

Legalized Marijuana. Are Your Employer Rights Up in Smoke?

Legalized marijuana changes virtually nothing in the workplace. Really? Yes, really.

A majority of the United States, and the District of Columbia, now have laws that legalize the use of marijuana in one form or another. Some of those states have very limited medical compassionate care use, as well as eight states that have legalized marijuana for recreational use. Even though many states have legalized marijuana in some form, it is very important to remember that it is still illegal under federal law. Also, where the health and safety of employees and clients are paramount, drug policies remain a very important workplace safeguard.

What About ADA Accommodations?

The Nonprofit HR Hotline receives dozens of calls each year ranging from; the employer's rights to deny usage of any kind; dealing legally with an employee who tests positive for marijuana; and the employee who has a doctor's note with a medical marijuana card allowing medical usage.

We get questions like, "Do we have to allow an ADA accommodation?" The answer to this one is "no."

Recent court cases that have considered the issue have found that the ADA doesn't require an employer to accommodate an employee's use of marijuana even if they use the drug pursuant to a



prescription and their marijuana use is lawful in the state where they work.

After the November 2016 election, we received a number of calls from concerned 501(c) Agencies Trust members wanting to understand the implications of newly enacted laws allowing recreational marijuana use on personal time and whether this now meant they couldn't enforce their drug-free workplace policies.

The good news is that the states with medical and recreational use laws overwhelmingly have provisions that protect organizations that maintain (or will implement) a drug-free workplace. Those provisions will not interfere with the organization's right to maintain a drug and alcohol free workplace nor will they require the organization to accommodate the use or affect the organization's ability to have or maintain policies prohibiting the use of marijuana by employees and prospective employees. Organizations are free to maintain and enforce any zero tolerance drug policies, especially for those positions that must ensure the health and safety of their clients.

Your workplace drug policies will be critical in maintaining and enforcing your drug-free workplace. Make sure that employees know that disciplinary action, which may include termination of employment, will take place if someone tests positive for marijuana. Be aware of your current policy and what it says regarding drug testing and verify that your drug testing policies are legal in your state.

The U.S. Department of Labor gives us some general guidance. "Under the Rehabilitation Act of 1973 and

> CONTINUED ON PAGE 3



This is our fourth and final HR update of 2016. We've included information on all the HR federal and state legislation and rules that will go into effect during December 2016 and the year of 2017. Also included is a list of the complimentary HR educational webinars we will present for the first quarter of 2017.

We wish you a peaceful and loving holiday Season.

Maureen & Sonya ■

Frequently Asked Questions (FAQs)

In the last HR Newsletter, we included a number of frequently asked questions regarding the Final Rule updating the FLSA exempt salary threshold (also known as the Overtime Rule) that was to go into effect December 1, 2016. In this edition, we have chosen to include a selection of FAQs based on the calls to the Hotline these last few months and the fact that even though there is a temporary injunction to delay the increase, the information below was relevant yesterday and will be tomorrow.

QUESTION:

If we pay an employee more than \$47,476, or whatever is the current minimum salary threshold annually, may we automatically assume they are exempt from overtime and are a salaried exempt employee?

Answer:

No. In order for a position to qualify for an exemption, three tests must be met. (ALL!)

1. The position must be paid a salary.
2. The position must be paid at least the minimum salary per federal or state law (whichever is most beneficial to the employee), and
3. The position must meet the job duties test (each exemption has different duties to qualify).

QUESTION:

Do nonprofits have an exemption from the increased salary threshold?

Answer:

Neither the FLSA nor the Department of Labor's (DOL) regulations provide an exemption from overtime requirements for nonprofit organizations. According to the DOL, nonprofit charitable organizations are not covered enterprises under the FLSA unless they engage in ordinary commercial activities that result in a sufficient amount of sales made or business done, such as operating a resale shop or providing veterinary services for a fee. However, employees of employers

that may not be covered by the FLSA on an enterprise basis may still be entitled to its protections if they are individually engaged in interstate commerce.

QUESTION:

What is interstate commerce?

Answer:

Interstate commerce is commercial trade, business, the movement of goods, information, money or transportation from one state to another.

Examples include: ordering, receiving and/or using goods from an out-of-state vendor, and making phone calls, sending emails or postal mail to someone in another state. Credit card transactions are another example of interstate commerce.

These days, it would be the very rare employee** that is not engaged in some sort of interstate commerce and therefore not entitled to the protections of the FLSA, including overtime and minimum wage.

**Even if you believe your employees are not covered under the FLSA, you must pay attention to and abide by your state and local laws.

QUESTION:

Is work done at home counted in total hours? What about on-call? What if my newly nonexempt employee wants to volunteer their time (off-the-clock work)?

