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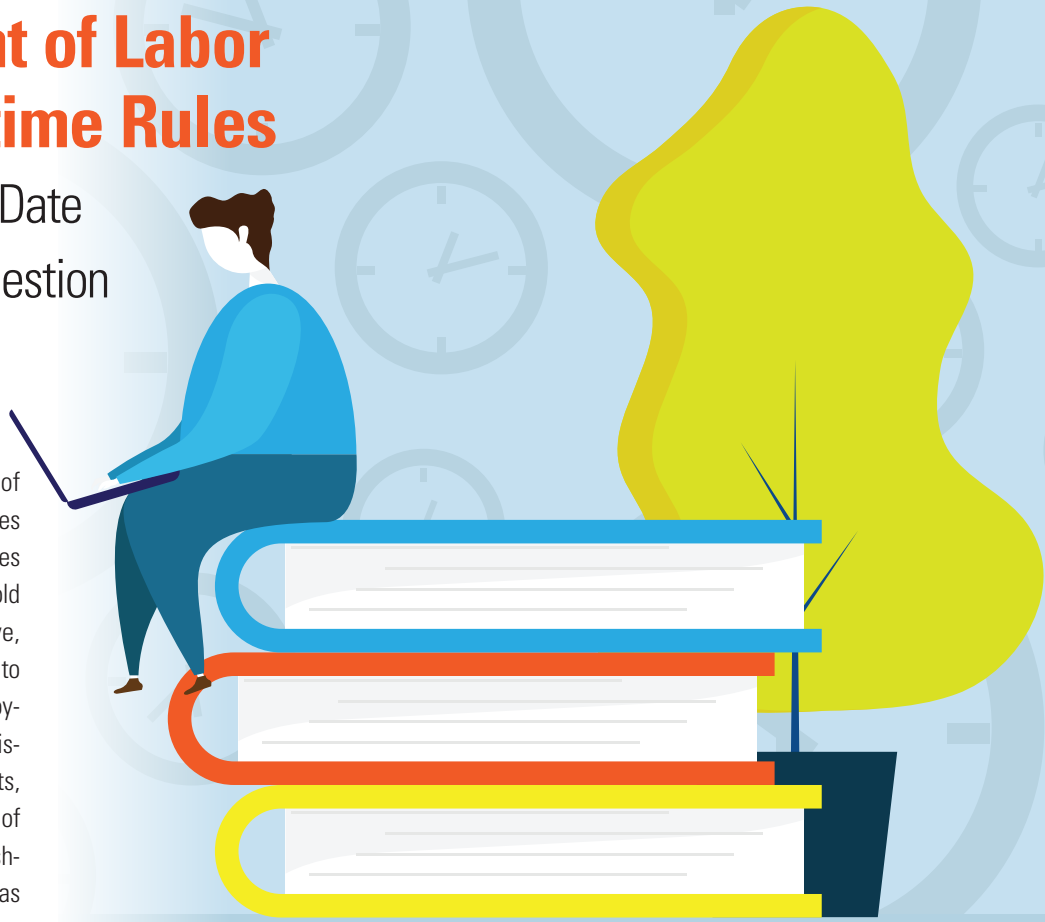
U.S. Department of Labor Proposes Overtime Rules

January 2020 Effective Date Could Be Called Into Question



On March 7, the U.S. Department of Labor issued proposed overtime rules under the Fair Labor Standards Act. The rules would increase the minimum salary threshold under the FLSA's "white-collar" executive, administrative, and professional exemptions to $35,308 annually, or $679 per week. Employers would be allowed to count certain nondiscretionary bonuses and incentive payments, including commissions, to satisfy up to 10% of the new salary threshold. The current threshold of $455 per week, or $23,660 annually, has not been increased since 2004.

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Inside

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ASA ADVOCACY

Chicago Predictive Scheduling Ordinance Dies in Committee, but Likely to be Reintroduced

The Chicago city council failed to advance a bill that would have required employers to provide workers two weeks' notice of work schedules, compensate employees for last-minute schedule changes or cancellations, and offer additional hours of work to existing qualified employees before hiring new employees or temporary employees through staffing companies.

The bill had languished for months with no action, but the chairman of the Workforce Development and Audit Committee hastily called the "Chicago Fair Workweek Ordinance" for a vote on April 8 after he came up short in his re-election bid.

