LANE POWELL
ATTORNEYS & COUNSELORS

Your Pacific Northwest Law Firm®

Best Practices for Best Employers™

How to Become a Best Workplace Starting Today!

September 15, 2015

LANE POWELL
ATTORNEYS & COUNSELORS

Lawyers for Employers®

D. Michael Reilly
Director of Labor and Employment and Employee Benefits Practice Group — Lane Powell PC

Sara Dnell
President — Lake Washington Human Resource Association

Dear Colleagues:

Being a "Best Workplace" is hard work. *Lane Powell, Puget Sound Business Journal*, and *Lake Washington Human Resource Association* have joined forces to help your business become a "Best Workplace."

We invite you to join us on **September 15** for our 33rd Annual Labor and Employment "Best Practices For Best Employers™" Seminar at the centrally-located Motif Seattle. Small- and large-business owners, senior corporate executives, corporate counsel and human resources professionals will receive cutting-edge guidance on quick-changing employment laws. *In previous years this event has sold out, so early registration is encouraged.*

Being caught unaware of big changes in employment laws can hurt your emerging or established business. We are here to help.

You will receive thoughtful insights on new developments in federal, state and local laws that will directly impact your business. Here are a few things you will learn:

- It's time to **revise your employment policies now** to avoid new scrutiny from the National Labor Relations Board — even if you are a non-union shop;
- It's time to **reassess your contracts with independent contractors** in light of new government policies, or you could face big penalties;
- How to **respond to investigations by the EEOC, DOL and OFCCP** enforcement actions and charge filings; and
- What will happen if the DOL enacts proposed regulations raising the minimum salary threshold for **white-collar exemptions**.

You will also hear discussions on important topics that affect your business, including:

- New, required **hiring practices** to ensure compliance and to create your "best workforce";
- What employers and HR professionals should know about **rapidly changing employee benefits laws**;
- New approaches and common pitfalls in compliance with **immigration laws**; and
- **Internships** — how to structure an internship to comply with changing laws, and how to team with universities to streamline the process.

Lane Powell, the "Lawyers for Employers," helps emerging and established businesses navigate the employment landscape on a local, national and international basis. The Lake Washington Human Resource Association is the "Super-Mega Chapter" of the Society for Human Resource Management, and has a long history of providing thoughtful insights to current employment issues facing businesses.

For more information or to register for our upcoming 33rd Annual Labor and Employment "Best Practices For Best Employers™" Seminar, please visit our website at www.lanepowell.com.

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LWHRA

PUGET SOUND BUSINESS JOURNAL

Best Practices For Best Employers™ Seminar

How to Become a Best Workplace Starting Today!

September 15, 2015

This annual seminar, geared toward employers, managers, human resource professionals and corporate counsel, is part of our ongoing Employment Law School For Managers® series.

Cost: $125 prepay online; $150 at the door. Register online at www.lanepowell.com.

This seminar has been pre-approved for 4.75 general CLE credit hours in Washington and 5 HR Certification Institute credit hours.*

8 a.m. to 2:15 p.m.
(7:30 a.m. Breakfast and Registration)
Please see full agenda on back page.

Location:
Motif Seattle
1415 Fifth Ave.
Seattle, WA

Questions? Contact:
Kelsey Lamon
206.223.6005
lamonk@lanepowell.com

*The use of this seal is not an endorsement by the HR Certification Institute of the quality of the activity. It means that this activity has met the HR Certification Institute's criteria to be pre-approved for recertification credit.

Top 5 Legal Developments Every Employer Needs to Know *Now*

By D. Michael Reilly

D. Michael Reilly is a nationally recognized employment attorney and has consecutively been named as one of "The Nation's Top 100 Most Powerful Employment Attorneys" by Human Resource Executive and Lawdragon since 2012. He advises employers in all employment matters, and represents employers in litigation, including ERISA and non-ERISA employee benefit litigation. He has successfully tried over 75 jury trials, arbitrations and bench trials, including retaliation and Sarbanes-Oxley claims. Mike can be reached at 206.223.7051 or reillym@lanepowell.com

Laws affecting employers are changing faster than ever. If you don't keep up, you can get burned. Here are a few of the most recent big changes every employer needs to know about.

