Knoxville Bar Association

THE CONSIGLIERE

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Let us know your ideas and suggestions for *THE CONSIGLIERE:*

- **Call or email Paul E. Wehmeier at 546-7000 or Marsha Wilson at 522-6522 or mwilson@knoxbar.org.**
- **Submit an article for consideration.**
- **Give us your feedback on this newsletter.**
- **Tell us about CLE topics or networking events you would like the Section to sponsor.**

FROM THE CO-CHAIRS

By: David Headrick, Esquire
LandAir Surveying Company, Inc.

Having just watched the Closing Ceremonies last night, I feel compelled to dedicate this Co-Chair Letter to the Olympics. From my position as an armchair Olympic athlete, it appeared that Rio was a great venue and that most everything went very well for the games.

Let's indulge for a minute: The United States won 121 medals, including 46 gold. The next closest was China with 76 metals and 26 gold. I'm sure that being in the same time zone as the games helps, but what really helps is having a strong swim team and track-and-field team. (Interesting sidebar: If Texas was its own country – which, to many of us, it is – it would rank eighth in the 2016 Olympics medal count with 42 total medals.)

I really enjoy seeing high-level athletes who have dedicated their lives to their sports compete against each other on the world's biggest stage. However, it is the emotions of the athletes that really made it special. I loved watching the swagger and rally cries of the men's basketball team as they dominated another Olympics. It was heartbreaking to see Kerri Walsh Jennings fail to continue her legacy defense of beach volleyball. Even in golf, Matt Kuchar showed more exuberance in winning a bronze medal than he did in any of his wins on the PGA Tour. And, who could forget the Hungarian guy who excitedly cheered on his swimmer wife, Katinka Whatshername.

NBC is said to have had some lower ratings, but I have to say that they did a pretty good job of catching up folks after the workday and still providing quality entertainment each evening. All sports, even the weird ones, seem to be evenly covered. Somehow, they also managed to keep all the underlying scandals away from the main press as well (except for that Ryan Lochte a.k.a., "Swim Shady," a.k.a., "Liar, liar speedo on fire!" thing). NBC gets an "A" in my book. Thanks for the selective filtering.

As usual, I also discovered a sport that I did not realize was a sport, i.e., Handball. I guess you can think up an unlimited amount of ways to deliver a ball to an objective while another team is keeping it from that objective. While I do think that sports like ping-pong are a little questionable, as long as there are highly dedicated athletes elevating it to the level of absurdity, it must be entertaining. In fact, I just had a great idea. Each Olympics should let fans vote for one new sport to be included. Anybody up for some Olympic hide-and-go-seek?

UPCOMING EVENTS

Corporate Ethics & Updates: The 2016 KBA Corporate Counsel Section Annual CLE

August 25, 2016
The Foundry, 747 Worlds Fair Park Drive
12 noon – 1 p.m. Buffet Lunch
1:15 – 4:30 p.m. CLE (Approved for 1.5 hours of general and 1.4 hours of dual CLE credit)
Register

1:15 p.m. – 1:45 p.m. *(30 minutes of Dual)*
Cyber Liability & How to Protect Your Company Before and After a Data Breach
Justin N. Joy, *Lewis, Thomason, King, Krieg & Waldrop, P.C. (Memphis Office)*

The risk of unauthorized data access can affect your business and your clients. The Tennessee legislature just passed a bill tightening Tennessee's law regarding breach notification requirements to protect customers. The cost associated with a cyberattack or data breach can be extremely high. Discover the problems unauthorized data access cause and the legal considerations that need to be addressed before an incident happens. This CLE will provide a general overview of key developments in data breach and privacy law, including cyber insurance considerations, FTC enforcement actions, and recently passed Tennessee legislation.

1:45 p.m. – 2:15 p.m. *(30 minutes of General)*
Legal Considerations for Advertising and Comparative Advertising
Tracy G. Edmundson, *Of Counsel, Egerton, McAfee, Armistead & Davis, P.C.*

Although compliance is a “hot-button” topic for many in-house counsel, the focus is often on financial reporting, regulatory, environmental or FCPA compliance. However, what a company says in connection with the promotion of its goods or services is an area where compliance review is very important. The FTC (and other trade regulation enforcement bodies outside the U.S.) and your competitors have regulatory and legal enforcement means at their disposal to challenge your advertising and marketing claims.