Answer:

Nonexempt employees should track ALL time worked. It is required under the FLSA. You must pay your nonexempt employees for travel time (not commuting to/from work – unless they are going to a different location that is farther away), waiting time and controlled on-call time. Controlled on-call means your employee would be limited geographically; need to respond quickly to a call (response time is key); must remain on the employer's premises; or wear a uniform. As for allowing or encouraging off-the-clock work, you are just asking to

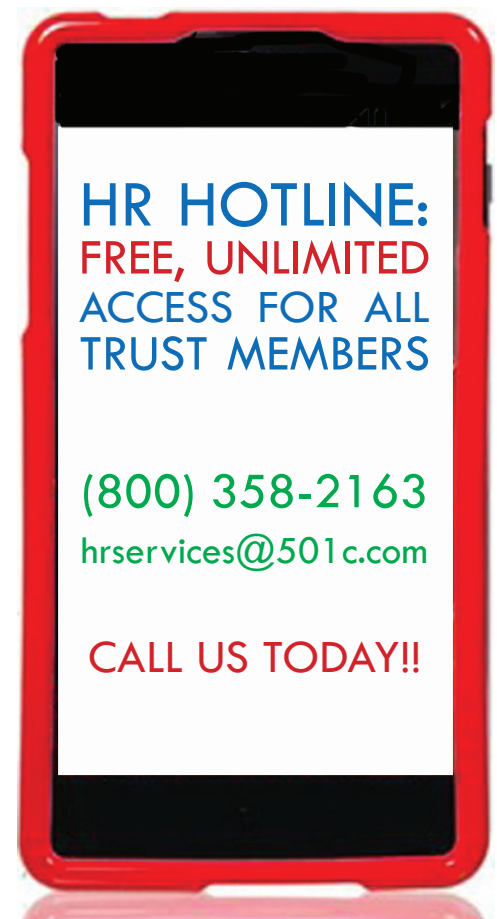
be sued. Do not allow your nonexempt employees to work for free, it's against the law. Do not allow your managers and supervisors to encourage or pressure your nonexempt employee to work off-the-clock.

QUESTION:

If an employee works nine hours one day and seven the next, do you still pay overtime for the one hour? Do different states have different rules concerning hour worked per day or per week that determine when overtime is earned?

Answer:

It depends on the state in which the employee works. If your state has daily overtime (over 8 hours in a day) then in the example above, you would be required to pay one hour of overtime for any time worked over 8 hours in a day. If your state does not have daily overtime, then there would be no overtime owed for that week assuming the other days worked did not exceed a total of 40 hours. ■



Riding the FLSA Rollercoaster

By the time you read this, the December 1st deadline for compliance with the DOL's double digit increase for the exempt salary threshold will have come and gone. A federal court judge in Texas has granted a preliminary injunction temporarily halting the new increase from going into effect. The judge's ruling stops enforcement of the rule until the Department of Labor receives a contrary ruling from the same Texas court or an appellate court.

This was welcome news for many non-profits. Not surprising though, is the mixed reaction from HR professionals. Many found the news regarding the temporary injunction frustrating. Countless staff hours were spent pulling together legally compliant plans only to have the changes pulled at the last moment. No surprise, the Hotline's number one call topic this summer and fall has been variations on the change to the FLSA salary threshold and the December 1st implementation date. This whole situa-

tion has been an emotional and financial rollercoaster for our Members and HR subscribers. And the ride continues.

So the question begs, what do we do now?

You did your due diligence; you did time studies, interviews, updates and changes to job descriptions, cost projections and the face-to-face meetings with your staff. The changes were planned and in many cases executed: some staff received an increase and some were transitioned to nonexempt. Now what? Do we roll the increases back? Do we reverse the changes we made to staff's exempt status?

Our advice is to hold steady with what you have put in place for many reasons. If you made the changes, leave those in place. If you were waiting until December 1st and therefore hadn't changed salaries or reclassified any staff, keep those plans at the ready, but don't implement them. Continue to follow the

current laws pertaining to your correctly classified staff.

The DOL will likely challenge the ruling and make the argument that they acted within the bounds of the law and their jurisdiction. So we remain in a holding pattern while the courts figure this out.

We will continue to do our very best to keep you informed and help keep your organization in compliance.

If you have any questions, regarding the FLSA, the DOL or any other HR related issue don't hesitate to contact us at the Hotline. ■

Legalized Marijuana

> CONTINUED FROM PAGE 1

the ADA (Americans with Disabilities Act of 1990) employers were given the right to prohibit the illegal use of drugs and alcohol in the workplace. The ADA is not violated by testing for illegal drug use and marijuana is still illegal under federal law."