1. It's Easier for the Government to Declare Your "Independent Contractor" or "Consultant" YOUR Employee. Recently, the U.S. Department of Labor (DOL) applied a new spin on an old test in its continuing efforts to target "independent contractors," "free lancers" and "consultants." This new DOL approach means that employers using independent contractors have a greater risk of getting hit with costs of an "employee," such as unpaid payroll taxes, unpaid unemployment taxes, unpaid workers' compensation premiums, overtime liability, unpaid 401(k) contributions, unpaid PTO, and potential personal liability for the uncollected state and federal taxes. The Wage and Hour Division is working with the Internal Revenue Service and 23 states (including Washington) to seek out and find employee misclassification. The DOL is also cooperating with the Employee Benefits Security Administration, Occupational Safety and Health Administration (OSHA), Office of Federal Contract Compliance Programs and the Office of the Solicitor. The DOL's focus on misclassification of workers is sure to lead to more enforcement actions. You will want to know this new approach, and check to see if your consultants and independent contractors meet it.

2. Employers Have New Duties to Provide Restroom Access for Transgender Employees. OSHA recently published guidance regarding restroom access for transgender employees. The guidance recommends that employers have single-occupancy, unisex restrooms or multiple-occupant, unisex restrooms with lockable single occupant stalls. In no event, according to OSHA, should an employer require an employee to use a segregated facility because of gender identity or transgender status. OSHA has indicated that failure to follow its guiding principles could lead to a citation. The Equal Employment Opportunity Commission (EEOC) has also targeted employers who fail to provide transgender employees with appropriate restroom access.

3. Refusal to Hire Based on Hijab Is Religious Discrimination. The U.S. Supreme Court recently held that job applicants need only show that a religious accommodation was a motivating factor in denying employment to prevail on a disparate-treatment claim under Title VII of the Civil Rights Act (Title VII). Abercrombie & Fitch refused to hire an applicant because her hijab conflicted with its dress code prohibiting employees from wearing caps. The Court stated that federal law prohibits employers from having discriminatory motives when making employment decisions, regardless of the employer's actual knowledge.

4. The EEOC Forbids Sexual Orientation Discrimination. The EEOC recently ruled in a 3-2 vote that federal law, as written, forbids sexual orientation discrimination. This groundbreaking decision effectively declares that, under existing federal law, sexual discrimination includes any actions that are "sex-based" or "take gender into account," including those based on sexual orientation. The EEOC's interpretation, if adopted by the Supreme Court, eliminates the need for Congress to amend federal law to expressly provide discrimination protection to gay and lesbian employees.

5. New Data on Those Wage/Hour Class Actions: Fewer Class Actions/Cheaper Settlements. According to a recent report by NERA Economic Consulting, three industries accounted for more than half of overall total spending in 2014 and 2015. Over the past 15 months, 21 percent of settlement dollars were paid to workers in the financial services/insurance sector, 19 percent of settlement dollars were paid to workers in the retail industry, and 17 percent were paid to workers in the food and food services industry — totaling 57 percent of spending. After controlling for the number of plaintiffs in a case, and the number of years in the class period, average settlement values per plaintiff per class year are down significantly — from a peak of $1,475 in 2011 to $686 in 2014, and just $253 through the first three months of 2015.

If you have any questions regarding these recent developments, consider attending the upcoming Lane Powell seminar to update your systems and to get the latest recommendations and approaches to make your company a "Best Workplace."

Interesting Facts…

In a recent survey, NERA Economic Consulting found that a majority of wage and hour cases in the financial/services/insurance, retail, and food and food services industries included allegations of overtime.

Recent surveys and studies suggest that more than four in 10 lesbian, gay and bisexual people have experienced some form of employment discrimination based on their sexual orientation at some point in their lives, and 90 percent of transgender employees have experienced harassment, mistreatment or discrimination on the job.

For more information and to register for our upcoming Annual Labor and Employment Seminar on September 15, please visit our website at www.lanepowell.com.