Section Events

Section Events

Therefore, some basic advertising claims compliance policies and/or procedures are important for protection of your corporate clients or employer.

2:15 p.m.– 2:45 p.m. *(30 minutes of General)*
Interns, Temps, Overtime and the FLSA
Cathy E. Shuck, *East Tennessee Children's Hospital, Of Counsel, Wimberly Lawson*

The Federal Department of Labor finds Fair Labor Standards Act (FLSA) violations in over 70% of the companies it audits. Is your organization vulnerable? This session will cover proper treatment of interns, temps, contractors and other workers under the FLSA, as well as review the new rules for overtime and exempt employees effective December 1, 2016.
2:45 p.m.– 3:00 p.m.

Break

3:00 p.m.– 3:30 p.m. *(30 minutes of General)*
Campaign Finance & Lobbying for Corporations
Stephanie D. Coleman, *Robertson Overbey*

Guiding your corporate client through participation in the political process can be complicated. This session will help you figure out how to comply with lobbying laws for corporations, the reporting and registration requirements, and when and how to use employees to persuade legislators. Advice regarding campaign contributions and political action committees will also be addressed.

3:30 p.m.– 4:30 p.m. *(1 hour of Dual)*
New Legal Issues for Corporate Counsel - Panel Presentation
Kimberly C. Hedrick, *Smart Auto;* ***William R. Seale,*** *Bush Brothers & Company;* ***Cathy E. Shuck,*** *East Tennessee Children's Hospital, Of Counsel, Wimberly Lawson and* ***David W. Headrick,*** *LandAir Surveying, Inc. (moderator)*

Listen to in-house counsel discuss business and ethical considerations that are challenging their practice on a day-to-day basis. Topics include Anti-SLAPP laws, overtime laws, data breach laws, employee privacy, accommodating religious needs, dealing with federal regulators, etc.

Corporate Counsel Section Pro Bono Night – October 25

Join the KBA Corporate Counsel Section for "pro bono power hours" on Tuesday, October 25 from 5:00 – 7:00 p.m. at The Adams Law Firm located at 8517 Kingston Pike, Knoxville TN 37919. Section members will gather together to answer civil legal questions posted to the website, Online TN Justice. Register online by clicking October 25 on the KBA event calendar at **www.knoxbar.org**.

Corporate Crime:

WHITE-COLLAR WINS IN THE SUPREME COURT

CORPORATE CRIME

By: James R. Stovall
Ritchie, Dillard, Davis & Johnson, P.C.

White-Collar Wins in the Supreme Court

Justice Scalia's death prevented the United States Supreme Court from deciding some significant cases this term, but not from issuing two important victories for white-collar defendants. Even with eight justices, in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), the Court limited what counts as an "official act" under federal bribery laws, and in *Luis v. United States*, 136 S. Ct. 1083 (2016), it curtailed the government's ability to freeze "untainted" or "substitute" assets before trial.

Not Every Act Of An Official is An "Official Act"

McDonnell is an appropriate decision for campaign season. Elected officials are expected to be responsive to the demands of their constituents, including constituents who contributed to their campaigns. They may arrange meetings or call other officials on a constituent's behalf. Officials violate the federal bribery statute, however, if they perform, or agree to perform, an "official act" in exchange for "anything of value." *See* 18 U.S.C. 201. *McDonnell* addresses what conduct constitutes an "official act."

Robert McDonnell, the former Governor of Virginia, and his wife, Maureen, were charged with bribery offenses related to $175,000 in loans, gifts, and other benefits given to them by Virginia businessman Jonnie Williams. Williams's company had developed a nutritional supplement from a compound in tobacco. In hopes of obtaining FDA approval, the company wanted Virginia's public universities to conduct research on the drug, and Williams sought the Governor's help in making that happen. *McDonnell*, 136 S. Ct. at 2361.

