September 2015 Legal Update

By: Julie Kinkopf, Esquire of Kinkopf Law LLC

Wage & Hour:

- ***DOL Releases Proposed Changes to Overtime Rules***—In July, the Department of Labor finally issued its long awaited proposed changes to the Fair Labor Standards Act (FLSA)'s overtime regulations. As expected, the DOL proposes greatly increasing the weekly minimum salary to qualify for one of the so-called "white collar" exemptions (administrative, executive and professional). In fact, the DOL wants to more than double the salary requirement for those exemptions from $455/week to $921/week in 2015 and $970/week in 2016. The DOL also seeks to increase the yearly salary requirement for highly compensated workers from $100,000 to $122,148 before those employees can be considered exempt from overtime requirements. These changes mean that, regardless of job duties, millions of employees will no longer qualify as exempt making them eligible for overtime pay and requiring them to track hours worked. The proposed regulations also create a mechanism to automatically update the salary levels in the future without requiring action by future administrations—basically an auto-pilot for increasing salary levels far into the future. The proposed regulations do not changes the "job duties" tests—at least not yet. For more information, see http://tinyurl.com/poyckeh. The comment period for the proposed changes has ended and the DOL reportedly received over 240,000 comments. Clearly this is an important topic for employers and that is why it will be covered at the GVFHRA Summit on October 16th (presentation by Julie Kinkopf, Esq.) and you won't want to miss the November 5, 2015 GVFHRA meeting when Charlene Rancor from the Department of Labor will be here to give us the inside scoop!

- ***New Guidance from the DOL on Worker Classification***—July was a busy month for the DOL. Not only did they release the proposed overtime changes discussed above, but on July 15, 2015, the DOL issued an Administrator's Interpretation of the FLSA's definition of employment (i.e. whether workers are "employees" entitled to the protections of the FLSA or "independent contractors"). Not surprisingly, according to the DOL, "most workers are employees under the FLSA's broad definitions," making them entitled to minimum wage, overtime and other FLSA protections. The new interpretation did not create a new test, instead restating the six factors of the "economic realities" test from the DOL's May 2014 Fact Sheet. In the new interpretation, the DOL re-examines each of the six factors and provides specific examples of how the DOL believes the factors should be applied. The Interpretation also

clearly signals that the DOL will continue to focus on worker classification and go after companies that misclassify workers as independent contractors. An article discussing the new Interpretation and each of the six factors can be found here: http://tinyurl.com/p9e3ooe. You also will not want to miss the November 5, 2015 GVFHRA meeting when Charlene Rancor from the Department of Labor will give us the view from inside the DOL.

- ***New IRS Fact Sheet on Payments to Independent Contractors***—In August 2015, the IRS issued FS-2015-21 as a reminder to employers to "correctly determine whether workers are employees or independent contractors." As with the DOL, the test remains the same as the old IRS test, but this clearly reinforces the continued focus by the IRS on worker classification.

National Labor Relations Board:

- ***NLRB Expands Joint Employment***—On August 27, 2015, the NLRB, in Browning Ferris Industries of CA, Inc., 362 NLRB No. 186 announced a new test for "joint employment." Under the new standard, companies with the right to control the terms and conditions of employment may now be considered joint employers regardless of whether the employees are on their payroll or someone else's—such as a staffing firm. The ability to exercise control, regardless of whether the company has in fact exercised such authority, is the focus of the NLRB's inquiry. As the Board puts it, "*reserved* authority to control the terms and conditions of employment, *even if not exercised*, is clearly relevant to the joint-employment inquiry." This is a significant change in the law and could make it easier for unions to organize and force more companies to bargain with them. A SHRM article discussing NLRB's broader definition of "joint employer" can be found at http://tinyurl.com/oxcxhbh.

- ***Electronic Signatures Now Allowed for Organizing***—The NLRB also announced in General Counsel Memoranda 15-18 that electronic signatures will be acceptable in support of a union's showing of interest.

Recent Court Cases in Pennsylvania:

- ***Suspension With Pay Not an Adverse Employment Action***—In August, the Third Circuit Court of Appeals held in Jones v. SEPTA, No. 14-3814, that a suspension with pay during an investigation will typically not constitute an "adverse employment action" under Title VII's anti-discrimination provision. The case involved an employee who was placed on a paid leave while the employer investigation claims that she had falsified timesheets. At the end of the investigation, the employer terminated the employee for submitting fraudulent timesheets. The employee then sued claiming the suspension was

gender discrimination under Title VII and the Pennsylvania Human Relations Act. The court dismissed the claims finding that the employee could not make out a case for discrimination because the paid leave was not an adverse employment action. The court declined to address whether in the paid suspension might be enough in a retaliation case, but stated it cannot support a discrimination claim.

- ***Use of Payroll Cards Could Violate Pennsylvania's Wage Payment and Collection Law (WPCL)—***A Luzerne County judge recently found that payroll cards (i.e. debit cards) are not "lawful money" and an employer's attempt to mandate use of the cards to pay wages was a *per se* violation of the WPCL. These type of cards are becoming increasingly popular with employers and employees, particularly in lower wage industries. The case is called *Siciliano v. Mueller*, No. 2013-07010 (CCP Luzerne 2015) and is currently being appealed to the Superior Court. There is also a bill pending in the Pennsylvania House (no. 1274) that would amend the WPCL to include "payroll cards." If your company uses, or is considering using payroll cards, you will want to keep a close eye on this case and legislation.

- ***Pittsburgh Approves Paid Sick Leave—***Joining Philadelphia and numerous other municipalities, Pittsburgh now requires employers to offer paid sick leave to their employees. The requirement is for all employers, although in the first year, those with less than 15 employees are required only to offer unpaid leave. For more information, see this SHRM article: http://tinyurl.com/pkt6rlh

    - ***Executive Order Requiring Federal Contractors to Provide Paid Sick Leave—***On September 7, 2015 President Obama signed an Executive Order requiring federal contractors to provide paid sick leave to covered workers and directing the Department of Labor to issue implementing regulations by September 30, 2016. The President has also encouraged Congress to pass the Healthy Families Act (S. 497; H.R. 932), which would require *all* employers with fifteen or more employees to offer paid sick time. That legislation is stalled and not expected to be voted on anytime soon.