AND WHITE-COLLAR OVERTIME EXEMPTIONS

What Employers Must Know

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There has been a lot of commotion about overtime regulations and exemptions under the Fair Labor Standards Act (FLSA). From receiving comments to the proposed salary changes, delaying implementation of the proposed changes, halting enforcement of those changes, and appealing an injunction; overtime exemptions have been a major topic in employment law the past two years. This article outlines what has occurred and what employers must know.

White-Collar Exemptions – Employers must pay overtime premiums to employees that work more than 40 hours in a given workweek, unless the employee is exempt under the FLSA. One category of the exemptions available is commonly referred to as the "white-collar" or "EAP" exemptions. Employees "employed in a bona fide executive, administrative, or professional capacity" are exempt from overtime pay. 29 USC § 213(a)(1). In 1961, Congress delegated the power to define these exemptions to the Department of Labor (DOL), which is the agency that enforces the FLSA. Each exemption has two tests: (1) duties test; and (2) salary-basis test. Those tests are set forth in regulations crafted by the DOL. Under the duties test, an employee must primarily perform the following duties to be employed in a bona fide exempt capacity:

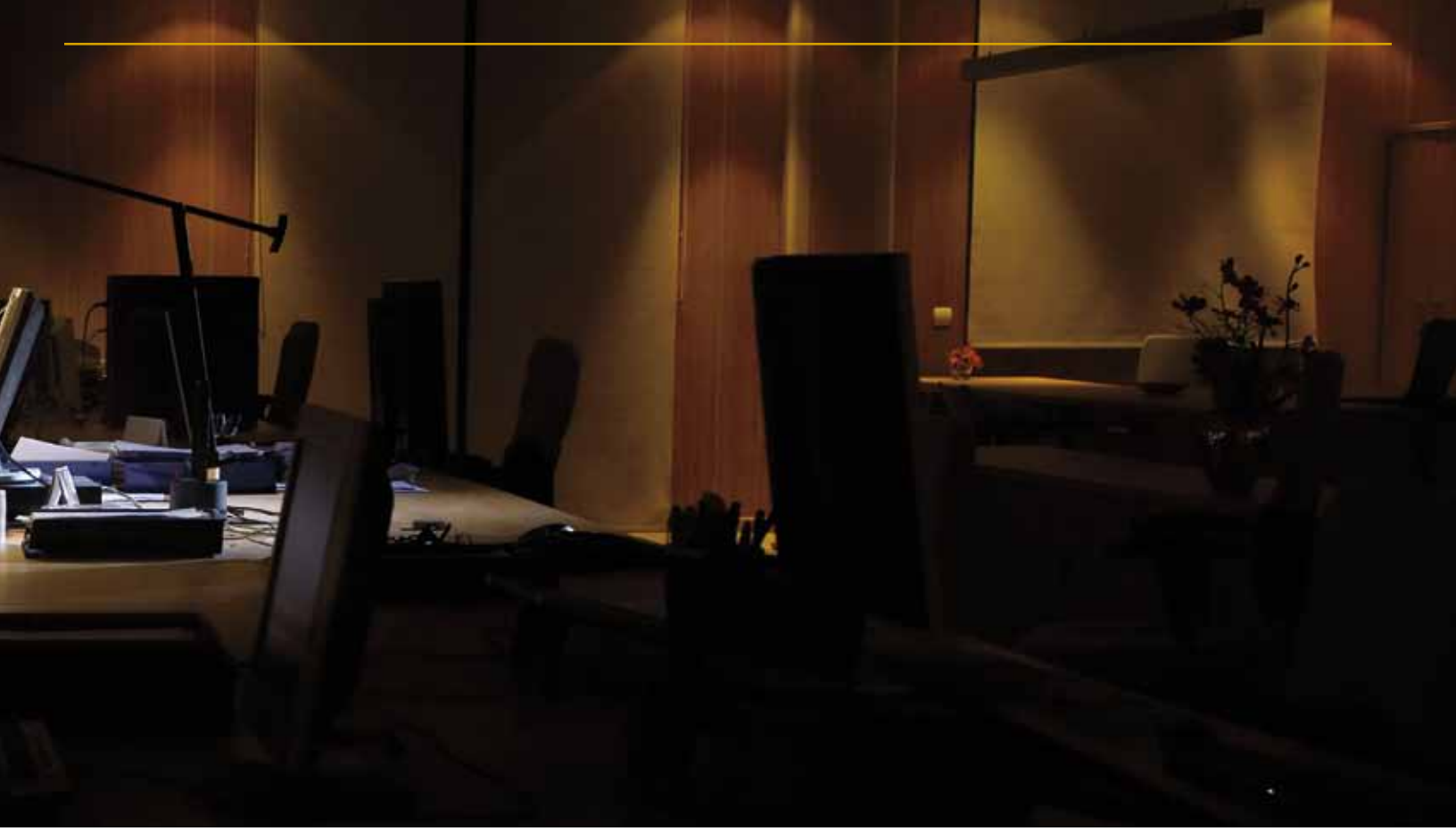
- Executive – manages the business or a department thereof, supervises at least two full-time employees or the equivalent, and makes employment decisions or recommendations;
- Administrative – performs non-manual/office work related to management of the business or its customers and routinely exercises independent judgment or discretion;
- Professional – performs work of an intellectual character that requires advanced knowledge in a field of science or learning and that knowledge is acquired traditionally through prolonged study or instruction; or
- Highly-compensated employee – performs non-manual/office work related to management of the business or its customers and performs at least one other duty required under the duties tests for the executive, administrative, and professional exemptions.