Williams also provided the Governor and his wife with numerous "things of value," including buying the Governor's wife $20,000 worth of designer clothing, giving them $15,000 to help pay for their daughter's wedding, and loaning them tens of thousands of dollars. McDonnell appeared to be responsive to Williams's requests for assistance. He asked Virginia's surgeon general to send an aide to a meeting with Williams and Mrs. McDonnell to discuss research studies on the supplement. He hosted a lunch event for the company at the Governor's mansion and invited researchers from UVA and Virginia Commonwealth University. He also met with state human-resources officers to discuss the health plan for state employees. During the meeting, he took one of the supplements during the meeting, commented that it was working well for him, and stated that it "would be good for" state employees. *Id*. at 2364-65.

At trial, the government contended that all these actions by McDonnell were "official acts," and the district court instructed the jury that the term encompasses "acts that public officials customarily perform," including acts "in furtherance of longer-term goals" or acts "in a series of steps to exercise influence or achieve an end." *Id*. at 2366. The court rejected an instruction, requested by McDonnell, that "merely arranging a meeting, attending an event, hosting a reception, or making a speech are not, standing alone, 'official acts' because they are 'not decisions on matters pending before the government.'" *Id*.

McDonnell and his wife were convicted on multiple counts, and the Fourth Circuit affirmed. The Supreme Court unanimously vacated and remanded, disagreeing with how the government and the lower courts had construed "official act."

The Court recognized that the federal bribery statute defines "official act" quite broadly: "*any* decision or action on *any* question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. 201(a)(3) (emphasis added). This definition, the Court reasoned, has two requirements: (i) a "question, matter, cause, suit, proceeding or controversy" that may be pending or be brought before a public official; and (ii) a decision or action "on" that question or matter. *Id*. at 2368.

As to the first requirement, "question" and "matter" could seemingly include any activity by a public official. The Court noted, however, that here those terms appear in a list, and the other terms in the list all "connote the formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination." *Id*. Relying on the canon *noscitur a sociis*—"a word is known by the company it keeps"—the Court read "question" and "matter" here as also referring to a formal exercise of governmental power. *Id*. at 2368-69.

In McDonnell's case, the trial court had found that the relevant "question" or "matter" was "Virginia business and economic development," which was an acknowledged goal of McDonnell's administration. The Supreme Court, however, held that to qualify under the bribery statute, a question or matter "must be more focused and concrete." *Id*. at 2369. It found three such questions or matters in this case, including whether researchers at state universities would initiate a study of the supplement, and whether the health insurance plan for state employees would include the supplement as a covered drug. *Id*. at 2370.

As to the second requirement, "decision" or "action" are, if anything, terms broader than "question" or "matter," arguably broad enough to encompass setting up a meeting, hosting an event, or calling another official—the conduct the government focused on in its prosecution of McDonnell. The Court, however, found that such conduct, "standing alone," is not an "official act." Its interpretation rested in part on the preposition "on": to commit bribery, the Court noted, an official "must make a decision or take an action *on* [a] question or matter, or agree to do so." *Id*. (emphasis original).

An official presented with the research-study question at issue in *McDonnell* could do that, the Court reasoned, by deciding to initiate a research study, or narrowing down the list of research topics. But simply setting up a meeting or making a call related to the proposed research is conduct too neutral to be a decision or action "on" that question. Otherwise, any action "somehow related to" a question would constitute an "official act," and the requirement that the action be "on" a question or matter "would be meaningless." *Id*. at 2371.

The Court also found that the government's "expansive interpretation" of "official act" raised "significant constitutional concerns." *Id*. at 2372. Most importantly, for a public official to arrange meetings for constituents or contact other officials on their behalf is part of the "basic compact underlying representative government." *Id*. But the government's interpretation would "cast a pall of potential prosecution over these relationships" if the constituent had "given a campaign contribution in the past" or "invited the official . . . to [a] ballgame." *Id*.

McDonnell is an important limit on public corruption prosecutions, particularly in its clarification that, for purposes of the bribery statute, a "question" or "matter" must involve the "formal exercise of government power." Still, it is not clear how much comfort *McDonnell* will give conscientious elected officials who want to respond to the concerns of constituents who are also contributors. The problem is that, even under *McDonnell*, whether an action counts as an "official act" turns in part not on objective characteristics of the action, but on the official's intent in performing or agreeing to perform it. *McDonnell* itself states that setting up a meeting or making a phone call can count as an official act, if the official "was attempting to pressure or advise another official on a pending matter." *Id*. at 2371. Because whether an official had that prohibited intent is a fact question that prosecutors and officials may see very differently, officials may face "overzealous prosecutions" even though the Court in *McDonnell* was seeking to prevent them. *Id*. at 2373.

