

# Major Employment Law Challenges Facing Employers in 2016

## What You Need to Know

BY PAUL M. OSTROFF

**L**AST YEAR, THE OREGON LEGISLATURE SERVED UP SEVERAL NEW MANDATES ON Oregon employers regarding paid leave, inquiries concerning criminal history and other matters. See [www.lanepowell.com/wp-content/uploads/2015/08/8-24-15-Ostroff-OBM.pdf](http://www.lanepowell.com/wp-content/uploads/2015/08/8-24-15-Ostroff-OBM.pdf). Portland has adopted a new “Ban the Box” ordinance, and regulatory agencies are pursuing new initiatives concerning overtime and independent contractors. This article will help you plan for these developments so that your company can remain competitive and compliant.

**Portland’s “Ban the Box” Ordinance.** Oregon employers became subject to state law effective January 1 that prohibits them from asking about an applicant’s criminal history on an application or prior to an initial interview. Portland’s ordinance goes several steps further.

Effective July 1, all employers in Portland with six or more employees will be prohibited from requesting any information about an applicant’s criminal background until it has made a conditional offer of employment. If the background check shows a criminal history, the employer may rescind the offer only after it assesses the gravity and nature of the offense, the time since the conviction and the nature of the employment. The ordinance contains exemptions for employers providing care to vulnerable persons, law enforcement, or when required by state or federal law.

### WHAT EMPLOYERS SHOULD DO

- Remove references to criminal background checks from applications;
- Instruct managers not to inquire about criminal convictions until a conditional offer of employment is made;
- Condition job offers on the applicant’s consent to and passing of a criminal background check;
- Adopt guidelines for determining when or if the results of a criminal background check may disqualify an applicant; and
- Identify positions for which there are legal requirements concerning an employee’s criminal record.

**Changes to “White Collar” Exemptions From Overtime.** The U.S. Department of Labor (DOL) has issued proposed regulations

that will significantly alter the landscape for maintaining exempt status for employees currently classified as administrative, executive or professional employees. Final regulations are expected to be issued in July.

The major proposed change is a drastic increase in the minimum salary, from \$455 per week to \$970. This increase will have its most significant impact on the retail, hospitality and service sectors. The DOL also solicited comments about modifying the “duties” test, with an eye towards requiring that 50 percent of an employee’s duties qualify as “exempt duties.”

### WHAT EMPLOYERS SHOULD DO

- Consider “fluctuating workweek” agreements for salaried employees to reduce potential overtime payments;
- Review employee duties to confirm that they will qualify as exempt under a revised “duties” test;
- Review staffing patterns to increase efficiency and reduce hours worked; and
- Monitor hours worked in classifications likely to be affected by the regulations.

**Increased Scrutiny and Liability Concerning Independent Contractor Status.** Last year, as part of a regulatory initiative to apply wage and hour laws to persons improperly classified as independent contractors, the DOL adopted an “economic realities” test that focuses on whether the person is in business for himself, or is instead economically dependent upon the employer. The DOL has moved aggressively on the enforcement front, targeting employers in a number of industries who have paid significant settlements for wage violations. The DOL also cooperates with the IRS and state agencies, so a DOL audit may

**“Employers should begin assessing their options, and making preparations now”**

trigger an audit by tax authorities.

On the state law front, the Oregon Supreme Court recently concluded that Broadway Cab’s drivers were employees and not independent contractors for purposes of employment tax, even though they were paid by customers and not by Broadway Cab. Among other things, the Court found that the drivers were employees because they did not have an independent place of business and could not hire employees to work for them. Similarly, the BOLI Commissioner, applying the economic realities test, recently issued an advisory opinion that drivers for Uber were employees and not independent contractors.

### WHAT EMPLOYERS SHOULD DO

Determining independent contractor status is highly fact specific and legally multi-faceted. Accordingly, employers should:

- Review their business arrangements with contractors;
- Confirm that contractors have:
  - An independent place of business (or home office);
  - A significant investment in their business;
  - Customers other than your company; and
  - The authority to hire and fire employees.
- Consult with competent employment law counsel.

**Key Takeaways For Employers.** Employers should begin assessing their options, and making preparations now. Careful consideration of both the business and legal aspects of managing compliance will be the key to reducing potential liability and maintaining profitability. ■



Paul M. Ostroff is a shareowner at Lane Powell, where he advises and represents employers in all phases of labor and employment law. He can be reached at 503.778.2122 or [ostroffp@lanepowell.com](mailto:ostroffp@lanepowell.com)