We encourage you to review your current policies to make sure you are in compliance with the laws and are clear to your employees what your policies and procedures entail in regards to drug testing and what the consequences are should they test positively for any drugs, including any metabolites. Consider including language dealing with legal off-duty conduct and the implications of participating in off-duty recreational marijuana and what that may mean for their employment at an organization that clearly has and enforces their drug-free workplace policy. Don't forget that if your organization receives any federal grants, contracts or funds, your organization must abide by the Drug-Free Workplace Act or risk losing funding. Any revisions of or adoptions to your policies and procedures should be reviewed by a labor and employment law attorney licensed in your state. ■

Exclusive **Free** HR Webinars January - March 2017 Schedule

10-Jan.	Tues.	The Power of Stay Interviews (<i>guest speaker</i>)	11:00 a.m. PST
18-Jan.	Wed.	Documenting Employment Events	11:00 a.m. PST
19-Jan.	Thurs.	Navigating the Employee Disciplinary Process	11:00 a.m. PST
31-Jan.	Tues.	Wage & Hour Overview: <i>What You Need to Know</i>	11:30 a.m. PST
2-Feb.	Thurs.	Hiring, Back to Basics	11:00 a.m. PST
8-Feb.	Wed.	Wage & Hour Overview: <i>What You Need to Know</i>	11:00 a.m. PST
16-Feb.	Thurs.	FMLA Basics: <i>What You Need to Know</i>	11:00 a.m. PST
22-Feb.	Wed.	FMLA Basics: <i>What You Need to Know</i>	8:00 a.m. PST
2-Mar.	Thurs.	Employee Engagement: <i>Why Does it Matter?</i>	11:00 a.m. PST
30-Mar.	Thurs.	ADA, Basic Requirements	11:00 a.m. PST



HRCI Recertification Credit Hours available

For a complete list of our upcoming trainings and to register go to: www.501cTrust.org/resource-center/ ■



State and Federal Legislation

State

Minimum Wage Changes 2017

Employers get ready! Minimum wage increases will affect numerous states across the country in January 2017 and beyond:

State	New Minimum Wage	Effective Date
Alaska	\$9.80 / hr	January 1, 2017
Arizona	\$10.00 / hr	January 1, 2017
Arkansas	\$8.50 / hr	January 1, 2017
California	\$10.50 / hr	January 1, 2017
Colorado	\$9.30 / hr	January 1, 2017
Connecticut	\$10.10 / hr	January 1, 2017
District of Columbia	\$12.50 / hr	July 1, 2017
Florida	\$8.10 / hr	January 1, 2017
Hawaii	\$9.25 / hr	January 1, 2017
Maine	\$9.00 / hr	January 1, 2017
Maryland	\$9.25 / hr	July 1, 2017
Massachusetts	\$11.00 / hr	January 1, 2017
Michigan	\$8.90 / hr	January 1, 2017
Missouri	\$7.70 / hr	January 1, 2017
Montana	\$8.15 / hr	January 1, 2017
New Jersey	\$8.44 / hr	January 1, 2017
South Dakota	\$8.65 / hr	January 1, 2017
Vermont	\$10.00 / hr	January 1, 2017
Washington	\$11.00 / hr	January 1, 2017

New York Wage Changes effective January 1, 2017

\$9.70 / hr Greater New York

\$10.00 / hr Nassau, Suffolk & Westchester counties

\$10.50 / hr New York City (small employers) \$11.00 / hr (large employers)

Ohio Wage Changes effective January 1, 2017

\$8.15 / hr (gross receipts of \$297,000 or more)

\$7.25 / hr (gross receipts under \$297,000)

Paid Leave

Arizona – effective July 1, 2017. Employers with fewer than 15 employees must allow workers to earn 24 hours per year, while those with 15 or more employees must grant 40 hours of paid earned annual leave.

Washington – effective 2018. Washington mandated 1 hour for every 40 hours and also allows workers to use the time for themselves or their families.

Federal

I-9 Form Update

The newest version of the Form I-9 is now available, U.S. Citizenship and Immigration Services (UCCIS) announced. Employers may continue using the current version for Form I-9 with a revision date of March 8, 2013 until January 21, 2017. After January 21, 2017, all previous versions of the Form I-9 will be invalid.

To access the form and form instructions, please go to this link – www.uscis.gov/i-9.

ACA (Affordable Care Act)

The IRS has extended the deadline to deliver ACA reporting forms to employees from January 31, 2017 to March 2, 2017.

ADA (The Americans with Disabilities Act)

Recent case law has determined that employers must accommodate, even if an employee never asks. Usually, an employee has the responsibility for informing his/her employer that he/she requires a workplace accommodation. Sometimes, when an employer is aware that the worker needs assistance, the employer must accommodate even if the employee never asks for help. A recent case from the 8th U.S. Court of Appeals illustrates this: an employee exhausted her Family and Medical Leave (FMLA) allotment and still couldn't perform all of her job duties. Instead of firing her, the employer should have considered accommodations for her, the court determined in *Kowitz v. Trinity*, No 15-1584 (8th Cir. October 17, 2016). ■

A Reminder:

The purpose of this update is to review the latest developments in human resource matters. The information contained herein has been abridged from numerous sources and should not be construed as legal advice or opinion, and is not a substitute for the advice of counsel.