The bill had languished for months with no action, but the chairman of the Workforce Development and Audit Committee hastily called the "Chicago Fair Workweek Ordinance" for a vote on April 8 after he came up short in his re-election bid. The last-minute effort to move the bill out of committee was thwarted as wholesale business opposition led to hours of debate with no vote. ASA lobbyist Paul Rosenfeld; the Illinois Search & Staffing Association, an ASA-affiliated chapter; and numerous staffing company representatives who wrote to and met with aldermen were instrumental to this crucial legislative victory.

Proponents have vowed to reintroduce the proposed ordinance after the new city council and mayor are sworn in next month. ASA and its lobbyist will continue to advocate against passage of a bill.

—Stephen Dwyer, ASA

ASA Participates in EEOC Harassment Roundtable

In March, ASA participated in a U.S. Equal Employment Opportunity Commission roundtable discussion on workplace harassment. The discussion—which featured executives from leading business organizations including the National Retail Federation, International Franchise Association, and National Association of Home Builders—focused on the steps participating organizations and their members have undertaken to combat harassment, and follows the association's participation in EEOC's two-year Select Task Force on Harassment in the Workplace.

ASA addressed the association's significant efforts to tackle this important issue—including producing numerous webinars, publishing many articles, making a workplace harassment video available to members, providing sensitivity training to member companies, and more—as well as joint employment concerns and the importance of staffing clients' compliance with the law.

—Stephen Dwyer, ASA

ASA Meets With Members of Congress, Administration Officials to Advance Policy Agenda

On March 13, ASA and staffing company representatives met with Congressman Lloyd Smucker (R-PA), members of the House Judiciary Committee, representatives from the White House Office of Legislative Affairs' Domestic Policy Council, and U.S. Department of Labor representatives. The meeting was scheduled at the behest of the Staffing Advisory Group, a coalition comprised of ASA, staffing companies, and staffing vendors that is focused on legislative and policy issues of importance to the staffing industry—including immigration reform, federal privacy legislation, proposed overtime rules, apprenticeships, and potential paid sick leave legislation. The meeting provided an opportunity for legislators and officials to learn more about the industry and ASA's legislative agenda, and represented the first of what ASA expects to be several meetings throughout the year.

—Toby Malara, ASA

NATIONAL NEWS ROUNDUP

Immigration Audits of Staffing Companies Increase

Immigration audits of staffing companies have increased significantly, with some firms being assessed six- or seven-figure fines for failing to examine original I-9 work authorization and identification documents and for other technical violations. According to Helen Konrad of McCandlish Holton, outside immigration counsel for ASA, auditors also are focusing on staffing companies' ability to timely produce an audit trail showing the date and time when employees completed each of the fields in an electronic I-9 form. According to Konrad, not all electronic I-9 software has the functionality to produce such a trail. Moreover, some software prepopulates the I-9 fields using information collected from the employee's resume or other sources—which generally is not allowed under the rules.

To help staffing companies ensure that their practices are compliant, ASA has updated its issue paper "Answers to Frequently Asked Questions About Form I-9 and E-Verify." Find it in the Legal Publications section of *americanstaffing.net*.

—Stephen Dwyer, ASA

National News continues on page 7

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Overtime Rules

Continued from page 1

The proposed rules also would increase the salary threshold for the "highly compensated employee" exemption from $100,000 to $147,414 per year. The rules do not change the duties tests for the white-collar exemptions. ASA plans to file comments objecting to the highly compensated employee exemption's proposed salary level.

The rules would increase the minimum salary threshold under the FLSA's "white-collar" executive, administrative, and professional exemptions to $35,308 annually, or $679 per week.

The previous attempt to increase the white-collar exemption's salary level under the Obama administration would have raised the threshold to $47,476 annually. A Texas federal court enjoined those rules, saying that they placed too much emphasis on the salary requirement and would have resulted in the reclassification of substantial groups of employees who performed exempt duties.

Workers' rights groups have vowed to challenge the proposed rules in court. Thus, while the rules are forecast by DOL to take effect in January 2020, litigation could call that date into question.

—Stephen Dwyer, ASA

Continued from page 4

NLRB Returns to Longstanding Independent Contractor Standard

In January, the National Labor Relations Board returned to its longstanding independent contractor legal standard in issuing its opinion in *SuperShuttle DFW Inc.*

The case was brought by a group of SuperShuttle drivers in the Dallas-Fort Worth area who attempted to unionize. The drivers were required to buy a franchise from the company, provide their own vehicle, and pay their own business expenses. The drivers also were able to set their own work hours, accept or reject rides from the dispatcher, and hire additional drivers.

The decision reaffirms the board's adherence to the traditional common-law test and clarified the role entrepreneurial opportunity plays in its determination of independent contractor status.