<u>Paying Counsel With Untainted Funds</u>

If *McDonnell* is a substantive win for defendants, *Luis* is a procedural one. In *Luis*, the Court addressed the government's ability to seize assets needed to fund a defense. A federal statute authorizes the pretrial seizure of property of a criminal defendant accused of violating federal health care or banking laws if the property (i) was "obtained as a result" of the offense; (ii) is "traceable" to the offense; or (iii) is "of equivalent value" to property in the first two categories. *See* 18 U.S.C. § 1345. *Luis* concerned the third category, property or assets "untainted" by a charged offense, which are sometimes referred to as "substitute" assets.

Sila Luis owned multiple health care companies. She was indicted for conspiring to defraud Medicare by billing for services that were not performed or were not medically necessary, for paying kickbacks, and for engaging in other offenses related to health care. The government alleged that Luis had obtained almost $45 million from her

conduct. By the time she was indicted, however, most of that had been spent, and she had only $2 million in assets. *Luis*, 136 S. Ct. at 1087-88.

The government filed a civil action under Section 1345 seeking a freeze on the transfer or alienation of any assets of Luis's up to $45 million. According to the government, the freeze was necessary in part to preserve property for the payment of restitution and other criminal penalties. Luis's remaining $2 million could be frozen, the government contended, as substitute assets. *Id*. at 1088.

The parties did not dispute that restraining Luis's ability to dispose of those funds would mean she could not retain the attorney of her choosing to defend her in the criminal case. Luis argued that such a restriction would violate her Sixth Amendment right to counsel. The trial court disagreed and entered a restraining order, which was affirmed by the Eleventh Circuit. The Supreme Court reversed, 5-3, without a majority opinion.

A plurality of the Court, in an opinion by Justice Breyer, joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor, found that a pretrial restraint of untainted assets violates the Sixth Amendment right to counsel if those assets are needed to retain the defendant's counsel of choice. The plurality reiterated that the right to counsel is "fundamental." Because of the importance of trust between lawyer and client, the Sixth Amendment grants a defendant not just the right to have an attorney, but "a fair opportunity to secure counsel of his own choice." *Id*. at 1089. Indeed, the Sixth Amendment "guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire." *Id*.

Despite this guarantee, in earlier decisions the Court has held that the government may seize a criminal defendant's assets before conviction, even if it interferes with the defendant's ability to retain counsel. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) (approving post-conviction forfeiture of funds traceable to proceeds of charged offense that would have been used to pay counsel); *United States v. Monsanto*, 491 U.S. 600 (1989) (approving pretrial restraint of funds needed for counsel that were obtained as a result of the charged offense). The plurality distinguished those decisions on the ground that the assets in those cases were "tainted." Under the forfeiture statute applicable in those cases, title to tainted assets passed to the government "at the instant the crime [was] planned or committed," and thus "before" the assets were restrained. *Id*. at 1090. Before a conviction, however, the government lacks that kind of property interest in untainted or substitute assets, even if, upon conviction, such assets would be forfeitable. To the plurality, that distinction is "not a technicality" but "the difference between what is yours and what is mine." *Id*. at 1091.

The plurality summarized its conclusion as the defendant has a "Sixth Amendment right to use her own 'innocent' property to pay a *reasonable* fee for the assistance of counsel." (emphasis added). *Id*. at 1096. The notion of "reasonable" fees does not appear anywhere else in the decision. It suggests, though, that the plurality would permit courts to freeze funds needed to pay a fee that is *not* reasonable, but the

decision does not provide any guidance concerning how a court should evaluate the reasonableness of a fee.

Justice Thomas concurred only in the judgment. He parted with the plurality because it relied in part on a "balancing" of the right to counsel against the government's interest in securing financial penalties and victims' interests in securing restitution that Justice Thomas found courts ill equipped to perform. *Id*. at 1101.