Complex Employee Benefits Rules Encroaching on Traditional Human Resource Territory

By Craig A. Day and Rachel M. Bowe

Craig A. Day focuses his practice on ERISA-related matters, employee benefits issues and executive compensation. He has extensive experience in ERISA issues related to qualified and nonqualified retirement plans and employee welfare benefit plans, including medical, dental, vision, life insurance, and short- and long-term disability plans. He also advises clients on issues related to the Patient Protection and Affordable Care Act. Craig can be reached at 206.654.7819 and dayc@lanepowell.com

Rachel M. Bowe focuses her practice on employment litigation and counseling, including wage and hour, enforcement of restrictive covenants and employment agreements, and discrimination and retaliation claims. She has defended clients against race, age, gender, leave and disability claims, and frequently represents clients in business tort disputes. Rachel can be reached at 206.223.7024 or bower@lanepowell.com.

In the past, human resource (HR) professionals have been able to focus on people issues and leave employee benefits issues to the experts. But the line between benefits and traditional HR responsibilities has blurred in recent years. With the rapid change in employee benefits laws and regulations it is no longer possible for HR professionals to remain blissfully ignorant of the complex employee benefits rules. The Affordable Care Act (ACA), Internal Revenue Code Section 409A, and recent guidance from the Internal Revenue Service (IRS), the Department of Labor (DOL), and the Department of Health and Human Services (HHS) has changed the way HR handles hiring, separations and even some of the programs designed to recruit and retain employees. Here are a few examples of those changes:

- **ACA's nondiscrimination requirement.** The ACA requires fully insured health plans to satisfy nondiscrimination rules regarding eligibility to participate in the plan and for plan benefits. In essence, these rules prevent an employer from providing significantly richer health care benefits to "highly compensated" employees. These new rules are important to understand when you are negotiating separation packages for executives, many of which include a provision for free or subsidized health coverage after termination of employment. Because this benefit is not offered to all employees, the practice could cause the plan to violate the new nondiscrimination rules and subject the employer to a fine equal to $100 per day for each affected individual (each one who is not eligible for the benefit).

- **Internal Revenue Code Section 409A.** Section 409A governs deferred compensation and the regulations are complicated enough to scare off even seasoned tax professionals. HR professionals often encounter this strange code section when negotiating severance or separation agreements with their executives because those agreements typically involve "compensation" that is earned in one year and paid out in another year. Careful drafting is required to either satisfy an exception to the rules or to comply with them — even something as simple as leaving out a deadline for signing a release could result in a violation. Violations result in immediate taxation and a 20-percent excise tax, assessed against the employee. Section 409A may also come into play during the hiring process if the new employee receives equity compensation, such as stock options.

- **Wellness programs.** Employers commonly offer their employees wellness programs to encourage positive and healthy habits. These plans have traditionally been subject to minimal regulation, but the IRS, DOL and HHS recently issued complex regulations that implement changes to wellness programs under the ACA and amended guidance previously issued under the Health Insurance Portability and Accountability Act (HIPAA), making compliance much more difficult. The U.S. Equal Employment Opportunity Commission has also issued proposed regulations that must be followed to avoid violating the Americans with Disabilities Act.

- **Reimbursements for health coverage.** With the enactment of the ACA, some small employers who are not required under the law to offer coverage to their full-time employees decided to simply reimburse employees for the cost of individual coverage purchased on the state health exchange. Recent IRS guidance effectively foreclosed this possibility. The IRS's view is that the practice of reimbursing employees (on a pre-tax or post-tax basis) for healthcare-related premiums or expenses creates a "group health plan" that is subject to the ACA's insurance market reforms. As a result, employers who adopt this kind of program could face significant excise tax penalties as of July 1.

These are just a few of the ways that employee benefits issues can arise in everyday HR transactions. Wise HR professionals will make sure that they understand enough about employee benefits to recognize these and other important issues.

Interesting Fact...

A 2013 study conducted by the RAND Corporation found that approximately 51 percent of U.S. employers with more than 50 employees offer some type of wellness program, and that the larger the employer, the more likely it is to have a wellness program. To provide a comparison, approximately 39 percent of employers with 50-100 employees and 91 percent of employers with 50,000+ employees offer wellness programs.