Given the drivers' discretion to make decisions affecting their income, the board held that they were independent contractors rather than employees, and were therefore not permitted to unionize under the National Labor Relations Act.

The decision reaffirms the board's adherence to the traditional common-law test and clarified the role entrepreneurial opportunity plays in its determination of independent contractor status. The decision also departs from the board's 2014 decision in *FedEx Home Delivery,* which stated that the legal test for independent contractor status should be based on "economic dependency."

—Stephen Dwyer, ASA

DHS Announces Final Rule for a More Effective and Efficient H-1B Visa Program

The U.S. Department of Homeland Security in January posted a final rule amending regulations governing H-1B cap-subject petitions, including those that may be eligible for the advanced degree exemption. The rule is designed to streamline the petition process and revise the selection order of petitions. The rule requires employers to electronically register with USCIS before filing a H-1B petition. USCIS will then conduct an annual lottery from the pool of registered employers, and only those chosen will be allowed to file a H-1B petition.

The rule also changes the way USCIS conducts the lottery with respect to an annual cap of 65,000 H-1B visas (known as the "regular cap") and an additional 20,000 H-1B visas available for applicants with a U.S. master's degree or higher (known as the "master's cap"). USCIS previously conducted the lottery for the master's cap first, and if there were leftover master's cap petitions that were not selected, they were placed in the regular cap lottery.

Under the final rule, USCIS has reversed the process by holding the regular cap lottery

first and including all master's cap petitions in the lottery. Any master's cap petitions not selected then will be included in the master's cap lottery. This new process likely will increase the number of petitions awarded to individuals holding an advanced degree from a U.S. college or university, while decreasing the number of H-1B visa holders with less than a master's degree.

The rule went into effect on April 1, although the electronic registration requirement was suspended for the fiscal year 2020 cap season.

—Toby Malara, ASA

OSHA Issues Final Rule to Protect Privacy of Workers

In order to better protect personally identifiable information or data, in January the U.S. Department of Labor's Occupational Safety and Health Administration issued a final rule eliminating the requirement for businesses with 250 or more employees to electronically submit information from OSHA Form 300 (log

of work-related injuries and illnesses) and OSHA Form 301 (injury and illness incident report). Employers are still required to maintain these forms on site, and OSHA will continue to ask for these forms as needed.

The final rule does not alter an establishment's duty to electronically submit information from OSHA Form 300A (summary of work-related injuries and illnesses), and OSHA has also amended the record-keeping regulation to require covered employers to electronically submit their employer identification number.

—Stephen Dwyer, ASA

The #MeToo movement continues to fuel employment litigation targeting the staffing industry. Staffing companies were among employers most often challenged by the EEOC for allegations of sexual harassment in the workplace.

Practical Tips for Increasing #MeToo Awareness

The #MeToo movement emerged in 2018 with significant implications for the staffing industry and workplaces in general. In this age of connectivity, social media has fueled the movement and attracted the attention of both the private bar and government enforcement agencies. Against this backdrop, many predicted that allegations of on-the-job sexual harassment would increase. The Equal Employment Opportunity Commission's release of data on workplace harassment in October 2018 confirmed that reality and the widespread impact of the #MeToo movement throughout the country. Indeed, the biggest story of 2018 in terms of EEOC-initiated litigation centered on the drastic increase in lawsuits that alleged sexual harassment in the workplace.

In response to the #MeToo movement, several states reviewed their laws on workplace harassment in the past year. In 2018, Washington and California changed their laws to bar employers from using mandatory nondisclosure agreements for employees asserting sexual harassment and abuse claims. More than any other state, California has been

ASA Among First to Sign 'Getting Talent Back to Work' Pledge

ASA is proud to announce it is an inaugural signatory of the "Getting Talent Back to Work" pledge—part of an effort led by the Society for Human Resource Management to help provide employment opportunities to qualified people with criminal backgrounds. The pledge follows congressional passage of bipartisan criminal justice reform, the "First Step Act," in December 2018.

"Now is the time to quash the stigma of incarceration," says Richard Wahlquist, ASA president and chief executive officer. "Employers need to embrace greater inclusivity when recruiting and hiring and give qualified individuals a second chance at success in life—particularly when the U.S. labor market is the tightest in history."

Each year in the U.S., more than 650,000 people re-enter society from prison. To assist companies making the pledge, SHRM developed the Getting Talent Back to Work Tool Kit—designed to help businesses apply evidence-based best practices for hiring applicants with a criminal background, understand the legal factors involved, and get practical guidance from industry leaders on recruiting this diverse group of people. View the tool kit and sign the pledge at *gettingtalentbacktowork.org.*

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at the forefront of introducing #MeToo bills, including seeking to ban mandatory arbitration clauses in employment contracts, which require workers to waive the right to take an employer to court in the event of a dispute.