The principal dissent was authored by Justice Kennedy (joined by Justice Alito). Kennedy's view was that, under *Monsanto*, any assets subject to forfeiture may be seized before a conviction, regardless of whether they are tainted or not, as long as the government establishes probable cause that the assets will ultimately be forfeitable. *Id*. at 1105. Kennedy found it anomalous that the government's interest in ensuring a defendant's presence at trial can justify the defendant's pretrial detention, but the government's interest in having a defendant's substitute assets available for forfeiture after conviction cannot justify restraining them before trial. *Id*. at 1106. Kennedy also reasoned that the distinction between "tainted" and "untainted" assets is "arbitrary" because "[m]oney, after all, is fungible." *Id*. at 1109. To Kennedy, "a defendant who has preserved his or her own assets by spending stolen money" should be treated no differently than "a defendant who has spent his or her own assets and preserved stolen cash instead." *Id*.

Justice Kagan also dissented. Like Justice Kennedy, she concluded that Luis's position was foreclosed by *Monsanto*. The fact she dissented separately, however, indicates she may be open to "overrul[ing] or modify[ing] that decision." *Id*. at 1112.

Luis will likely make tracing issues more important in pretrial asset-seizure disputes. Regardless, given the Supreme Court's evident concern with the practical effect asset seizures have on the exercise of constitutional rights, defense counsel should continue challenging pretrial seizures that undermine a defendant's right, not just to counsel, but to counsel of the defendant's choosing. Both *Luis* and *McDonnell* also suggest that, even without Justice Scalia, the Supreme Court remains willing to push back on the government's expansive application of federal criminal statutes.

INTELLECTUAL PROPERTY

By: Matt Googe
Robinson Intellectual Property Law

Defend Trade Secrets Act of 2016

President Obama recently signed the Defend Trade Secrets Act of 2016 ("DTSA") into law. This new law has several important provisions that are highly

Intellectual Property:

DEFEND TRADE SECRETS ACT OF 2016

relevant to how companies manage and protect their proprietary information and trade secrets. There are many important changes as a result of the new law, and this is only a brief summary of some of the most important changes enacted under the DTSA.

CIVIL CAUSE OF ACTION FOR THEFT OF TRADE SECRETS IN FEDERAL COURT

One important change is that an owner of a misappropriated trade secret may now bring a civil action under the DTSA if the trade secret is related to a product or service used in interstate commerce. Previously, the only remedies available were under various state theft of trade secret laws or potential criminal prosecution of violators of the Economic Espionage Act. The DTSA provides a broad basis for jurisdiction, and could include a claim for misappropriation of a trade secret that is only used on an internal basis, or that is related to a product or service currently in development so long as that product or service is intended to be used in interstate commerce. Available remedies under a civil cause of action would include damages, injunctive relief, and seizure of misappropriated trade secrets.

BROAD DEFINITION OF "MISAPPROPRIATION" AND "TRADE SECRET"

Under the DTSA, misappropriation includes either: obtaining, without permission, a trade secret that was knowingly obtained through improper means; or disclosing or using a trade secret knowing either that it is a trade secret or that it was obtained through improper means. Improper means include theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic means.

Activities that are not considered misappropriation still include reverse engineering, independent derivation, or other information acquired lawfully. These permitted activities are consistent with existing trade secret laws on both the state level and under the Economic Espionage Act.

The DTSA also uses a broad definition of trade secret, and that definition includes "all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorized physically, electronically, graphically photographically, or in writing if…(A) the owner has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by another person who can obtain economic value from the disclosure of that information."

In sum, almost any type of information can qualify as a trade secret so long as the information is actually secret, the owner of that information takes reasonable

measures to maintain that secrecy, and economic value can be derived from the secrecy of that information.

NOTICE OF IMMUNITY TO EMPLOYEES AND CONTRACTORS

One important change outlined in the DTSA is that employers now have a duty to provide notice to their employees and contractors of a new immunity provision in the law that protects whistle blowers from criminal or civil liability for disclosing a trade secret if that disclosure is made in confidence to a government official or attorney and if the disclosure is made for the purpose of reporting a violation of the law. Employers must now provide notice of this immunity provision in any contract or agreement with employees or contractors that govern use of a trade secret or other confidential information of the employer.

This change is important because failure to provide notice means that an employer may not later recover exemplary damages or attorney fees in an action brought under the DTSA against an employee who had no notice. The notice itself may be provided as a simple cross-reference in a confidentiality agreement to an employment policy or other handbook given to employees that describes the reporting policy for suspected violations of law.