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Katheryn Bradley defends employers in employment litigation, and devotes a substantial part of her practice counseling managers and human resource professionals on best practices for recruiting employees and complying with background checking laws. She also prepares executive employment agreements, employee handbooks, effective covenants not to compete, and trade secrets and intellectual property agreements. Katheryn can be reached at 206.223.7399 or bradleyk@lanepowell.com.

Colleen M. O'Neill represents employers in employment litigation and prepares separation agreements, employee handbooks, offer letters and other employment agreements for employers. She is experienced in counseling clients on issues such as terminations, minimum wage exemptions, and unemployment compensation and benefits matters. She has also represented corporate clients in state and federal litigation involving employment, contract, and insurance coverage matters. Colleen can be reached at 206.223.7022 or oneillc@lanepowell.com.

So You Hired an Axe Murderer: Avoiding Mistakes in the Hiring Process

By Katheryn Bradley and Colleen M. O'Neill

Harriet applies for a position as a butcher at your Ballard deli. Her application shows that she meets the basic job requirements, but you've had some bad luck with your recent hires, so you do a quick Google search to unearth whether she has skeletons in the closet. Harriet's public Facebook page reveals numerous postings questioning why Harriet's three former husbands have gone missing on their honeymoons. Anonymous posts speculate that Harriet is an axe murderer because she was arrested years ago. Can you rely on these Facebook postings and her arrest record in deciding whether to hire Harriet?

Employers must carefully navigate the numerous federal, state and local laws that regulate how employers make hiring decisions. In an age where Google reigns supreme, 73 percent of the U.S. population has a social network profile. Many employers use social media during the recruitment process. But employers should not act rashly upon information gained from social media. Nor should employers rely blindly on third-party background checks without seeking to verify that the information is accurate and, in some cases, providing the applicant with an opportunity to respond. Recent guidance from the Equal Employment Opportunity Commission (EEOC) further cautions employers to limit reliance on arrest records that did not result in conviction. Federal and state laws place further limits on when employers may rely on conviction records, particularly if the conviction is more than 10 years old or unrelated to the position.

Since you need more information to determine if these Facebook postings are true, you decide to run a criminal background check on Harriet because of the Facebook posts. Can you obtain her criminal records prior to the interview? Because your deli is located within Seattle city limits, you must comply with Seattle's Job Assistance Ordinance. Under that ordinance known as SHRR 80-090, you cannot request an applicant's criminal history prior to conducting an initial screening. Your review of her application confirmed that she met the basic qualifications, so you decide to engage a service to conduct the background check, but before receiving any results, you bring Harriet in for an interview.

During the interview, Harriet mentions that she tends to fall asleep when she is cutting meat, but she assures you that she has never filed a workers' comp claim. However, you just read an article linking marijuana use to narcolepsy in adolescents. You suspect Harriet is using marijuana. Can you ask Harriet whether she is using marijuana? According to EEOC guidance on this issue, questioning an applicant about illegal drug use is permissible. But with marijuana being legal in Washington state, you wonder if this question is still permissible. You nonetheless decide to ask Harriet if she is using marijuana. She responds that it has been prescribed for narcolepsy.

Can you ask Harriet whether she needs an accommodation? Under EEOC guidance, employers are generally prohibited from asking any disability-related questions before making a job offer. However, when an applicant voluntarily discloses a non-visible disability, an employer can then ask whether an accommodation is needed, and if so, what type of accommodation she may need. In this case, you may need more information to determine whether Harriet's medical condition poses a direct safety threat or can be reasonably accommodated.

After the interview, you receive Harriet's background check, which reveals that she was convicted of marijuana possession five years ago. Can you refuse to hire Harriet based on this conviction? The short answer is that it depends on whether your decision is justified by business necessity. The conviction was recent, so you will have to decide whether the drug possession conviction has a nexus to Harriet's position as a butcher.

As you can see, the hiring process is wrought with legal landmines. You must carefully navigate your way through the local, state and federal laws to avoid lawsuits stemming from your decision not to hire a potential candidate for reasons that violate these laws.

