



ideas that work

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GREATER SILVER SPRING CHAMBER OF COMMERCE
(IN COOPERATION WITH ITS NON-PROFIT TEAM)

EMPLOYMENT LAW WORKSHOP
(DECEMBER 8, 2015)

By: Marc R. Engel, Esq.

1. Montgomery County Earned Sick and Safe Leave Act

- A. On June 24, 2015, Montgomery County, Maryland joined a number of jurisdictions throughout the country in passing legislation that requires employers in Montgomery County (the “County”) to provide earned sick and safe leave to certain employees working in the County.
- B. The Act goes into effect on October 1, 2016.
- C. The Act requires that paid sick or safe leave be provided to all employees working in the County, although the amount of leave that needs to be provided differs based upon the size of the employer. The legislation was passed in order to establish minimum standards for earned sick and safe leave in the County because the legislators believe that it was necessary to (a) promote the health and welfare of County residents; (b) safeguard employers and employees against unfair competition; (c) increase the stability of industry in the County; and (d) decrease the need for the County to spend public money for the relief of employees who also live in the County.
- D. Permissible uses of sick and safe leave which is quite extensive. That list includes the following:
 - a. Treating the employee’s physical or mental illness, injury, or condition;
 - b. Obtaining preventative medical care for the employee or a covered individual;
 - c. Caring for a covered individual with a mental or physical illness, injury, or condition;
 - d. Closing of the employer’s place of business or an employee’s child’s school or child care center due to a public health emergency;
 - e. Caring for a covered individual when a healthcare provider has determined that the family member’s presence in the community would endanger the public; or



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- f. Missing work due to domestic violence, sexual assault, or stalking of the employee or a covered individual, where the leave is used during temporary relocation of the employee/covered individual or to obtain legal or medical services for the employee/covered individual or the employee/covered individual's family.

E. The Act broadly defines the group of covered individuals to include: a biological child, adopted child, foster child, or stepchild of the employee; a child for whom the employee has legal or physical custody or guardianship; a child for whom the employee is the primary caregiver; a biological parent, adoptive parent, foster parent, or stepparent of the employee or the employee's spouse; the legal guardian of the employee; an individual who served as the primary caregiver of the employee when the employee was a minor; the spouse of the employee; a grandparent of the employee; the spouse of a grandparent of the employee; a grandchild of the employee; a biological, adopted, or foster sibling of the employee; or the spouse of a biological, adopted, or foster sibling of the employee.

F. The Act provides that all employees who are based or work in the County are entitled to accrue sick and safe leave at a rate of one (1) hour for every thirty (30) hours worked subject to certain limitations. Employers in the County with fewer than five (5) employees must provide up to thirty-two (32) hours of paid sick and safe and twenty-four (24) hours of unpaid sick and safe leave per year. On the other hand, employers with five (5) or more employees must provide up to fifty-six (56) hours per year of sick and safe leave per year. This calculation is easier for non-exempt employees than it is for exempt employees. For exempt employees, the Act provides that in making this calculation employers should assume that the employee worked the number of hours in a normal workweek for that employer up to forty (40) hours per workweek. Importantly, the Act covers regular part-time employees provided that they regularly work at least eight (8) hours per week. The Act does not extend earned sick and safe leave benefits to independent contractors.

G. The Act permits employers to decide whether to provide sick leave as it accrues throughout the year, or to provide the entire balance of sick leave to employees at the beginning of the year. If an employer does not provide the full amount of sick and safe leave at the beginning of the calendar year, the employer must allow the employee to carry her sick and safe leave balance of up to fifty-six (56) hours over to the next year. However, if an employer does provide the full amount of sick and safe leave to employee at the beginning the calendar year, it is not required to permit an employee to carry over any leave remaining at the end of the calendar year.



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H. It *does not* require employers to pay unused accrued sick leave upon the conclusion of employment. The statute permits employers to continue to use general paid time off (PTO) policies that combine both vacation and sick leave. Employers, however, will need to ensure that they properly allocate leave that is taken for purposes protected by the statute, and that individuals receive sick and safe leave in an amount that is at least equal to, if not greater than, the amount required by the Act.

I. The Act prohibits retaliation against employees who attempt to exercise their rights under the statute or participate in any proceeding or investigation pursuant to the statute. The Act also contains a notice requirement. In light of the new legislation, employers should do the following:

1. Create a policy that addresses earned sick and safe leave for employees who work in Montgomery County.
2. Train managers and supervisors on how to respond to requests for sick and safe leave.
3. Publish the appropriate notice required by the Act.
4. Make sure that employees are not retaliated against for attempting to take leave protected by the Act.
5. Appropriately track leave that employees take, particularly in situations where employers are using a PTO system, in order to make sure that the employee is receiving the minimum amount of sick and safe leave required under the Act.

2. Montgomery County New Minimum Wage Law

- A. Minimum Wage Rates
 1. 10/01/15 \$9.55
 2. 07/01/16 \$10.75
 3. 07/01/17 \$11.50
- B. Tipped Employees (earning more than \$30 per month in tips): must earn the Montgomery Co. Minimum Wage Rate per hour. Employers must pay at least \$4.00 per hour. This amount plus tips must equal at least the Montgomery Co. Minimum Wage Rate.
- C. Amusement and Recreational Establishments (that meet certain requirements): must pay employees at least 85% of the State Minimum Wage Rate.
- D. Employees Under Age 20: must earn at least 85% of the State Minimum Wage Rate for the first 6 months of employment.



