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Legislative Snippets

# MakinenLaraJA Note from Lara…

***Special Interest Articles:***

* DOL Final Rule Fact Sheet
* DOL Rule Gives Agency Broader License to Sue for Pay Discrimination

***In Every Issue:***

Legislation 2-3

Advocacy 4

ACA News 5

EEOC News 5

OFCCP News 5

OSHA News 5

In Other News… 8

Cases 8

Education 8

Back Page Extras 9

**Serving the Professional.**

**Advancing the Profession.**

Welcome to the latest edition of Legislative Snippets! This edition has news on legislation updates, proposed changes you need to know about, court cases and other interesting snippets for you to put on your radar as well as in your legislative/legal toolkit. Enjoy!

Amendment 69: Colorado State Health Care System Initiative

The **Colorado State Health Care System Initiative**, also known as **Amendment 69**, will be on the November 8, 2016, ballot in Colorado as an initiated constitutional amendment.[[1]](https://ballotpedia.org/Colorado_State_Health_Care_System_Initiative,_Amendment_69_(2016)#cite_note-sos-1)

Amendment 69 was called **Initiative 20** during circulation.

A **"yes"** vote is a vote in favor of creating ColoradoCare, a healthcare payment system designed to finance healthcare for Colorado residents partly through an approximately $25 billion increase in state taxes.

A **"no"** vote is a vote against creating ColoradoCare.

### Ballot title

The ballot title and submission clause as designated and fixed by the Board is as follows:[[6]](https://ballotpedia.org/Colorado_State_Health_Care_System_Initiative,_Amendment_69_(2016)" \l "cite_note-6)

“Shall state taxes be increased $25 billion annually in the first full fiscal year, and by such amounts that are raised thereafter, by an amendment to the Colorado Constitution establishing a healthcare payment system to fund healthcare for all individuals whose primary residence is in Colorado, and, in connection therewith, creating a governmental entity called ColoradoCare to administer the healthcare payment system; providing for the governance of ColoradoCare by an interim board of trustees until an elected board of trustees takes responsibility; exempting ColoradoCare from the Taxpayer's Bill of Rights; assessing an initial tax on the total payroll from employers, payroll income from employees, and nonpayroll income at varying rates; increasing these tax rates when ColoradoCare begins making healthcare payments for beneficiaries; capping the total amount of income subject to taxation; authorizing the board to increase the taxes in specified circumstances upon approval of the members of ColoradoCare; requiring ColoradoCare to contract with healthcare providers to pay for specific healthcare benefits; transferring administration of the Medicaid and children's basic health programs and all other state and federal healthcare funds for Colorado to ColoradoCare; transferring responsibility to ColoradoCare for medical care that would otherwise be paid for by workers' compensation insurance; requiring ColoradoCare to apply for a waiver from the Affordable Care Act to establish a Colorado healthcare payment system; and suspending the operations of the Colorado health benefit exchange and transferring its resources to ColoradoCare?”[[7]](https://ballotpedia.org/Colorado_State_Health_Care_System_Initiative,_Amendment_69_(2016)#cite_note-quotedisclaimer-7)

**Constitutional changes**

The measure would amend the Colorado Constitution by adding an additional article, Article XXX, which can be read [here](http://coloradocareyes.co/wp-content/uploads/2015/04/ColoradoCare_Full_Initiative.pdf).

Click [here](https://ballotpedia.org/Colorado_State_Health_Care_System_Initiative,_Amendment_69_(2016)) to read more.



# National Legislation and News

**Defend Trade Secrets Act Becomes Law, Opening Federal Courts to Aggrieved Companies**

*Jackson Lewis reports:*

For the first time, companies have a federal private right of action for misappropriation of trade secrets. The Defend Trade Secrets Act (“DTSA”), signed by President Barack Obama on May 11, 2016, applies to any misappropriation of trade secrets that occurs on or after the signing date.