CONCLUSION

In sum, the DTSA provides several changes that make preservation of trade secrets a more viable option for protecting proprietary information. However, to take advantage of this, confidentiality agreements and policies must be reviewed to make sure that any potential proprietary information is maintained in confidence, and that reasonable steps are taken to preserve that information as a secret.

EMPLOYMENT LAW

By: J. Chadwick Hatmaker
Woolf, McClane, Bright, Allen & Carpenter, PLLC

Employment Law:

USING BYOD POLICIES TO AVOID LEGAL RISKS

USING BYOD POLICIES TO AVOID LEGAL RISKS

In our 24/7 society it seems everyone carries a smartphone. We feel the need to be able to access email, surf the internet, text message and make and receive calls anytime, anywhere. And many employers want their employees to be reachable anytime, anywhere. As a result, many employers are going “BYOD” and allowing employees to Bring Your Own Device to work. But going BYOD creates certain legal

risks. In-House Counsel need to know those risks and how to minimize exposure to them.

The primary legal risks associated with going BYOD include:

- Loss of confidential information.
- Wage and hour issues, such as a non-exempt employee using the device to work overtime or a minimum wage violation because the fees and expenses for the device reduce the employee below minimum wage for each hour worked.
- Discrimination and harassment.
- Employee negligence – the employee has an accident while using the device which results in a worker's compensation claim, a claim by an injured third party, or both.
- An overbroad BYOD policy which inhibits "concerted activity" in violation of the National Labor Relations Act ("NLRA")

To minimize these risks In-House Counsel should advise their employer to adopt a BYOD policy. An effective BYOD policy should:

- State that mobile device management software will be installed on the employee's device which allows the employer to remotely "wipe" the device if necessary.
- State that the employer is not responsible for personal data loss.
- State that the employee has no expectation of privacy in the information stored on the device.
- State that the employer can monitor and preserve all data on the device.
- Require employees to sign the policy consenting to the terms.
- Prohibit the use of the device outside of the employee's normal work hours unless expressly authorized to do so.
- Prohibit the use of the device for work while on unpaid leave unless expressly authorized to do so.
- Ensure that the fees and expenses for the device do not reduce the employee below minimum wage, or violate applicable state law.

- State that time worked using the device will be counted as compensable time.
- Prohibit the use of the device for discrimination or harassment.
- Prohibit the use of the device when driving or operating equipment.
- Prohibit the storing of information from prior employers.
- State the protocols that will be followed in the case of an employee's resignation or termination.
- Specify any other prohibited uses.
- State that the employee must notify management immediately in the event their device is lost, damaged or stolen.
- Contain an NLRA disclaimer.
- State that the BYOD Policy may be revoked at any time.

Some employers may also allow employees to establish social media accounts identifying them as representatives of the employers. Depending on the employee's job creation of these social media accounts may be encouraged. But who owns these accounts after the employment relationship ends? The cases that have been decided thus far make it clear that if the employer wants to establish ownership of the accounts it is best to have a BYOD or other policy in place that addresses the issue.

In-House Counsel whose employers adopt BYOD policies which contain appropriate language to address the legal risks addressed in this article can reduce exposure to those risks. Remember, an ounce of prevention is worth a pound of cure.

The FLSA FINAL Rule Is Here . . . Are you Ready?

By: Sarah R. Johnson
Holifield, Janich & Associates, PLLC

The FLSA Final Rule is Here…Are You Ready?

The United States Department of Labor ("DOL") released the Final Rule amending the executive, administrative, professional, and computer employee exemptions under the Fair Labor Standards Act ("FLSA"). The new rule updates the salary level required for exemption that many "white collar" workers must meet to qualify as exempt from federal overtime rules.

What do you need to know?

- Effective Date: December 1, 2016.

- Minimum salary necessary to qualify as an exempt executive, administrative, professional or computer employee is $913 per week or $47,476 annually (more than double the prior threshold of $455 per week).

- Minimum compensation necessary to qualify for the "highly compensated employee" exemption is $134,004 per year (an increase of $34,004 per year when compared to the prior threshold of $100,000 per year).