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E. See attached DLLR notice (Attachment A)

3. “Ban the Box” Legislation

A. See Attachment B.

B. Takeaways

1. Do not ask questions on initial job application about applicant’s criminal history.
2. Give notice to applicant if employer intends to withdraw conditional job offer due to applicant’s criminal record.
3. Train managers not to ask about applicant’s criminal history during the initial interview.

4. Timesheets and Overtime

A. So called “small” employers in Maryland are subject to the overtime laws – see attached article. (See Attachment C)

B. Sample timesheet certification language:

“I hereby certify that this timesheet sets forth all of the hours that I worked in this particular workweek. I understand that my employer is relying upon the accuracy and truthfulness of the information that I have completed. I further certify that no supervisor has instructed me not to record all of the hours that I worked. I understand that no supervisor is authorized to instruct me not to record all of the hours that I worked.”

5. Employee or Independent Contractor

A. See Attachment D.

6. Proposed New Overtime Regulations

A. The proposed regulation applies to the salary component of the so-called white-collar exemptions. In addition to performing exempt duties in order to be eligible for the professional, executive or administrative exemption, an individual must be paid a pre-predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed. Presently, employees must be paid \$455 per week or \$23,660 annually in order to be exempt from



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minimum wage and overtime requirements under the Fair Labor Standards Act (FLSA). The proposed regulation would increase the salary threshold. Specifically, the salary threshold would be indexed to the 40th percentile of weekly earnings for full-time salaried workers. This would raise the salary level in 2016 to about \$970 a week or \$50,440 annually.

- B. Presently, there is an exemption for highly compensated individuals, which is defined as individuals whose compensation is at least \$100,000. This figure includes at least \$455 per week paid on a salary or fee basis if the employee customarily and regularly performs one of the exempt duties set forth in the FLSA regulations. The proposed regulation would increase this \$100,000 figure. Specifically, it would do so by indexing to the annualized value of the 90th percent of weekly earnings of full-time salaried workers which would in effect raise the annual salary level in 2016 to approximately \$122,148.
- C. The Department of Labor (DOL) is also proposing the adoption of a mechanism to provide for automatic updates to the salary threshold.
- D. The proposed regulations do not change the “duties” tests applicable to white-collar exemptions (administrative, professional, and executive). However, the regulations address the current duties tests and solicits suggestions for additional occupation examples and seeks comments on the current requirements. In addition, the regulations address the possibility of including non-discretionary bonuses to satisfy a portion of the standard salary requirement. For the time being, the DOL does not propose specific regulatory changes on either of these issues.
- E. Reasons for opposing proposed regulations:
 - 1. Regulations further confuse the overtime exemptions.
 - 2. Regulations are likely to add to number of wage hour lawsuits filed.
 - 3. Regulations fail to simplify the duties tests for determining who is an exempt employee.
 - 4. The same salary leave should not apply to all parts of the country because the economic conditions are different.
 - 5. Regulations will prompt employers to reduce wages (and the availability of overtime hours).
 - 6. Transitioning more employees to non-exempt status is likely to adversely impact morale.
 - 7. Employees may lose exempt status even though their duties have not changed at all.



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7. **Insurance**

- A. Employment Practice s Liability Insurance (EPLI)
- B. Special rider/endorsement for wage hour/overtime claims

8. **Understanding and Responding to Workplace Security and Violence**

- A. See Attachment E.

9. **Takeaways**

- A. Create or review job description
- B. Revise job application forms
- C. Revise Employee Handbook to include “safe harbor” language from FLSA
- D. Revise offer letters to address leave accruals
- E. Use performance plans
- F. Review characterizations of individuals as employees or independent contractors
- G. Make sure that employees accurately report hours
- H. Include certifications in time sheets
- I. Train managers on overtime, discrimination, and retaliation issues
- J. Document performance issues
- K. Consider applying the 24-hour rule before terminating an employee
- L. Do not ask about criminal convictions during the initial applicant interview
- M. Generally, do not withhold monies that an employee owes to the employer unless specifically authorized by the employee in writing to do so
- N. Be consistent in disciplining employees
- O. Extremely important to consider EPLI

Marc R. Engel, Esq. is an employment attorney and litigator at Lerch, Early & Brewer, Chartered where he co-chairs the firm's Employment and Labor Group and is a member of the firm's Litigation Group. He advises employers of all types of employment issues (including wage and hour and overtime issues), performs human resource audits, and conducts training on a variety of employment issues, including strategies for improving hiring, performance management, retention, and avoiding discrimination and harassment claims. He also litigates and mediates employment and business disputes and counsels clients on litigation avoidance strategies. In 2011, Marc was listed in Washingtonian Magazine's Top Lawyers for Employment Law. He has been recognized as a Top Rated Lawyer in Labor & Employment Law by Martindale-Hubbell, a premier attorney rating organization. For more information about human resource audits or the employment practice, please contact Marc at (301) 657-0184 or by email at mrengel@lerchearly.com. For more information about the firm, please visit our website at www.lerchearly.com. **This outline is not intended to provide legal advice as to any specific matter.**