The Work Week

Bassford Remele Employment Practice Group

November 18, 2024

Welcome to another edition of *The Work Week with Bassford Remele.* Each Monday morning, we will publish and send a new article to your inbox to hopefully assist you in jumpstarting your work week. This week, we bring two topics to your inbox.

Bassford Remele Employment Practice Group

I. Overtime Overreach?
Court Halts DOL's Final Rule Expanding Eligibility For Overtime

Beth L. LaCanne

Last week, a U.S. District Court judge in the Eastern District of Texas, in *Texas v. Department of Labor*, struck down the Department of Labor's ("DOL") final rule that extended overtime pay protections to a significant number of American workers. In April, we covered the DOL's Final Rule: Restoring and Extending Overtime Protections which related to overtime eligibility, raising the salary threshold for employees who are ineligible for overtime.

As a brief overview, the DOL enforces the Fair Labor Standards Act ("FLSA") which sets forth minimum payment requirements and overtime eligibility. The FLSA categorizes employees into non-exempt and exempt. Non-exempt employees must be paid a minimum hourly wage and overtime pay if they work more than 40 hours per week. Exempt employees are excluded from minimum wage and overtime requirements.

The DOL's April 2024 final rule changed previous compensation thresholds by increasing the minimum weekly salary to determine exempt versus non-exempt status in phases – July 1, 2024; January 1, 2025; and every three years thereafter.

In *Texas v. Department of Labor*, the Eastern District of Texas held that the DOL exceeded its statutory authority when it issued the final rule in April 2024. The court estimated that the July 1, 2024 change converted one-third of American employees to nonexempt (i.e., eligible for overtime). The court's ruling

vacates the DOL's final rule entirely and nationwide. The ruling also vacated the July 1, 2024, salary threshold, restoring the DOL's 2019 salary thresholds. The 2019 salary thresholds are: EAP exemption $684 per week, or $35,568 annually; HCE exemption at $107,432 per year. Although the 2019 thresholds are the operative thresholds, the DOL could appeal the decision to the Fifth Circuit. Time will tell whether the incoming DOL under the new Trump administration will impact the decision to appeal.

Employers have the option to continue their existing compensation structure that includes the July 2024 increase and pause the implementation of the January 1, 2025, increase. Alternatively, they could revert to the prior compensation structure under the DOL's 2019 thresholds. Many factors will impact which approach is most appropriate for each employer, not the least of which is employee morale.

At Bassford Remele, we regularly help our clients assess the impact of legal decisions on their businesses and provide guidance on the impact of effectuating legal decisions. Please feel free to reach out to our team with any questions you may have!

II. Keeping Employment Decisions FCRA Compliant

Beth L. LaCanne

Think the Fair Credit Reporting Act ("FCRA") only applies to creditors, debt collectors, and credit reporting agencies? Surprise! Recent guidance issued by the Consumer Financial Protection Bureau (CFPB), discusses the FCRA's side hustle regulating employment decisions that contemplate consumer reports prepared by a third-party consumer reporting agency. Prior editions of *The Work Week* discuss a Biden administration executive order and the EEOC's enforcement action for misuse of AI. This week, we will discuss the CFPB's guidance and its implications for employers.

FCRA Compliance

The CFPB's 2024-06 Circular states that "[s]imilar to credit reports and credit scores used by lenders to make lending decisions, background dossiers—such as those that convey scores about workers—that are obtained from third parties and used by employers to make hiring, promotion, reassignment, or retention decisions are often governed by the FCRA."

In addition to the traditional background checks, there is a growing market for reports that track, assess, and evaluate workers' activities, both on the job and in their personal lives using advancing technology. These reports contain far more than financial histories and criminal histories. For example, companies may be able to gather information about an individual's collective bargaining activities or use products that monitor a worker's productivity by tracking messaging, web browsing, and keystroke frequency, among other things. On the AI front, companies can collect "consumer data in order to train an algorithm that produces scores or other assessments" about individuals.

The FCRA excludes data regarding the transactions or experiences between the individual and their employer. However, if that data is then combined with data from other sources into a report, the exclusion is inapplicable.

Companies that provide services and reports to employers are likely to be construed as consumer reporting agencies, and the reports they compile are likely to be construed as consumer reports implicating the FCRA. In turn, employers who purchase the services and reports must comply with the FCRA. Employers may be well-served to assume the reports they receive from a third party regarding an individual will be viewed as a "consumer report" under the FCRA.

If an employer is receiving consumer reports regarding individuals, it must comply with not only the general obligations of the FCRA but also the additional obligations for consumer reports used for employment purposes. Specifically, employers must:

- obtain permission from the individual;
- provide notice and a copy of the report before taking adverse action; and
- limit the use for a permissible purpose (e.g., evaluating whether the individual is appropriate for the position, a promotion, reassignment or retention).

As with other laws intended to protect workers, the FCRA provides a variety of monetary remedies, not the least of which are attorney's fees. Because of the risks associated with violating the FCRA, employers utilizing third-party vendors to provide reports or contemplating hiring a third-party vendor should assess the business need for the consumer reports. If it makes business sense to use consumer reports for employment purposes, employers should review their policies and practices, to ensure compliance with the FCRA.

Conclusion

While the CFPB's primary enforcement target may be creditors and debt collectors, its recent guidance leaves little doubt that employers are also on the CFPB's radar. Employers should ensure the FCRA is on their radar when using a third-party vendor to compile data regarding individuals.

At Bassford Remele, we constantly monitor decisions and guidance issued by federal, state, and local administrative agencies to keep our clients apprised of new developments in employment law. Please feel free to reach out to our team with any questions!

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