These materials are intended solely for educational purposes, and are not intended and should not be relied upon as legal advice. Persons in need of legal advice relating to any particular case or issue should consult legal counsel.

This presentation is not intended to create an attorney-client relationship.
Two Topics

• New Federal Overtime Rules and Maine Update
• Using Social Media in Hiring Decisions
New Federal Overtime Rules

The basics:

• Fair Labor Standards Act
  ▫ Covers almost all employers
  ▫ Mandates minimum wages and overtime (OT)
  ▫ OT = 1 ½ regular rate of pay for all hours worked over 40 hours in a workweek
  ▫ Many exemptions, including:
    • Bona fide executive, administrative, and professional employees
    • Highly compensated employees
New Federal Overtime Rules

The basics:

• **Executive Exemption**
  ▫ Compensated on a salary basis at least $455/wk
  ▫ Primary duty must be management
  ▫ Customarily and regularly direct the work of at least 2 or more FTEs
  ▫ Authority to hire and fire, or weight given to suggestions to hire, fire, advance, promote, or change status of other employees
New Federal Overtime Rules

The basics:

• Administrative Exemption
  ▫ Compensated on a salary or fee basis at least $455/wk
  ▫ Primary duty is office or non-manual work related to management or general business of employer or employer’s customers
  ▫ Exercise of discretion and independent judgment concerning “matters of significance”
New Federal Overtime Rules

The basics:

- Professional Exemption
  - Compensated on a salary or fee basis at least $455/wk
  - Primary duty is work requiring advanced knowledge in field of science or learning customarily acquired by prolonged course of specialized intellectual instruction
New Federal Overtime Rules

The basics:

• Highly Compensated Employees
  ▫ Perform office or non-manual work
  ▫ Customarily and regularly perform at least one of the duties of an exempt executive, administrative, or professional employee
  ▫ Total annual compensation $100,000 or more
    • At least $455 per week on a salary or fee basis
New Federal Overtime Rules

The basics:

- **Salary basis:**
  - Salary requirements don’t apply to outside sales, teachers, lawyers, or physicians
  - “Salary basis”: Regularly receives predetermined amount of compensation. Amount can’t be reduced based on quantity or quality of work.
New Federal Overtime Rules

May 2016 Regulations

• Increases standard salary level at the 40th percentile of earnings of FT salaried workers in lowest-wage Census Region
  ▫ From $455/wk to $913/wk
  ▫ Annually: $23,660 to $47,476

• Sets total annual compensation for highly compensated employees at 90th percentile of FT salaried workers
  ▫ From $100,000 to $134,004 per year

• Levels updated every 3 years
• Effective December 1, 2016
New Federal Overtime Rules

Court Challenge

- Nov. 22: Court granted temporary nationwide injunction.
- Dec. 1: U.S. DoL appealed
- Appeal still pending
- Regulatory freeze – 60 days
New Federal Overtime Rules

Where we are today

• Injunction currently in effect
• This means the new federal overtime laws don’t apply right now
• If the injunction is lifted, the rules will take effect, maybe retroactively to December 1
• Trump Administration or Congress could overturn or modify the new rules
New Federal Overtime Rules

What should employers do?

• Employers that have already implemented changes to comply with the new rules: roll back or stay with changes until litigation is settled?
  ▫ Can’t withhold wages

• Employers that have not made changes based on injunction: stay the course?

• Risk of retroactive effective date

• Be ready in case rules go into effect

• Have clear communications with employees
Maine Overtime Update

Don’t forget Maine law:

• Very similar to federal OT laws:
  ▫ 1 ½ times regular pay for all hours actually worked over 40 hours in that week
  ▫ Maine and federal OT laws define affected employees differently, but federal and Maine OT laws largely overlap
Maine Overtime Update

Don’t forget Maine law:

• One major difference: salary test for salaried executive, administrative, and professional workers

• Maine minimum wage increases could bring more of these workers under Maine OT laws who would otherwise be exempt under federal law
  
  • Maine salary test: Greater of rate established by U.S. DoL and 3000 multiplied by Maine hourly minimum wage
  
  • Jan. 7 - Maine min. wage: $9/hr (3000 x $9 = $27,000)
  
  • Current federal OT salary limit: $23,660
  
  • Weekly: $455 to $519.24
Using Social Media in Hiring
5 Dos and Don’ts for Maine Employers
Using Social Media in Hiring

What might it include?

• Googling a candidate’s name and finding social media hits
• Asking a candidate to provide a LinkedIn address in a resume
• Reviewing a candidate’s Facebook or LinkedIn profile
• Friending a candidate
• Asking a candidate to friend the employer or HR
Using Social Media in Hiring

Like all hiring activities, checking social media carries risks:

• Lawsuits
• EEOC/MHRC actions
• Reliable and valid information?
• Scaring away candidates

Do employers need to avoid using social media in hiring? No, but employers need to be careful.
Dos and Don’ts for Maine Employers: #1

2015 Maine Statute (26 M.R.S. §§ 615-619)

Don’t:

• Ask candidates to share passwords to accounts
• Ask candidates to access accounts in presence of employer
• Require candidates to provide account information
• Require candidates to “friend” or add employer or agent of employer as a contact
• Ask candidates to change privacy settings

Doesn’t apply to: publically available information, required candidate screenings, or investigations of employee misconduct or unlawful acts.
Dos and Don’ts for Maine Employers: #2

• **Do:** Have a policy and procedure, and follow it.
• **Describe how checks will be conducted:**
  ▫ Treat all candidates equally
  ▫ Which sites
  ▫ What will be reviewed
  ▫ Who conducts the search
  ▫ When the search will be conducted
Dos and Don’ts for Maine Employers: #3

**Do:** Lawful research of candidates in a targeted way

- Don’t look for information you can’t elicit in an interview
  - A court or EEOC/MHRC may assume that you are aware of that person’s protected characteristics (e.g., pregnancy, religion, sexual orientation, disability) once you look at a social media account

- Conduct the same search for every candidate
  - Recommended: wait until after meeting the candidate to conduct a social media search
  - Save information that causes you to doubt the candidate’s suitability
Dos and Don’ts for Maine Employers: #4

- **Do:** Have someone other than the hiring manager conduct the search and provide a report
  - Insulate the hiring manager from protected classification information
  - Give the searcher strict guidelines to follow
  - If you use a third-party to conduct the search, you may need to comply with the Fair Credit Reporting Act
Dos and Don’ts for Maine Employers: #5

• **Do:** Be careful before using social media information to make a hiring decision
  ▫ Treat the information the same as information you obtain from an interview, resume, or references
  ▫ Consider the context of the information. Is it part of a larger picture? Is the information reliable?
Questions?

Michael Burian, Esq.
mburian@kozakgayer.com

Kozak & Gayer, P.A.
160 Capitol Street, Suite 4
Augusta, Maine 04330
Tel.: 207.621.4390