# EMPLOYMENT & HUMAN RESOURCES *newsletter*

*Fall 2018*

**Fairness | Integrity | Expertise | Hard Work | Common Sense**

Shared values. Firm results.

## *Inside this Issue*



GISLASON & HUNTER LLP
ATTORNEYS AT LAW
www.gislason.com

## SOCIAL MEDIA IN THE WORKPLACE: LINK IN YOUR EMPLOYEES

It's no secret that during the 2016 campaign, political candidates harnessed the power of social media more than ever before. It is also no secret that the President of the United States has continued to use social media as a political forum. With tech-savvy Millennials in the workforce and now Generation Z (those born in 1995 or later) on their heels, the lines between "personal" and "professional" have become increasingly blurred online. A rise in the popularity of political discussion on social media could pose potential problems for employers, even outside of the political arena and election season. As a result, employers would do well to maintain certain policies and practices to ensure that employees are not harassing one another, or that no trade secrets or brand negativity are publicly shared. However, protecting each employee's rights can be difficult, especially when they directly conflict with one another.

continued on page 2

### A. Employers Should Not Interfere with an Employee's Rights.

Generally, for an at-will employee, an employer may impose discipline for any off-duty conduct as long as the conduct is not protected. Rights that are frequently at issue when dealing with social media are the right to engage in concerted activities and protection from discrimination. Employees may have more protection if they are subject to a collective bargaining agreement or an employment contract with a just-cause provision.

One of the biggest areas of concern for employers is making sure they don't take actions that would interfere with an employee's right "to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection" – a protection afforded under Section 7 of the National Labor Relations Act ("NLRA"). A "protected concerted activity" is generally an activity undertaken together by two or more employees, or by one on behalf of others, "when they seek to improve terms and condition of employment or otherwise improve their lot as employees…." (CITE) An employer violates an employee's rights if it maintains workplace rules that would reasonably tend to "chill employees in the exercise of their Section 7 rights." (CITE)

Labor law protections are primarily for employees to talk about issues within the workplace, like complaining about a supervisor, but there can be overlap with politics. For example, if an employee in Minnesota were to talk about the recent minimum wage increase on social media, that would be an example of where politics mixes with work-related issues. That type of posting could still be considered "protected concerted activity under the NLRA."

Another concern for employers is an employee's protection from discrimination. Minnesota is one of about half of the states that have laws protecting employees from discrimination based on political activity. Specifically, Minnesota Statute § 10A.36 states: An individual or association must not engage in economic reprisals or threaten loss of employment or physical coercion against an individual or association because of that individual's or association's political contributions or political activity. This subdivision does not apply to compensation for employment or loss of employment if the political affiliation or viewpoint of the employee is a bona fide occupational qualification of the employment. An individual or association that violates this section is guilty of a gross misdemeanor.

As such, an employer must be very careful when an employee's social media posts include information that would identify the employee's political contributions or activity. An employer must not discipline or terminate an employee based upon political affiliations.

### B. Employers Should Implement a Social Media Policy and Ensure Posts Do Not Interfere With the Employers' Policies or Interests.

To protect the rights of employees and employers as mentioned above, and many more that we don't have space to go into, employers should institute a workplace social media policy as part of their employee handbook and human resources training efforts. In fact, two separate social media policies may be necessary; one for the employee's personal social media accounts and one for corporate social media accounts. The policies should give employees an understanding of what they are allowed to post and what is off-limits.

The social media policy should allow the employer to maintain discretion to discipline an employee for any unprotected conduct. Some items to put into a social media policy may include:

- Employer reserves the right to monitor employee's posts and to intervene if an employee's private activity could violate the rights of the employer or other employees or negatively affect the image of the employer.
- Prohibition against disclosing any proprietary information.
- An exception for Section 7 conduct under the NLRA.

Another concern for employers is making sure the employer's own policies are not being violated or its interests affected negatively by an employee's social media posts. Employers need to not only look out for their own interests, but also to protect the rights and interests of other employees. This is not always easy. For example, most employers have policies against, and laws prohibit, harassment in the workplace. But, what if a post includes political activity that is protected by § 10A.36 but also harasses other employees?

