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Time to Re-Examine Your Employee Overtime Exemptions Under New FLSA Rules

By Josephine Ko

The Department of Labor (DOL) recently revealed that it would most likely issue its final changes to the overtime rules under the Fair Labor Standards Act (FLSA) in late 2016. This news came from none other than the DOL's own chief law enforcement official, Solicitor M. Patricia Smith after much speculation and uncertainty. These final rules coming later this year mark a monumental overhaul of the overtime rules that employers have relied upon for over a decade.

Under current FLSA regulations, employers do not have to pay overtime to certain categories of employees if their primary job duties qualify as executive, administrative, professional, computer, and outside sales *and* they are paid on a salary basis of at least \$23,660 per year. This is all set to change.

In June 2015, the DOL proposed changes which sent shockwaves throughout the business community. Most alarming for many employers is that the DOL has proposed nearly doubling the minimum salary threshold to \$50,440. The DOL may settle on a lower salary in its final rules, but it will certainly be a much higher figure than the current amount. Some pundits are speculating that it is likely to be set at about \$40,000 per year. The proposed rules also incorporate automatic increases to keep pace with inflation and to avoid additional rulemaking for such increases. The DOL did not propose changes to the primary duties which qualify for overtime exemptions, but that may only be a matter of time. The DOL specifically requested public comments on whether that should change. By the time the public comment period closed, the DOL had collected a record 270,000 comments to sift through.

The DOL's announcement has been long-anticipated. These exemption tests were last over-



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hauled in 2004. The DOL had planned to issue proposed changes in late 2014, but they were not released until June 2015. This delay has kept employers guessing as to how and when their bottom line would be affected. Now it looks like the final rules will roll out just in time for the next presidential election. Nearly five million workers are expected to be impacted by these changes.

What is the takeaway for employers? The new rules likely will not go into effect until early 2017. Given this timing, employers who were planning to make anticipatory changes may want to wait until the final rules are released. All employers should use this time wisely to prepare for the change, reassess employee classifications, and consult with legal counsel about how to comply with the anticipated new rules.

Josephine Ko is an attorney at Barran Liebman LLP where she represents employers and business owners across Oregon and California in employment law matters. She also frequently speaks and writes on employment law issues, providing tailored trainings to employers, community and professional groups on legal developments that affect the Human Resources field. Contact her at 503.276.2102 or jko@barran.com.

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Changes to Sex Changes

By The Honorable Beth Allen
Multnomah County Circuit Court
Judge



In the 2013 legislative session, the requirements for a legal change of sex changed. Prior to that modification, only those persons “whose sex has been changed by a surgical procedure” were able to receive a judgment that changed their sex, and thereby obtain a birth certificate changing their gender marker. The new governing statute is as follows:

A court * * * may order a legal change of sex and enter a judgment indicating the change of sex of a person if the court determines that the individual has undergone surgical, hormonal or other treatment appropriate for that individual for the purpose of gender transition and that sexual reassignment has been completed. (ORS 33.460).

The big change is that surgery is no longer necessary for a petitioner to obtain a legal sex change judgment. This amendment was viewed as a huge success for transgender individuals because many do not want or cannot afford sex reassignment surgery in order to transition. Indeed, surgery is contraindicated for some individuals. Instead, what may be appropriate for an individual petitioner is hormone treatment. It may be that neither surgery nor hormone treatment is appropriate but that some “other treatment” is. It may mean psychiatric therapy, or it may be ordinary “talk” therapy, which can be provided by a non-doctor. Appropriate treatment could be simply living as a person of the sex opposite of that assigned at birth for a period of time. The key, it seems, is that what is appropriate must be determined in consideration of the individual’s unique circumstances.

In Multnomah County, a petitioner may use pre-approved forms for all pleadings in an identity change. The packet contains a declaration setting forth that the specific requirements of the statute have been met. If the petitioner has signed the declaration, and no one offers evidence to controvert the declaration, and there are no concerns that the petitioner did not have capacity to execute the declaration, the petition will be granted. Essentially, sex change petitions are handled in the same manner name changes, which also generally are granted on only a declaration. Some judges do the identity docket in open court. Others prefer to review all the petitions in chambers while the petitioners wait in the courtroom. And, speaking of name changes, Multnomah County has forms for that common situation where both gender and a name change is sought. The form may be modified for those jurisdictions that do not

have a blended form.