Interesting Fact…

According to a 2015 survey conducted by CareerBuilder, fifty-two percent of employers use social networking sites to research job candidates.

Recent findings from Quest Diagnostics show that positive results for marijuana use in the workforce rose 6.2 percent in 2013. In Washington and Colorado, two of the states that have legalized recreational marijuana, the increase was 23 percent and 20 percent, respectively.

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Andrew J. Stevenson focuses his practice on business immigration law. His practice includes temporary and permanent immigration sponsorship for professional workers, I-9 and employment eligibility compliance, investment-based visas, DHS/DOL immigration audits, seasonal and agricultural worker visas, sports and artist/entertainment visas, waivers and resolution of inadmissibility problems, consular processing, removal defense, complex family immigration, naturalization and citizenship. He is currently the chair of the American Immigration Lawyers Association's National Liaison Committee to U.S. Customs and Border Protection, and has a Yellow Belt certification in Legal Lean Sigma® and Project Management. Andrew can be reached at 206.223.7046 or stevensona@lanepowell.com.

Avoiding Immigration Liability in the Workplace

By Andrew J. Stevenson

Immigration enforcement in the workplace can be an unexpected and hefty source of liability for employers. U.S. Immigration and Customs Enforcement (ICE) regularly initiates audits to review companies' I-9 records and employment eligibility verification practices, and has levied stiff penalties for violations. The U.S. Department of Justice (DOJ), the U.S. Department of Labor and U.S. Citizenship and Immigration Services all have field operations actively investigating immigration-related discrimination claims, wages paid to foreign workers and more. These agencies' actions and press releases send a clear message: no business is immune from scrutiny, no matter how large or small, and no matter what industry.

Recent headlines reflect the gravity of immigration enforcement on business operations. Broetje Orchards near the Tri-Cities agreed to a settlement with ICE, under which it paid $2.25 million in civil penalties for employing unauthorized workers. Clothing retailer Abercrombie & Fitch was fined more than $1 million for I-9 violations by ICE, and agreed after a DOJ investigation to pay back wages and other compensation for citizenship discrimination claims. The CEO of meat packing plant Agriprocessors was criminally charged for conspiring to harbor illegal aliens, and aiding and abetting document fraud, ultimately receiving a 27-year jail sentence.

In light of increasing enforcement and the potential for corporate and personal liability, now is the time to review your internal practices regarding employment eligibility verification and immigration compliance. Establishing clear and consistent internal policies for your company can help minimize your liability and protect your bottom line when an auditor knocks on your door. The following are a few suggestions to get you on the right track:

- **Centralize internal authority for immigration issues.** Identify a key person or group within HR that will be responsible for all immigration and employment eligibility verification issues, and make sure your key people receive professional training on I-9 compliance. These efforts will help ensure quality and consistency in your day-to-day performance of immigration functions.
- **Prepare front-line staff for a visit by auditors.** Make sure that all receptionists and other staff working near public entrances to your offices are aware of the possibility of a visit by a government agent. Instruct staff to accept service of any documentation or notices, and to assure agents that the company intends to cooperate with any investigation. However, staff should not allow agents to physically enter office premises, or seize or inspect any company documentation without a warrant on the day of the initial visit. Make sure staff have contact information on hand for company executives or counsel to provide immediate notice of an auditor's visit or service of documents.
- **Conduct an internal I-9 audit.** Review your internal records to evaluate whether your I-9 completion practices are in compliance with the law. Even minor technical violations frequently result in fines, which range up to $1,100 and are gauged on a per-employee basis. After identifying errors, correct them on existing I-9 forms and set internal policies to ensure proper and consistent I-9 completion in the future. Check to see whether you retain copies of employment eligibility documents together with your I-9 forms, and if not, consider doing so for all employees. Also review I-9 retention policies to ensure you are not keeping any old, noncompliant documents unnecessarily.
- **Consider in advance your possible responses to "no-match" letters or other government notices.** Think about how you would respond if agents served your company with Notices of Suspect Documents or "no-match" letters alleging discrepancies between your employees' documents or SSN and government records. Since the most serious recent fines and penalties have targeted companies who failed to take action after receiving similar notices, best practices demand communication with the affected employee and the government, as well as actions to acknowledge and attempt to resolve any document discrepancies. You should establish policies that will create records of your good faith efforts to work through these situations, and clarify when adverse action against employees is or is not appropriate (for example, you should be sure not to terminate any employee based on a Social Security "no-match" letter alone). You may also wish to consider staffing contingency plans to keep business operations afloat in the event key personnel changes become necessary.
- **Draft and implement a corporate immigration policy to avoid missteps and clarify limits on sponsorship.** The interviewing and hiring process is rife with opportunities to improperly discuss citizenship, national origin and other "off-limits" topics. I-9 completion also presents many potential complications, like requesting or insisting on specific employment authorization documents, or failing to re-verify certain documents once the original document expires. These and other all-too-common practices can trigger discrimination investigations by DOJ or audits and fines by ICE, but are eminently avoidable by putting a set of best practices in writing and sharing them with all managers and recruiters. Employers that sponsor their workers for temporary or permanent immigration status should incorporate clear language into offer letters clarifying the exact type(s) of sponsorship offered and on what timeline (and retaining discretion to continue temporary sponsorship or initiate permanent sponsorship based on performance, longevity or other factors).
- **Use legal counsel strategically.** Instead of hiring business immigration counsel on a reactive basis, once a government agency shows up at your door or serves you with an inspection notice (or worse, when you wish to appeal a fine), consider engaging counsel to help you proactively establish immigration compliance policies. Counsel can train your HR managers on immigration issues to equip you to regularly perform self-audits and form response policies to government notices and letters. In the event of a government investigation, your internal communications with counsel regarding immigration issues may be protected by the attorney-client privilege, and critical steps may be taken prior to government inspections to identify and mitigate liability.
- **Prepare for a future of mandatory electronic compliance and consider enrolling in E-Verify or IMAGE.** When Congress next takes up immigration reform, it will almost surely enact stricter requirements for U.S. employers to verify the employment eligibility of their workers. Most draft immigration bills have included mandates for enrollment in electronic employment verification systems, such as E-Verify, and impose significant new fines and penalties for those who fail to do so. ICE has mounted an aggressive campaign offering incentives for employers to voluntarily enroll in E-Verify through its IMAGE program, offering free education and training on employment eligibility verification best practices, but also requiring submission to an I-9 audit. Although Washington state has not required use of E-Verify on a state-wide basis, other states have begun to do so. Since such programs appear to be the wave of the future, you should consider the pros (more sophisticated screening of employee documents and reduced likelihood of immigration fines/violations) and cons (inconvenience of new bureaucracy and resolving document discrepancies with employees) of voluntary enrollment before it becomes mandatory.

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Employers Prepare for the Big Impact of White-Collar Exemption Reform

By Sarah Swale and Kelly M. Lipscomb

Sarah Swale focuses her practice on employment litigation and counseling. She defends clients against EEOC claims, discrimination, harassment, hostile work environment and wrongful termination in violation of public policy claims. Sarah also advises employers regarding compliance with federal and state employment laws, provides management training on compliance with anti-harassment and leave laws, reviews employee handbooks and personnel policies, and prepares separation and release agreements. As the Chair of Lane Powell's Wage and Hour Group, she also advises employers on compliance with federal and state wage and hour laws, and assists employers responding to DOL and LNI audits. She can be reached at swales@lanepowell.com or 206.223.7946.

Kelly M. Lipscomb focuses her practice in the areas of labor and employment law, and business litigation. She has represented employment clients in arbitration proceedings and collective bargaining, and advises them in all phases of labor and employment matters, from employee hiring and training to separation. Kelly provides employee training on anti-harassment and leave laws, and advises employers on wage and hour; FMLA; and sex, race and disability discrimination issues. She can be reached at lipscombk@lanepowell.com or 206.223.7078.