For example, if an employee endorses President Donald Trump's travel ban on social media, some questions might be: "Is he or she making comments expressly or by way of inference that could be perceived as anti-Muslim, and what is the impact of those comments in the workplace? Would this be considered harassment? Is this a declaration of political activity that is protected by Minnesota Statute § 10A.36?"

Employers should review each post separately to determine whether it violates the employer's own policies or reflects negatively on the employer's brand. Employers should also be aware of activities taking place at work. Obviously, an employer should investigate and, if necessary, act on any complaints of harassment or discrimination in the workplace. But an employer should also pay attention to the activities by employees in the workplace to make sure attitudes and opinions that are posted on social media do not affect other employees and the workplace.



### C. Employers Should Educate and Train Employees Regarding Social Media Use.

Employers have more latitude to regulate their employee's social media use while they are in the workplace than when employees are off duty. Most employers allow incidental personal use of social media while employees are on the job. However, the postings could extend to political-related postings. Employers then wrestle with how to respond to these postings by employees.

In addition to implementing a social media policy, employers should give employees examples of social media posts that could be a problem, thus potentially getting them to think twice before sharing a picture or statement that could potentially relate to or reflect on their work. Employees should be reminded that they are all ambassadors of the employer's brand and their posts reflect on both them and their employer.

Legally, employees have freedom of speech to post whatever they choose on their personal social media channels. However, freedom of speech protection only goes so far. Employees should be reminded that whatever is put on social media is sent to everyone, including their boss. So whatever an employee posts on social media represents that employee's professional brand. If an employee cannot say it to his boss, he should not post it on social media. Taking this one step further, employees should be told harassment or discrimination of coworkers on social media may also be a violation of another employee's rights and not tolerated.

Employers should also encourage employees to bring workplace complaints and conflicts to the attention of the company directly. Doing so will allow the employer to evaluate and address the complaint or conflict.

Social media is not going away. Employers who are proactive in implementing policies and educating their employees of the potential issues relating to social media posts and their employment may be able to avoid facing legal issues or even a public relations nightmare.

**Jennifer G. Lurken**
Gislason & Hunter Attorney
(507) 387-1115
jlurken@gislason.com
Mankato Office

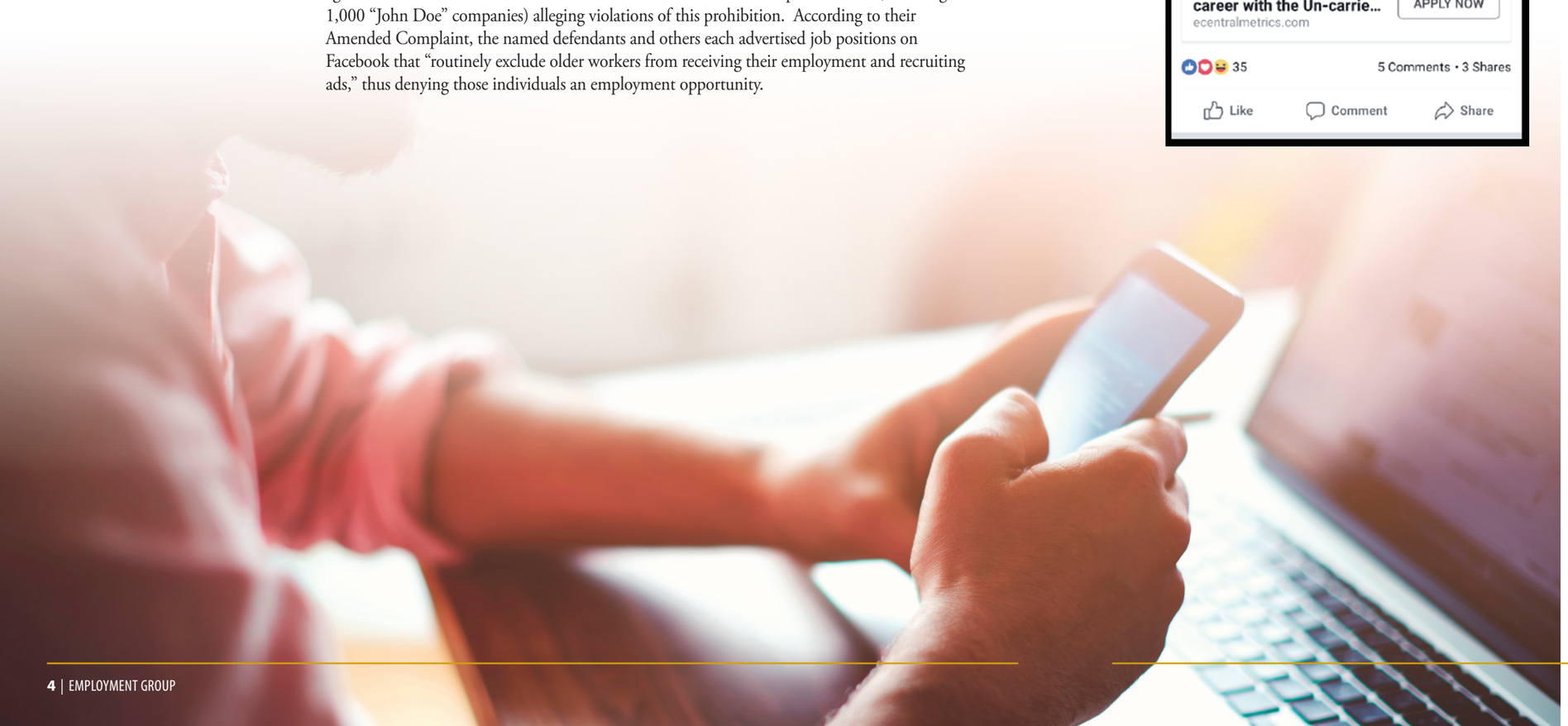
# ARE TARGETED SOCIAL MEDIA JOB POSTINGS ILLEGAL?