The movement continues to fuel employment litigation targeting the staffing industry. Staffing companies were among employers most often challenged by the EEOC for allegations of sexual harassment in the workplace. Among the new lawsuits filed were claims of sexual harassment by supervisors, co-workers, or customers; failure to implement or communicate a complaint procedure for employees to use when harassed while on assignment; and failure to respond to, investigate, or remedy an employee's complaints of sexual harassment while on assignment.

To help staffing companies reduce the risk of these claims, ASA published the legal scenario "Practical Tips for Increasing #MeToo Awareness" in the March–April *Staffing Success* magazine. Find it at *americanstaffing.net/digital.*

You can also read the full issue paper upon which the article is based, "Staffing Industry Class Action Report—Part I" authored by Gerald L. Maatman Jr., Esq., of Seyfarth Shaw LLP, at *americanstaffing.net/legalarticles*. The paper focuses on class and collective actions filed against staffing companies in 2018, and allows companies to spot litigation trends and focus on timely compliance issues. Plus, be on the lookout for the second part of this informative issue paper, which will be published this summer.

—Stephen Dwyer, ASA

STATE NEWS ROUNDUP

Ninth Circuit Adopts Common-Law Agency Test for Joint Employment Under Title VII

Rejecting an economic realities test, in *EEOC v. Global Horizons Inc.* the U.S. Court of Appeals for the Ninth Circuit in February determined that common-law agency principles should be utilized in determining whether a joint employer relationship exists under Title VII.

The case addressed whether fruit growers and a recruiter of orchard workers were joint employers under Title VII. The Ninth Circuit held that the growers had control over the workers' housing, meals, transportation, and wages, and this was sufficient to establish joint employer status.

—Stephen Dwyer, ASA

How California Employers Can Protect Against PAGA Claims

Private Attorneys General Act claims are a form of collective action in which one employee may sue his or her employer on behalf of the state and any "similarly aggrieved" employees in the workforce for violations of any labor code statute. The proliferation of these claims demands attention by California employers.

PAGA was intended to deputize citizens as private attorneys general to enforce the labor code in light of the state's limited resources.

PAGA was intended to deputize citizens as private attorneys general to enforce the labor code in light of the state's limited resources. Litigation picked up steam in 2014 when the state's high court held that employees could not waive their right to bring PAGA claims in court.

PAGA actions (the number of which has increased dramatically in recent years) are potentially more harmful than standard class actions because plaintiff's counsel is entitled to attorneys' fees as part of the recovery, class certification is not required, and claims are limited to bench trials.

The primary line of defense against PAGA claims is to tighten wage and hour practices pertaining to nonexempt employees. Employers should require nonexempt employees to accurately record their time, and should audit their employment policies and practices on a yearly basis to maintain compliance.

—Stephen Dwyer, ASA

COURT AND AGENCY ACTIONS

Using Arbitration Agreements as a Value Add for Customers

Employers are turning to workplace arbitration agreements with increasing frequency to mitigate litigation risks and deliver benefits to employees in the form of expeditious and cost-effective resolution of workplace disputes. The U.S. Supreme Court's ruling this past year in *Epic Systems Corp. v. Lewis* strengthens the risk mitigation features of arbitration agreements by upholding the legality of a waiver of the ability to file or participate in class actions. As a result, appropriately drafted and

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Every Monday, ASA distributes the ASA Legal and Legislative Report, an electronic report summarizing recently introduced legislation relevant to the staffing industry. The report also includes articles regarding recent legal decisions and developments. ASA invites interested members to sign up to receive the weekly email—send your contact information to tmalara@americanstaffing.net.

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implemented arbitration agreements with class action waivers can reduce an employer's susceptibility to class action litigation.

Many staffing companies have implemented arbitration programs with class action waivers for their temporary workers. Even if a worker (or his or her lawyer) declines to abide by the arbitration agreement and instead files a judicial action (including a class action), employers can block the lawsuit by filing a motion to compel arbitration under the Federal Arbitration Act. By and large, courts have upheld such agreements in the wake of *Epic Systems,* and granted motions to compel arbitration on an individual, bilateral basis. In sum, class actions are blocked.

Employers are turning to workplace arbitration agreements with increasing frequency to mitigate litigation risks and deliver benefits to employees in the form of expeditious and cost-effective resolution of workplace disputes.