Until now, companies victimized by trade-secret theft were limited to state law and state court (where these cases often are brought) civil actions to enjoin perpetrators and their new employers or business partners from benefitting from the theft and to seek a remedy for violations that already have occurred. Click [here](http://www.jacksonlewis.com/publication/defend-trade-secrets-act-becomes-law-opening-federal-courts-aggrieved-companies) to read more.

Pending Legislation

**House Bill 612 – National Right-to-Work Act**

To preserve and protect the free choice of individual employees to form, join, or assist labor organizations, or to refrain from such activities. Click [here](http://www.cqstatetrack.com/texis/statetrack/walks/us/getprinttext.html?bill=HR612&session=114) to read more.

**House Bill 932 – Healthy Families Act**

To allow Americans to earn paid sick time so that they can address their own health needs and the health needs of their families. Click [here](https://www.congress.gov/bill/114th-congress/house-bill/932/text?resultIndex=12&overview=open#content) to read more.

**House Bill 987 – Davis-Bacon Repeal Act**

To repeal the wage rate requirements commonly known as the Davis-Bacon Act. Click [here](https://www.congress.gov/bill/114th-congress/house-bill/987/text?resultIndex=13&overview=open#content) to read more.

**House Bill 1147 – Legal Workforce Act**

To amend the Immigration and Nationality Act to make mandatory and permanent requirements relating to use of an electronic employment eligibility verification system, and for other purposes. Click [here](https://www.congress.gov/bill/114th-congress/house-bill/1147/text) to read more.

**House Bill 1439 – Family and Medical Insurance Leave Act**

To provide paid family leave benefits to certain individuals, and for other purposes. Click [here](https://www.congress.gov/bill/114th-congress/house-bill/1439/text?resultIndex=24&overview=open#content) to read more.

**House Bill 1619 – Paycheck Fairness Act**

To amend the Fair Labor Standards Act of 1938 to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex, and for other purposes. Click [here](http://www.cqstatetrack.com/texis/statetrack/walks/us/getprinttext.html?bill=HR1619&session=114) to read more.

**House Bill 1787 – Fair Pay Act of 2015**

To amend the Fair Labor Standards Act of 1938 to prohibit discrimination in the payment of wages on account of sex, race, or national origin, and for other purposes. Click [here](http://www.cqstatetrack.com/texis/statetrack/walks/us/getprinttext.html?bill=HR1787&session=114) to read more.

**House Bill 2654 – Pregnant Workers Fairness Act**

To eliminate discrimination and promote women’s health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition. Click [here](https://www.congress.gov/bill/114th-congress/house-bill/2654/text?resultIndex=65&overview=open#content) to read more.

**House Bill 2260 – Sarah Grace-Farley-Kluger Act**

To amend the Family and Medical Leave Act of 1993 to provide leave because of the death of a son or daughter. Click [here](https://www.congress.gov/bill/114th-congress/house-bill/2260/text?resultIndex=52&overview=open#content) to read more.

**House Bill 3071 – Schedules That Work Act**

To permit employees to request changes to their work schedules without fear of retaliation and to ensure that employers consider these requests, and to require employers to provide more predictable and stable schedules for employees in certain occupations with evidence of unpredictable and unstable scheduling practices that negatively affect employees, and for other purposes. Click [here](https://www.congress.gov/bill/114th-congress/house-bill/3071/text?resultIndex=75&overview=open#content) to read more.

**House Bill 3222 – Employee Rights Act**

To provide protections for workers with respect to their right to select or refrain from selecting representation by a labor organization. Click [here](https://www.congress.gov/bill/114th-congress/house-bill/3222/text?resultIndex=78&overview=open#content) to read more.

**Senate Bill 30 – Forty Hours is Full Time Act of 2015**

Amends the Internal Revenue Code, with respect to the employer mandate to provide health care coverage, to: (1) modify the formula for calculating the number of full-time employees employed by an applicable large employer subject to the mandate; and (2) define a "full-time employee" as an employee who is employed on average at least 40 hours per week (currently, 30 hours). Click [here](https://www.congress.gov/bill/114th-congress/senate-bill/30) to read more.