**Brock P. Alton**
Gislason & Hunter Attorney
(763) 225-6000
balton@gislason.com
Minneapolis, Minnesota

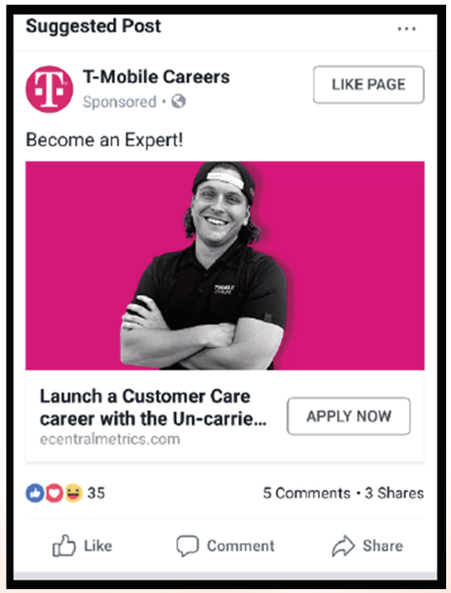
Enacted in 1967, the Age Discrimination in Employment Act ("ADEA") was, in part, an outgrowth of the civil rights movement. Congress had been informed that age discrimination occurred not because of any dislike or animus towards older workers, as is the case with other forms of discrimination, but because of "inaccurate stereotypes about older workers' declining abilities and productivity." It therefore enacted the ADEA with the stated purpose of promoting "employment of older persons based on their ability rather than age; [prohibiting] arbitrary age discrimination in employment; [and helping] employers and workers find ways of meeting problems arising from the impact of age on employment."

Broadly speaking, the ADEA makes it unlawful to refuse to hire, discharge, or otherwise discriminate against an employee or potential employee over 40 years old on the basis of age. That includes a prohibition on issuance of any employment-related advertisement indicating a preference based upon age. Job notices may not contain terms that discourage older workers by containing statements "such as age 25 to 35, young, college student, recent college graduate, boy, girl, or others of a similar nature" unless an exception applies.