    - New salary thresholds for highly compensated employees will be set at the 90th percentile of earnings of full-time salaried workers nationally.

- Special salary level for employees in American Samoa increased to $767 per week.

- Special "base rate" for employees in the motion picture industry increased to $1,397 per week.

- The salary threshold will be updated every three years, beginning on January 1, 2020, and the revised salary requirements will be announced 150 days prior to the date they are scheduled to go into effect.

    - New salary thresholds will be set at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South), as measured at the end of the second quarter of the previous year.
    -

- The "duties test" does not change.

The Final Rule Is Not All Bad News for Employers

As an offset to the drastic increase in salary levels, the DOL is granting employers the ability to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. This means that up to $91.30 in nondiscretionary bonus and incentive payments per week, or $4,747.60 in nondiscretionary bonus and incentive payments per year paid no less frequently than on a quarterly basis, can count toward meeting the $47,476 threshold. This also means that even if the employer can make use of the full 10 percent, the employee still will need to receive a salary of at least $821.70 per week, or $42,728.40 per year. To qualify, the bonuses, commissions or incentives must be paid on a quarterly or more frequent basis, and the payments must be tied to productivity and profitability. Employees who fail to earn sufficient bonus or commission income during the quarter to meet the new

salary threshold must receive a "true-up" payment in the first pay period after the quarter ends to bring their total compensation to the required amount. As an example, by the last pay period of the quarter, the sum of the employee's actual weekly salary, plus received nondiscretionary bonus, incentive, and commission payments, does not equal $11,869 (i.e., 13 times the weekly minimum of $913), an employer may make one final payment to reach the $11,869 level no later than the next pay period after the end of the quarter.

On the other hand, the Final Rule does not allow employers to include any bonuses in the calculation of highly compensated employees ("HCEs") reaching the salary threshold. HCEs must receive at least the full standard salary amount each pay period on a salary or fee basis without regard to the payment of nondiscretionary bonuses and incentive payments. The DOL concludes that permitting employers to use nondiscretionary bonuses and incentive payments to satisfy the standard salary amount for HCEs is not appropriate because employers are already permitted to fulfill almost two-thirds of the total annual compensation requirement with commissions, nondiscretionary bonuses, and other forms of nondiscretionary deferred compensation.

What Should Employers Do to Comply?

- Adopt protocols to ensure that nonexempt salaried employees are paid overtime at the proper rate.
    - Revise Employee Handbooks and policies relating to overtime and time keeping.
    - Implement time clock system.
    - Travel time incurred by newly reclassified employees should be analyzed to assess whether and to what extent that time should be considered compensable time and if adjustments to travel schedules should be implemented.
- Evaluate telecommuting and other alternative work arrangements to determine whether compensable time can be realistically managed and tracked from remote locations.
- Remind employees about when they are permitted and not permitted to engage in work-related activities outside of scheduled work hours.
    - i.e. employees checking and responding to work-related emails and texts outside of their normal work hours.
- Be prepared for the reclassifications to occur every three years

- Exempt status may be lost as a result of the automatic update if the weekly guaranteed salary is close to the threshold without an appropriate update.

- Analyze whether nonexempt salaried employees should be converted to an hourly pay basis.
  - Pros: tracking and paying overtime will be easily facilitated.
  - Cons: may be viewed by the affected employees as a demotion.

- Analyze whether the fluctuating workweek approach is beneficial, which can result in a substantial reduction in overtime pay costs.

- Analyze whether the size of the payroll should be reduced.

- Analyze whether the compensation of employees should be reduced.

- Analyze whether bonuses should be reduced or future compensation increases should be eliminated or reduced.

Section Leadership

Section Co-Chair
David Headrick
LandAir Surveying Company, Inc.
118 N. Peters Road, #202
Knoxville, TN 37923
865.599.0148

Section Co-Chair
Marcia A. Kilby
Director of Legal Services
DeRoyal
200 DeBusk Lane
Powell, TN 37849
Direct: 865.362.1391
mkilby@deroyal.com

Editor, The Consigliere
Paul E. Wehmeier
Arnett, Draper & Hagood, LLP
P. O. Box 300
Knoxville, TN 37901-0300
865.546.7000
pwehmeier@adhknox.com