**Senate Bill 233 – Working Families Flexibility Act of 2015**

Amends the Fair Labor Standards Act of 1938 to authorize private employers to provide compensatory time off to private employees at a rate of 1 1/2 hours per hour of employment for which overtime compensation is required. Authorizes an employer to provide compensatory time only if it is in accordance with an applicable collective bargaining agreement or, in the absence of such an agreement, an agreement between the employer and employee. Click [here](https://www.congress.gov/bill/114th-congress/senate-bill/233) to read more.

**Senate Bill 497 – Healthy Families Act**

To allow Americans to earn paid sick time so that they can address their own health needs and the health needs of their families. Click [here](http://www.cqstatetrack.com/texis/statetrack/walks/us/getprinttext.html?bill=S497&session=114) to read more.

**Senate Bill 683 – Compassionate Access, Research Expansion, and Respect States Act of 2015**

Amends the Controlled Substances Act (CSA) to provide that control and enforcement provisions of such Act relating to marihuana shall not apply to any person acting in compliance with state law relating to the production, possession, distribution, dispensation, administration, laboratory testing, or delivery of medical marihuana. Transfers marihuana from schedule I to schedule II of the CSA. Click [here](https://www.congress.gov/bill/114th-congress/senate-bill/683) to read more.

# State Legislation Enacted

**Colorado Broadens Whistleblower Protections for State Employees Who Disclose Confidential Information**

*Jackson Lewis reports:*

Encouraging government whistleblowers, an amendment to Colorado law bars disciplinary actions against state employees who reveal confidential information while reporting instances of waste, mismanagement of public funds, abuses of authority, or illegal and unethical practices to a designated “whistleblower review agency.” Colorado Governor John Hickenlooper signed the amendment (SB 16-056) to Colorado Revised Statutes Section 24-50.5-101 *et seq.* on June 10, 2016.

The law defines whistleblower review agencies to include the office of legislative legal services, the state attorney general, or the commission on judicial discipline.

Prior to this amendment, there were no whistleblower protections for Colorado government employees who revealed confidential information exempted from disclosure by the Colorado Open Records Act or another state statute.

Now, the law protects an employee’s disclosure of confidential information if the employee first discloses the information to a review agency to determine whether the information is releasable or should remain confidential. If the information is releasable, the agency is tasked with releasing the information to members of the general assembly and to the public. The whistleblower review agency also must notify the disclosing employee’s supervisor that the agency has received the information and remind the supervisor that retaliation is prohibited (unless limited statutory exceptions apply).

The amendment does not affect the employee’s right to bring a private right of action after first bringing a complaint to the state personnel board pursuant to Section 24-50.5-105. Click [here](http://www.jacksonlewis.com/publication/colorado-broadens-whistleblower-protection-state-employees-who-disclose-confidential-information) to read more.

**Colorado Expands Pregnancy Discrimination Law**

*Jackson Lewis reports:*

Colorado Governor John Hickenlooper has signed into law a bill that makes it an unfair employment practice if an employer fails to provide reasonable accommodations to a job applicant or an employee for conditions related to pregnancy or childbirth.

Amending the Colorado Anti-Discrimination Act, the bi-partisan bill (House Bill 16-1438) provides greater protections for pregnant employees than those provided under federal law. The new law applies to most employers, regardless of size, and requires accommodations for conditions related to pregnancy or childbirth that may qualify as disabilities under the Americans with Disabilities Act.

All Colorado employers must comply with the new law, which goes into effect on August 10, 2016. Click [here](http://www.jacksonlewis.com/publication/colorado-expands-pregnancy-discrimination-law) to read more.

# **Colorado Repeals State Employment Verification Requirement**

*SHRM reports:*

Beginning on August 10, 2016, Colorado employers will be relieved of the additional state verification and retention obligations related to the Form I-9, Employment Eligibility Verification.

Since January 1, 2007, Colorado employers have been required to verify the work authorization of all newly hired employees—in essence, comply with federal I-9 requirements.