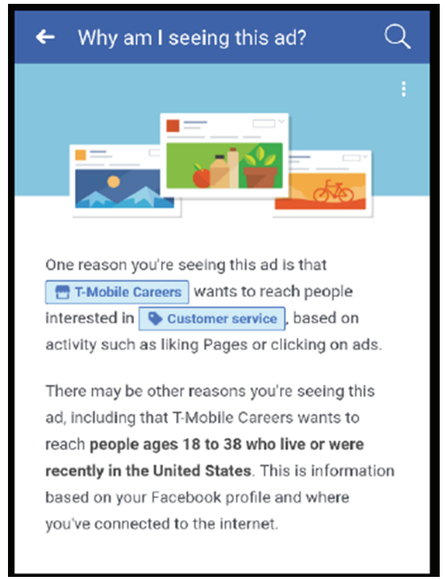
Recently, three named plaintiffs commenced a potentially extremely large class action lawsuit against T-Mobile, Amazon, Cox Communications, Cox Media Group, and others (including 1,000 "John Doe" companies) alleging violations of this prohibition. According to their Amended Complaint, the named defendants and others each advertised job positions on Facebook that "routinely exclude older workers from receiving their employment and recruiting ads," thus denying those individuals an employment opportunity.



Specifically, Facebook permits companies advertising on the platform to choose who they wish to advertise to using a number of criteria, including age. Targeted advertisements are nothing new, of course. But, given the nature of social media and Facebook's business model and the information provided by users, companies can advertise with extremely accurate criteria. According to the plaintiff's Amended Complaint, one such advertisement used by T-Mobile looked like this:




When a user checks to see why they are receiving this advertisement, however, they are told as follows:




The Amended Complaint names a number of other companies as potential defendants, including Capital One, Sleep Number Corp., and IKEA. It seeks certification of a class of plaintiffs, believed to be in the millions, and made up of Facebook users over 40 years of age. The Amended Complaint alleges claims under the ADEA and similar state statutes.

It will be some time before this litigation is concluded. Based upon statements in the media, it would appear that the defending companies are pursuing numerous defense strategies, including comparing these advertisements to place similar ads in magazines or other print materials targeted at a younger audience. Settlements in cases of this size are quite common, and so the litigation may never require a Court to fully consider whether the claims are legally valid.

In the interim, however, the case offers another reminder to employers using social media to do so carefully. Although most companies are more comfortable with the changing media landscape than they were ten, or even just five, years ago, the legal fallout of that change continues.




# WHEN THE BIG BAD WOLF IS AT THE DOOR

**Cory A. Genelin**
Gislason & Hunter Attorney
507-387-1115
cgenelin@gislason.com

It's 10:30 on a Tuesday morning. You've finished the morning Staff Meeting, answered twenty seven emails, checked Facebook and are now sitting down to write some employee reviews.

Then you get it. A letter from an attorney. Not your attorney. An attorney representing the employee you terminated last week. The employee you fired after his fifth disciplinary violation in six months; the one whose filing error cost you your biggest client; the one wasn't on time once in two years of employment; the one who spoke disrespectfully to everyone in the office; the one you really should have fired long ago. Unfortunately, he's also the one who has an open work comp claim, who also filed for FMLA, and who is a racial minority. In other words, he's a member of a "protected class."

On behalf of her client the attorney is requesting a copy of the employee's termination notice, copies of any and all policies which you claim the employee violated, a breakdown of the race of all employees hired and fired in the past two years, payment of all wages owed, a copy of the employee's personnel file, the names of all managers involved in the termination, and the reason for the termination. She also demands that you have no further contact with her client. What do you do?

After you've calmed down, read letter one more time. A terminated employee is only entitled to certain information. Just because the letter is from an attorney, that doesn't mean that more information should be provided. At the same time, a demand from a representative of an employee should be treated as a demand from the employee himself.

A terminated employee is entitled to all wages due and payable within 24 hours of demand. For an hourly worker, this should be easily calculated; for workers on commission, the commissions may not be "payable" until they are calculated in the ordinary course of business. Any amount certain to be owed must be paid on time. So honor this request. The employee is also entitled to the reason for termination in writing but only if the request is made within 15 working days of the termination. A terminated employee is entitled to review his personnel file once per year for as long as the employer maintains the file and you need to provide a copy within 7 working days after the request. That is all he's entitled to.

