EMPLOYMENT LAW BULLETIN

Mazanec, Raskin & Ryder November 2019 Newsletter

DOL Overtime Rule is Official

On September 24, 2019, the U.S. Department of Labor announced the long-awaited overtime rule. The new rule will make an additional approximately 1.3 million workers eligible to receive overtime compensation. The new rules goes into effect January 1, 2020. Here's what you need to know:

- The standard salary level is raised from $455 per week to $684 per week (equivalent to an annual salary of $35,568);
- Highly compensated employee threshold has been raised from $100,000 per year to $107,432 per year;
- Employers are permitted to use non-discretionary bonuses and incentive payments to satisfy up to 10% of the standards salary level. If an employee does not earn enough in nondiscretionary bonuses or incentive payments in a year to retain exemption status, employers do have the ability to make a "catch up" payment in order to preserve the exemption status.

While these changes are not as dramatic as they were first proposed in 2016, they may still affect how you classify your employees. If you have employees who currently are exempt but will become non-exempt on January 1, 2020, you may wish to discuss your options in making these necessary changes. MRR attorneys are available to work through this with you.

Immunity on Matters that Arise Out of the Employment Relationship

Most public employers know that there is an exception to political subdivision immunity for matters that arise out of an employment relationship. The Ohio Supreme Court recently clarified this exception in *Piazza v. Cuyahoga County*, 2019-Ohio-2449. A county employee alleged that a county executive made a statement to the press that falsely connected the employee and her termination from the county to a county scandal. She sued the county for the tort claim of false-light invasion of privacy. The county attempted to assert immunity by arguing that the former employee was not employed at the time of the alleged wrongdoing, and therefore the employment exception to immunity did not apply. The Supreme Court held that she did not need to be employed at the time of the alleged wrongdoing. Neither the termination nor the alleged wrongful statement could have occurred absent the employment relationship. The matter therefore had enough of a tie to employment that the county was not entitled to immunity.

What Five Words Are Key for ADA Compliance?

The next time an employee comes to you with a concern about their ability to do their job, listen closely. Your solution to the issue may be easier than you think. Rather than worrying that whatever you say may run afoul of the law or create an HR nightmare, your first question should be to ask your employee, **"how can I help you?"** Not only may that question put a quick end to the issue, it satisfies your first obligation under the Americans with Disabilities Act (ADA).

Employers' first obligation under the ADA is not to analyze whether an employee has a disability recognized under the law. Employers' first (and most important) obligation under the ADA is to engage in the interactive process. The interactive process simply requires the employer and employee to have a conversation about what an employee may reasonably need in order to do his/her essential job functions. Once you ask the "how can I help you?" question of the employee, you have properly shifted the burden onto the employee to communicate with you. If they don't engage with you, then your obligation to engage in the interactive process under the ADA ends. You should document that you asked the question and their response.

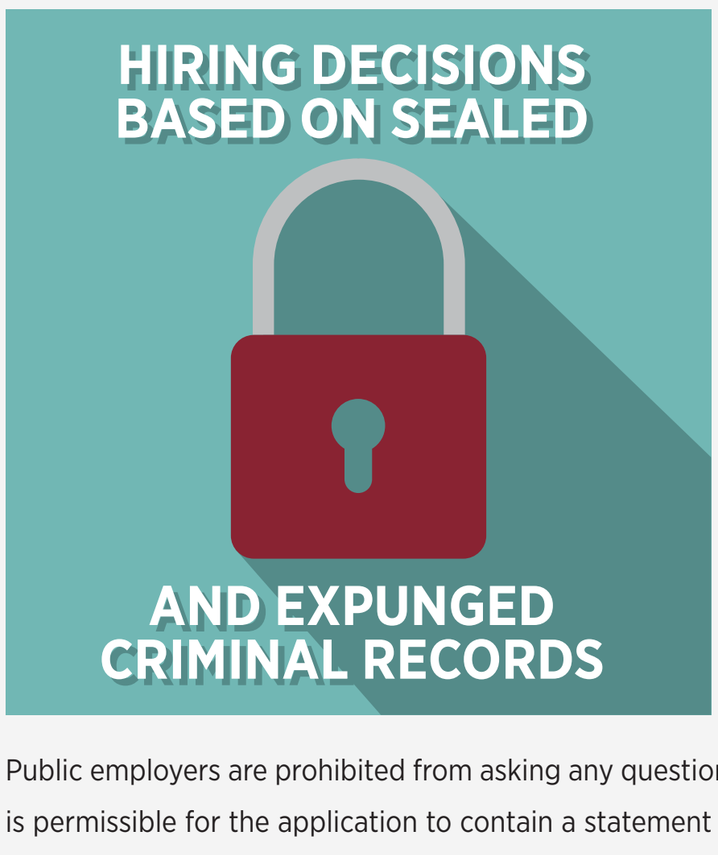
If the employee responds with a statement that they need something that's easy enough to provide, provide them with that assistance. You should then document that you asked, "how can I help you?", what their response was, that you provided the requested assistance, and that you followed up with them to ensure that the assistance provided is indeed what they need.

If the employee responds with a statement that they need something that is not easy to provide or will put a burden on the employer, you will need to engage in a further dialogue to determine whether there is something that you can reasonably provide. An employee does not have the right to demand a specific remedy to their situation, but the employer is required to take steps to try to provide a reasonable accommodation. Those discussions, including the accommodations discussion, must be documented.

DID YOU KNOW?

Employees Cannot Decide How to Use their Intermittent FMLA Leave

Employers have a new case to assist in their struggles of dealing with employees' intermittent FMLA usage. In *LaBelle v. Cleveland Cliffs, Inc.*, 2019 WL 4389145, the employer terminated an employee abusing FMLA leave. The employee had approved FMLA to attend medical appointments and take approximately three days off a month for pain "flair ups" with his shoulder. However, the employee stacked FMLA leave days with vacation days and played golf on some of those leave days. The employee argued that he was in constant pain and that he would take leave around vacations or weekends in order to give himself as much rest time as possible. The Sixth Circuit recognized that occasional rest to alleviate low-level constant pain is not what his FMLA leave was for. If he had constant pain that required occasional long weekends to mitigate, he should have requested FMLA for that purpose.



Can employers ask applicants about expunged or sealed criminal records? Although "expunged" and "sealed" records may be used interchangeably, they have different meanings and different legal implications. Expunged records are records which are destroyed, deleted, and erased in a manner that makes the record permanently irretrievable. A sealed record, on the other hand, is not permanently irretrievable, but is shielded from the public's view for most, but not all purposes.

Revised Code § 2953.33 (B)(1) permits employers to question a person on sealed convictions if the question "bears a direct and substantial relationship to the position for which the person is being considered." Note the statute refers to sealed, not expunged, records. [And note that a person may not be questioned about an expunged criminal record relating to certain crimes involving the improper handling of firearms in a motor vehicle. R.C. § 2953.33 (B)(2)].

Public employers are prohibited from asking any question about criminal history in an initial employment application, although it is permissible for the application to contain a statement regarding criminal offenses which might disqualify an individual from a position. Criminal history questions for applicants after the initial application process is fair game, however.

Mazanec, Raskin & Ryder Co., L.P.A.
Attorneys and Counsellors at Law

CLEVELAND
100 Franklin's Row
34305 Solon Road • OH 44139
440.248.7906

COLUMBUS
175 South Third Street
Suite 1000 • OH 43215
614.228.5931

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mrrlaw.com

CONTACT US
Stacy V. Pollock, Partner
David M. Smith, Partner