Taking a cue from Jurassic World, President Barack Obama recently released the Indominus Rex of exemption reforms when he announced a plan to extend overtime protections to nearly 5 million workers in 2016. In a recent *The Huffington Post* blog post, President Obama identified the plan as part of his top priority "to strengthen the middle class, expand opportunity and grow the economy." On July 6, the U.S. Department of Labor (DOL) issued its Notice of Proposed Rulemaking (NPRM), laying out the details of President Obama's plan. Like an asteroid hitting Earth, the NPRM foreshadows a vastly altered landscape for employers who currently enjoy exemptions from overtime requirements for salaried exempt white-collar workers earning less than $50,000 a year.

The DOL has not revised its regulations on the federal overtime exemptions under the Fair Labor Standards Act (FLSA) in more than 10 years. Back in 2004, the DOL raised the salary threshold for executive, administrative and professional employees (white-collar workers) to $455 per week or $23,660 annually. To qualify as exempt from the FLSA's overtime provisions, all salaried white-collar workers also had to meet the duties test for executive, administrative or professional employees. However, the DOL's 2004 regulations did not include any mechanism for raising the salary threshold, which remains the same today, even though according to the Social Security Administration, the cost of living has increased by nearly 25 percent in that time. Under the current regulations, approximately 85 percent of salaried white-collar workers fail the duties tests and are therefore entitled to overtime under the FLSA. The proposed regulations are intended to bring the salary threshold up to date as a more effective measure of exempt status and to keep it there in years to come.

The DOL's proposed regulations would initially raise the salary threshold for white-collar workers astronomically to $921 per week or $47,892 annually. The proposed regulations also include a mechanism for automatically updating the salary threshold to keep up with the cost of living. If the proposed regulations are implemented, the salary threshold would be automatically raised in 2016 to approximately $970 per week or $50,440 annually. So, employers will have to pay overtime to most employees who do not currently make at least $47,892 per year, or $50,440 in 2016. It does not take a rocket scientist, or a paleontologist, to calculate that this increase will have a drastic impact on employers nationwide. The DOL estimates that this will cost employers between $1.18 billion to $1.27 billion dollars per year in additional earnings transferred to employees.

The DOL's proposed regulations are currently in the comment period, and all comments must be received on or before September 4, 2015. After the comment period, the DOL is expected to issue a Final Rule. The Final Rule is expected to raise the salary threshold and include one of two slightly different methods for automatically updating the salary threshold on an annual basis. The DOL has also asked for comments on whether to allow nondiscretionary bonuses, such as certain production or performance bonuses, to satisfy a portion of the standard salary test requirement. Although the DOL has asked generally for comments on the white-collar exemption duties tests, the DOL is not making any specific proposals to modify the standard duties tests.

As it is almost a certainty that the Final Rule will automatically increase the salary threshold for salaried white-collar workers to somewhere around $50,000 — give or take — employers should start preparing now to determine whether their salaried exempt employees may be affected by the Final Rule, and develop a strategy for how to handle the big bang. As a start, employers will need to decide whether to raise affected employees' salaries to meet the new threshold, or to start recording their hours and paying them overtime. Employers may also want to consider implementing additional precautionary measures to capture all hours worked (e.g., hours spent working from home or responding to emails or phone calls during off hours) and/or reduce employees' hours to 40 or fewer hours per week to avoid these new overtime obligations.

Interesting Fact...

According to the DOL, the current overtime threshold of $23,660 for white-collar workers is less than the national poverty threshold of $24,008 (for a family of four).

According to the DOL, only 8 percent of salaried workers fall below the current threshold that would guarantee them overtime and minimum wage protections.

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Best Practices For Best Employers™ Seminar Agenda

September 15, 2015

7:30 – 8 a.m. Registration and Breakfast

8 – 8:10 a.m. Welcome and Introduction


Morse

8:10 – 9 a.m. **"Fast and Furious": Annual Labor and Employment Update — Top Tips for Best Employers**
Laura T. Morse, Lane Powell PC
It has been another busy year with lots of changes to laws affecting employers and you should know about them. You will receive an update on the law and practical tools for responding to these changes. Some of the topics that will be covered include: how to handle reasonable accommodations, including for pregnancy; tips on revising your policies to avoid scrutiny from the NLRB; evaluating independent contractor designations under the new DOL guidance; and how to make sure you are complying with Seattle's new "wage theft" ordinance.