There may be cases where disclosing the rest is appropriate. However, at this early stage you can assume that anything you share will be used against you. If there is no filed lawsuit or unemployment action, then this attorney doesn't have the authority to demand documents.

This attorney is trying to evaluate whether or not she should pursue this matter. Even if she says she's drafting a complaint, that's probably not the case. Any mistakes in your documentation will serve as blood in the water. The best thing you can do is show that you know your employment law obligations by delivering only things to which the employee is entitled.

Once you've done that, it's probably time to sit down with an attorney and evaluate the possibility of any liability in the matter. If your case for termination is strong, you can then package the information and disclose it in such a way as to make the employee and the attorney lose heart.


**Brittany R. King-Asamoa**
Gislason & Hunter Attorney
(507) 387-1115
bking-asamoa@gislason.com
Mankato Office

# UPCOMING NOTICE PERIODS IMPACTING OVERTIME PAY

Proposed changes to the Fair Labor Standards Act (FLSA) overtime white-collar exemptions have not made headlines in recent months. However, this unfortunately (or fortunately) does not mean the discussion regarding the FLSA exemptions has ended. Earlier this year, the United States Department of Labor (DOL), Wage & Hour Division published its Spring Regulatory Agenda for 2018. The agenda contained two proposed timeframes for Notice of Proposed Rulemaking (NPRM) periods pertaining to the FLSA that employers should take notice of:

(1) September 2018 – Clarifying the "Regular Rate of Pay" under the FLSA; and

(2) January 2019 – Revising the Salary Level for Executive, Administrative, and Professional Overtime Exemptions

## Regular Rate of Pay

From the abstract appearing in the DOL's 2018 Spring Regulatory Agenda for the regular rate of pay NPRM, we can expect a proposed rule that will "clarify, update, and define regular rate requirements" under the FLSA. Such is generally necessary given the inconsistencies seen amongst employers' calculations of overtime pay. The FLSA requires employers to identify an employee's hourly "regular rate of pay", on each and every workweek the employee works overtime. That calculation, contrary to what many managers and supervisors believe, does not always equate to the employee's typical hourly rate.

"Regular rate of pay," as the phrase is used for establishing the overtime pay an employee must be paid, includes all forms of remuneration paid to the employee during the subject workweek except the following, which are specifically excluded by the FLSA at 29 U.S.C. § 207(e):

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) [s]ums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a),2 where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; [and]

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if—

(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; and

(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—

continued on page 10

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

29 U.S.C. § 207(e). Aside from those identified above, all other payments made during the workweek must be included in the calculation of the employee's regular rate of pay for that workweek. Common payments that employers must include in this calculation include: incentive/project-based bonuses, shift differentials, and commissions. Unfortunately, the work performed to acquire these items does not always fit within the same workweek. Consider the following example for a more in-depth instruction of how to properly calculate the regular rate of pay:

Susie is a manager at ABC store earning approximately $21,840 per year, or $10.50 per hour. For the month of April she worked: Week 1 – 40 hours, Week 2 – 42 hours, Week 3 – 45 hours, and Week 4 – 50 hours.

She receives commissions based on store sales every pay period. In April, she was paid commissions for her work in Week 2 in the amount of $70, and $50 in Week 4. ABC store determined that Susie earned the following commissions for each week in April:

| Week | Commissions Earned |
|---|---|
| 1 | $40 |
| 2 | $30 |
| 3 | $25 |
| 4 | $25 |

ABC store would use the following equation to calculate Susie's regular rate of pay ("RROP") for overtime purposes in Weeks 2, 3, and 4 of April:

$$\frac{\text{(Hourly rate * hours worked) + Commissions}}{\text{Hours Worked}} = \text{RROP}$$

| Week* | Regular Rate of Pay |
|---|---|
| 2 | $11.21 |
| 3 | $11.06 |
| 4 | $11.00 |

*Week 1 was not calculated because Susie did not work overtime that week.

It is unclear how a modification to the FLSA could make calculations of the regular rate of pay easier for employers. But, regardless of such, employers should take notice of the proposal to ensure they fully understand the identification of such rate under the law currently and, if it will change, how that will impact their workforce.