In other jurisdictions, judges have been requesting a doctor’s note rather than or in addition to the declaration of the petitioner. Although I do not necessarily agree with that procedure, I would recommend that if further documentation is required and if a doctor has not been the transition care provider, the petitioner offer evidence to demonstrate that the person providing the transition care has the expertise to provide treatment to persons undergoing sex reassignment, in addition to the letter setting out that the petitioner has undergone appropriate gender reassignment treatment. As for the statement of the transition being “complete,” how that is handled may differ from one judge to another, so check with the court clerk in advance to see what is expected as the judge may require that a specific category of third party provide that.

Some final notes. These days, young people whose gender identity does not match that assigned at birth are more comfortable with sharing their recognition of this reality at an earlier age, and/or are being taken more seriously when this news is shared. Thus, a gender change may be sought by a minor. In that case, the process for appointing a guardian is the same as for a minor seeking a name change.

And, in light of people’s changing perceptions of the meaning of gender identity, already petitioners are looking to the courts to change a gender marker from either male or female to “other” or “neutral” or some other non-binary marker. How that will be resolved by a judge is likely to be determined on a case-by-case basis until there is some guidance from our appellate courts. And, finally, in some cases, the docket containing the petitioner’s current name and gender may be posted on the courtroom door. Because the identity docket tends to be done as a “cattle call,” chances are good that others who are waiting for the docket will see the incongruence of the name of the docket and the appearance of the petitioner seeking an identity change. In the courtroom, the judge or the clerk may call out the current name or type of identity change sought. This may cause grave discomfort for the petitioner, so it would be wise to know in advance how the docket is handled. A prepared client is a more satisfied client.

*Statewide forms for sex change, or for both sex and name change, can be found here:

<http://courts.oregon.gov/OJD/OSCA/JFCPD/Pages/FLP/Forms.aspx>

Also published by the OSB Litigation Section.

Beth Allen is a judge on the Multnomah County Circuit Court in Oregon. Before becoming a judge, Judge Allen developed a specialized practice dealing with family law and related issues impacting the LGBT community. Judge Allen taught the sexual orientation and gender identity seminar as an adjunct professor at Lewis & Clark Law School for the past 10 years or so. Judge Al-

len is the author of *The Demise of DOMA? What's New and What's Not in Juvenile and Family Law*, *Juvenile & Family Court Journal*, Vol. 65, Issue 1 (2014), and *Same-Sex Marriage: A Conflict of Laws Analysis for Oregon*, *Willamette Law Review*, Vol. 32, Number 3 (1996). Since becoming a judge, she has spoken numerous times at CLEs, judicial conferences, and to the public about marriage equality and the legal effect of *Windsor* and *Geiger* for lesbian and gay couples and their families. She co-chairs the county workgroup addressing juvenile dependency and justice LGBTQ issues, and has already championed significant changes in court procedures to ensure dignity to LGBTQ parties, attorneys, and witnesses.

AFCC Oregon Chapter 2nd Annual Conference
Advocacy and Its Playgrounds: Father Involvement, Overnights, and Parenting Post-Divorce
Friday, April 8

8:30am to 5:30pm

Oregon State Bar Meeting Room, Tigard, OR

Morning Plenary Speaker:

Marsha Kline Pruett, Ph.D., MSL

Afternoon Panel Discussion

Eligible for 6.0 CEs (pending)

\$125 Oregon Chapter Members; \$180 non-members

Register here: <http://www.or-afcc.org/>

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<https://www.governmentjobs.com/careers/oregon/jobs/1346750/assistant-legal-counsel> - focus on business transactions

Classified advertising rates

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Display advertising rates

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1/4 page	\$50
1/2 page	\$90

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THE WCBA MARCH CLE & DINNER MEETING WEDNESDAY March 9, 2016

CLE: SEARCH AND SEIZURE

Presented by David B. Thompson, Sr. Assistant Attorney General,
Oregon Department of Justice

Dinner Guests—Pending

Date: Wednesday, March 9, 2016

Time: CLE - 5:15pm Cocktails & Dinner - 6:30pm

Place: The Old Spaghetti Factory, 18925 NW Tanasbourne Drive, Hillsboro

CLE Credit (Pending approval): 1 General Skills Credit

PLEASE NOTE: To pre-register, please check the appropriate box below and email or send via regular mail with the name of the attendee.

Payment will be taken at the door unless you would like to pre-pay on our website via Pay Pal.

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- Dinner + CLE = \$30 (member)
- Dinner + CLE = \$40 (non-member)
- Dinner only = \$15 (member and non-member)
- CLE only = \$15 (member)
- CLE only = \$25 (non-member)