Reilly

9 – 9:45 a.m. "In the Line of Fire": What Works in Responding to the EEOC, DOL and OFCCP in Investigation and Enforcement Matters
D. Michael Reilly, Lane Powell PC
Government investigations of employers and charge filings are on the rise. Being nimble in responding to government inquiries is critical. Are you ready if a government agency shows up at your door? Learn about recent agency investigations and enforcement efforts; get reasonable, court-approved defensive measures to limit the scope of agency investigations; and understand what strategies can help you prevent small matters from morphing into a broad pattern or practice claims.

9:45 – 10 a.m. Break


Day


Bowe

10 – 10:45 a.m. Making "Friends with Benefits": What Your Benefits Lawyer Would Tell You If You Would Just Return His Call
Craig A. Day and Rachel M. Bowe, Lane Powell PC
Employee benefits laws are changing rapidly and new issues are cropping up even in the most ordinary HR transactions. Even if your work does not involve employee benefits, knowing something about COBRA, ERISA, Section 409A and the ACA will help you go about your daily business without subjecting your company or employees to penalties or visits from the DOL or IRS.


Bradley


O'Neill

10:45 – 11:30 a.m. "So You Hired an Axe Murderer": How to Avoid This and Ensure the Pre-Employment Process Runs Smoothly
Katheryn Bradley and Colleen M. O'Neill, Lane Powell PC
Do you want to avoid having axe murderers at your workplace? Are you unsure as to how you can screen applicants properly and in compliance with the law? All employers must navigate the pre-employment and pre-hire phase with care to avoid potential landmines during the process. From the background screening process (i.e., drug tests, criminal background checks and background investigations including searches on social media) to the interview process (i.e., questions that can and cannot be asked and disability accommodation requests), this presentation will address each part of the pre-employment process and stress how they must be handled with care to ensure compliance with the law and to create the best workforce.

11:30 a.m. – 12:45 p.m. Lunch


Heitkemper


Reilly

12:15 – 12:45 p.m. "The Internship": How to Team With Universities and Structure Your Internship to Comply With Changing Laws and Regulations
Dr. Mary Heitkemper, Gonzaga University Career Center, and D. Michael Reilly, Lane Powell PC
Employers are using internships now more than ever to recruit and "test run" the best candidates. Setting up an internship incorrectly could be costly to the employer. Are unpaid internships legal? How does the ACA affect how you set up internships? The speakers provide an "Internship in a Box" with forms to structure your program right and to systemize your internship. You will also learn how to team with universities to tailor your internship to your company's needs.

12:45 – 1:00 p.m. Break


Stevenson

1:00 – 1:30 p.m. "No Country for Employers": Don't Get Caught in the Wild, Wild West of Immigration Law
Andrew J. Stevenson, Lane Powell PC
Employers are experiencing more challenges in recruiting and immigration law compliance. Learn about the most common (and potentially costly) pitfalls in handling employment eligibility and compliance with immigration laws. Receive insights and practical strategies on: mistakes in employment eligibility verification; tips and best practices for I-9 compliance and audits; E-Verify and the future of employment eligibility screening; avoiding immigration-related discrimination; and drafting and implementing a corporate immigration sponsorship policy.


Swale


Lipscomb

1:30 – 2:15 p.m. Digging Your Wage and Hour Practices Out of the "Jurassic" Period
Sarah Swale and Kelly M. Lipscomb, Lane Powell PC
Learn how to prepare now for the possible mass extinction of the salaried exempt employee in light of the DOL's proposed regulations raising the minimum salary threshold for white-collar exemptions. And learn best practices for dusting off and cleaning up your ancient overtime, meal and rest break, and timekeeping policies — you're going to need them.

Stay Current on Important Legal Changes That Can Affect Your Business

Lane Powell regularly provides seminars and Legal Updates on an array of topics that are designed to help you stay current on important legal changes that can affect your business. If you are interested in signing up for our Legal Updates, please visit our subscription page at www.lanepowell.com/subscribe/. If you are interested in reading our blogs, please visit www.lanepowell.com/blogs/.