The primary duties required to be performed by employees under these exemptions have not changed. The duties test is an essential part of the analysis for determining whether an employee meets a white-collar exemption. Current litigation surrounding the minimum salary increase will not affect this requirement.

Minimum Salary Requirement – Prior to President Barack Obama's issuance of the Presidential Memorandum dated March 13, 2014, calling to "modernize and streamline the existing overtime regulations" for white-collar employees, the minimum salaries for the white-collar exemptions were $455/week ($23,660/year) for executive, administrative, and professional (EAP) employees and $100,000/year for a highly-compensated employee. To be exempt from overtime pay under FLSA, an employee must pass both tests—perform the required duties and earn the minimum salary. The DOL announced the purpose of the salary test was to "provide an index to the 'bona fide' character of the employment for which exemption is claimed and ensure that the EAP exemption will not invite evasion of the FLSA's minimum wage and overtime requirements for large numbers of workers to whom the wage-and-hour provisions should apply." *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 81 FR 32391, 32406 (internal quotations omitted). But, the minimum salary has not changed in over ten years. This is believed to be one of the reasons employers have increasingly "misclassified ordinary workers as managers." 81 FR at 32406.

On December 1, 2016, this was scheduled to change. The DOL issued a new rule in May 2016, increasing the minimum salary for white-collar exemptions to $913/week ($47,476/year) for EAP exemptions and $134,004/year for highly compensated employees. With this change the DOL also introduced "catch-up payments" that allowed employers to pay up to ten percent of the minimum salary required for EAP employees in nondiscretionary bonuses, commissions, or other incentive payments per quarter. 81 FR at 32427. Failure to make such payments would entitle the employee to overtime pay for the respective quarter. The DOL also introduced an automatic mechanism for increases in the future. However, the DOL cannot currently enforce these rules.

Not Enforced – United States District Court of Eastern District of Texas Judge Amos Mazzant granted an emergency injunction on November 22, 2016, that prohibits the implementation and enforcement of the new minimum salary requirements. *State of Nevada v. U.S. Dep't of Labor*, No. 4:16-CV-00731, 2016 WL 6879615 (E.D. Tex. Nov. 22, 2016). The judge reasoned that the DOL "exceed[ed] its delegated authority and ignore[d] Congress's intent by raising the minimum salary level such that it supplants the duties



test." Id. at 6. Judge Mazzant is a federal judge that ruled on a federal question—his decision on this matter takes effect nationwide.

The DOL is currently dedicated to fiercely challenging this ruling. "The Department strongly disagrees with the decision by the court. . . . [A]nd we remain confident in the legality of all aspects of the rule." WAGE AND HOUR DIVISION, *Important Information Regarding Recent Overtime Litigation in the U.S. District Court of Eastern Texas*, U.S. DEP'T OF LABOR, https://www.dol.gov/whd/overtime/final2016/litigation.htm (last visited March 1, 2017). An appeal was filed on December 1, 2016, by the Department of Justice on the DOL's behalf. The Department's motion to stay the injunction was denied on January 3, 2017. Now that President Donald Trump has taken office, the decision to proceed with the appeal (or drop it) will be made by the DOL's new secretary. President Trump's current choice for DOL secretary is Alexander Acosta.

How to Comply – The exemptions have not changed. To utilize a white-collar exemption, employers must still analyze each employee based on the duties they perform and the salary they are paid. That salary is still $455/week ($23,660/year) for EAP employees and $100,000/year for highly compensated employees. These employees must be guaranteed this salary without consideration of bonuses and commissions. However, this is not the end. The consequences of misclassifying an employee as exempt from overtime pay can be costly.

Employers must remain vigilant and mindful of the litigation surrounding these exemptions. Take this time to review positions within your organization. Evaluate whether positions currently identified as "exempt" meet the duties test. Develop mechanisms for checking this and the salary the employee receives periodically. Reviewing this information now should prepare your company for a seamless transition into compliance with any new regulation(s) that may take place in the near future.

Gislason & Hunter LLP's Employment Law and Benefits Practice Group conducts position audits for employers desiring to have employment positions within their organization reviewed for compliance with the Fair Labor Standards Act. To schedule an audit, contact our office at 507-387-1115.

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