**White-Collar Exemptions**

The reasons employers should take notice of the second NPRM are obvious, but are worth repeating along with a brief recap of recent changes to the white-collar exemption. The Presidential Memorandum dated March 13, 2014, requested the modernization of white-collar overtime exemptions to more accurately identify the employees actually employed in bona fide executive, administrative, and professional capacities. In response, the DOL issued a new rule in May 2016 that increased the minimum salary required for white-collar exemptions from $455/week to $913/week ($47,476/year) for executive, administrative, and professional employees and $134,004/year for highly-compensated employees. This was a drastic change at the outset. Further, the DOL established a mechanism designed to automatically increase these minimum salaries in the future. But, the DOL was enjoined from enforcing the new rule approximately nine (9) days before it was scheduled to take effect. State of Nevada v. U.S. Dep't of Labor, No. 4:16-CV-00731, 2016 WL 6879615 (E.D. Tex. Nov. 22, 2016).

Employers should find solace in the DOL's decision to revisit the FLSA's white-collar exemptions in 2019, under the direction of United States Secretary of Labor Alexander Acosta. In 2017, following the DOL's decision to withdrawal its appeal of the injunction issued by Federal Judge Amos Mazzant, Secretary Acosta claimed the salary increase contained in the enjoined rule was excessive. He has reported a more appropriate minimum salary for these exemptions may be $33,000/year. Employers should keep watch for the notice period and comment with their thoughts.



*Gislason & Hunter LLP*

# Employment Law Conference

**Thursday, October 25, 2018**

**Courtyard Marriott**
**907 Raintree Road**
**Mankato, MN 56001**

**11:30 – Lunch Buffet**

**Noon – 3:30 Conference**

**Topics to include:**

- **Sexual Harassment – Updates on polices, training and program implementation**
- **Social Media in the Workplace**
- **The Nuts & Bolts of Employment Law (FMLA, hiring, firing, policy development etc)**
- **Case Law Update to include Health Law issues important to Human Resources**

## Registration

Name _____

Company _____

Address _____

Email _____

**$50.00 includes, lunch, break, seminar and access to materials**
**RSVP: jdonner@gislason.com**

____ Check enclosed

____ Please call me for credit card information - Phone_____

GISLASON & HUNTER LLP
ATTORNEYS AT LAW
www.gislason.com

# *Employment Law*
## PRACTICE GROUP


**Brock Alton**
balton@gislason.com

**Cory Genelin**
cgenelin@gislason.com

**Brittany King-Asamoa**
bking-asamoa@gislason.com

**Jennifer Lurken**
jlurken@gislason.com

**Dean Zimmerli**
dzimmerli@gislason.com



# *Locations*

**Minneapolis Office**
Golden Hills Office Center
701 Xenia Avenue S, Suite 500
Minneapolis, MN 55416
763–225–6000

**Des Moines Office**
Bank of America Building
317 Sixth Avenue, Suite 1400
Des Moines, IA 50309
515–244–6199

**Mankato Office**
Landkamer Building
124 E Walnut Street, Suite 200
Mankato, MN 56001
507–387–1115

**New Ulm Office**
2700 South Broadway
New Ulm, MN 56073
507–354–3111

**www.gislason.com**

# *Employment Law Services*

- Defense or investigation of harassment, discrimination, whistleblower, and retaliation claims under state and federal law by employees
- Development of EEOC compliance policies and procedures
- Compliance audits or investigations by government agencies such as OSHA or state or federal wage and hour regulators
- Design of drug testing policies and procedures
- Crafting of leave and other personnel policies and handbooks
- Advice concerning termination or other discipline of employees
- Guidance on layoff, furlough, or other changes to your workforce
- Defense or investigation of wage and hour claims, including prevailing wage violations
- Enforcement of non-compete, non-disclosure and other confidentiality contracts
- Negotiation of employment contracts and severance agreements
- Issues relating to compensation disputes
- Individual defense of employment law claims made by employees or their employer
- Negotiations regarding buy-outs or other issues regarding non-compete agreements



GISLASON & HUNTER LLP
ATTORNEYS AT LAW
www.gislason.com