An often-overlooked attribute of workplace arbitration agreements is the potential for third parties to invoke them to avoid a class action. As the *Epic Systems* ruling is applied by courts and employers grow in sophistication relative to crafting arbitration clauses, a growing body of case law is allowing customers of staffing companies to rely upon the arbitration agreements signed by temporary employees to "piggy back" on staffing companies' motions to compel arbitration. Various legal theories are invoked in this context, including the notion that the customer is a third-party beneficiary of the agreement and/or the worker is equitably estopped to arbitrate any of his or her claims.

Recently, a federal appellate court—the Third Circuit in Philadelphia—endorsed this approach in the case of *Noye et al. v. Kelly Services et al.* The plaintiff had signed an arbitration agreement with Kelly Services that contained a class action waiver. Nonetheless, he brought a nationwide class action for alleged violations of the Fair Credit Reporting Act rela-

tive to his onboarding. The district court granted Kelly Services' motion to compel the plaintiff to adjudicate his claim in an individual, bilateral (i.e., nonclass action) basis. It denied a tagalong motion by Kelly's customer. On appeal, the Third Circuit reversed and remanded on the basis of the equitable estoppel theory.

As the ruling in *Noye* reflects, staffing companies can provide a value add to their customers if their arbitration agreements are drafted with care and allow for application to others based on a third-party beneficiary and/or equitable estoppel theory.

—Gerald L. Maatman Jr., Seyfarth Shaw LLP

New York Court Dismisses Negligent Hiring Case Against Staffing Company

In a February unpublished decision regarding *Shainwald v. Professionals for Non-Profits Inc.,* a New York state court dismissed a client's lawsuit against a staffing company stemming from a temporary worker's alleged theft of $100,000 of jewelry from the client's home, and ruled that there was no evidence that the firm acted fraudulently or negligently in screening the worker.

The client requested a personal assistant to work in her home, and alleged the staffing company had a duty to conduct a background check on the assigned worker but failed to do so. The staffing firm argued it had no legal duty to conduct a background check on the temporary worker as there was no evidence she had a propensity for theft, and also argued that the client's lawsuit failed to allege that a background check would have revealed past crimes. Instead, the client claimed that evidence impugning the worker's trustworthiness and character were found in her "public records," which revealed a $300 tax lien and an eviction proceeding.

In dismissing the negligent hiring and fraud case, the court ruled that the worker's public records did not reveal a propensity for criminality, and further noted New York City law prohibits staffing companies from conducting a credit check and using credit checks to discriminate against prospective employees. At the time of the court's decision, the temporary worker had not been charged with any crimes; moreover, the court ruled that even if the worker had been convicted of crimes, the client still failed to allege the staffing company had knowledge of any alleged criminality and could not show how a background check would have prevented the alleged theft.

Unless mandated by law, or unless dealing with vulnerable populations such as children or the elderly, staffing companies generally are not under a legal obligation to conduct criminal background checks. Those that conduct such checks must comply with complex requirements, including state laws, the Fair Credit Reporting Act, and guidelines from the Equal Employment Opportunity Commission.

ASA offers an issue paper on the topic, "Background Checks: A Primer for Staffing Firms on Complying With Federal, State, and Local Laws," and staffing companies are advised to ensure their policies and procedures are reviewed by knowledgeable employment counsel. Find the issue paper in the Legal Publications section of *americanstaffing.net.*

—Brittany Sakata, ASA

Check Out 2019 ASA Staffing Law Conference Photos

If you missed the conference, or just want to revisit the action, take a look at the photos now posted on *staffinglawconference.net.*

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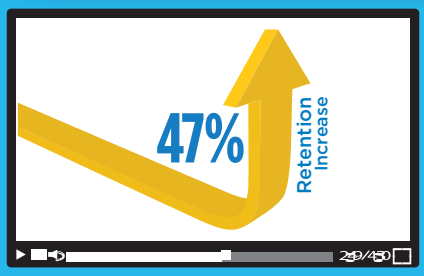

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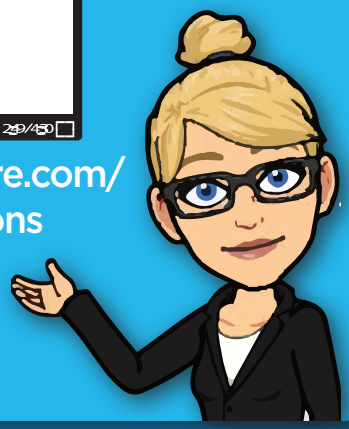

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