However, Colorado added requirements on top of those for the Form I-9: the completion and retention of a written or electronic version of an entirely separate affirmation form, and retention of copies of the identity and work authorization documents presented by the employee during the I-9 process.

More than 200 employers have been subject to fines under the law and more than 7,000 random audits were conducted. The law called for fines between $5,000 and $25,000.

House Bill 16-1114, signed into law by Governor John Hickenlooper, eliminates the additional verification and retention obligations for Colorado employers. Click [here](https://www.shrm.org/legalissues/stateandlocalresources/pages/colorado-repeals-e-verify-requirement.aspx?utm_source=SHRM%20Workplace%20Compliance%20_%20PublishThis_NewTemplate%20(38)&utm_medium=email&utm_content=July%2001,%202016&MID=00730338&spMailingID=25878095&spUserID=ODM1OTI0NTkxNDES1&spJobID=840164259&spReportId=ODQwMTY0MjU5S0) to read more.

**SB16-179: CDLE Unemployment Insurance Classification**

Under current law, the department of labor and employment (CDLE) determines whether an individual is classified as an employee or an independent contractor for purposes of unemployment insurance eligibility. CDLE has the authority to audit businesses to gather information to assist in making the determination. As it relates to the audit process, the bill requires CDLE to:

* Develop guidance for employers on the statutory factors specified that determine the classification;
* Clarify the process by which an employer or individual may submit further information in response to a determination by the department and prior to an appeal;
* Establish an individual to serve as a resource for employers on certain classification and audit matters;
* Establish internal methods to improve consistency between auditors; and
* Establish an independent review of a portion of audit and appeal results at least twice a year to monitor trends and make improvements to the audit process.

This law takes effect August 10, 2016. Click [here](http://www.legispeak.com/bill/2016/sb16-179) to read more.

**New Colorado Law Grants Employee Access to Personnel Files**

*Jackson Lewis reports:*

Colorado Governor John Hickenlooper has signed into law new requirements specifying when and how private-sector employers must respond to their employees’ requests for inspection and copying of their personnel files. Prior to this law, Colorado had no law granting private-sector employees access to their personnel records.

The new law goes into effect on January 1, 2017. Click [here](http://www.jacksonlewis.com/publication/new-colorado-law-grants-employees-access-personnel-files) to read more.

Advocacy

# Get Involved

SHRM understands how vital member participation is to advancing the views of the profession on Capitol Hill or in state legislatures. The **SHRM Advocacy Team** initiative is designed for HR professionals to participate and influence federal/state public policy and regulatory efforts. As an advocate for the HR community, it is important that you keep your elected officials informed on how public policy issues can affect employees, employers, and the HR profession as a whole.

SHRM provides our members with other opportunities to "put a face" behind HR and to let their voices be heard.  Our Relationship Building Activities with public policymakers include:

* [**Write Your Elected Official**](http://www2.shrm.org/government/writecongress.asp)
* [**Day Inside the Beltway**](http://www.shrm.org/Advocacy/GetInvolved/AdvocacyTools/DayInsidetheBeltway/Pages/default.aspx)
* [**Day Inside the District**](http://www.shrm.org/Advocacy/GetInvolved/AdvocacyTools/DayInsidetheDistrict/Pages/default.aspx)

Reprinted from [www.shrm.org](http://www.shrm.org)

SHRM’s Advocacy App

Use the app to keep up-to-date on all legislative and agency proposals affecting the workplace. Among its features:

* Take Action button: Immediately respond to calls to action on HR-related issues before state or federal lawmakers.
* Lawmaker Directory button: Connect with your state and federal lawmakers.
* Advocacy Team Resources button: Join SHRM's A-Team and access advocacy resources.
* Key Issues button: Get briefings on public-policy issues affecting the workplace and SHRM position statements, as well as talking points on those issues.
* Lawmaker Event Feedback button: Send feedback to SHRM about the result of a meeting or conversation with a lawmaker.
* Spread the Word button: Engage with elected officials and fellow HR professionals on social media.

Click [here](https://www.youtube.com/watch?v=Wo8snlkEhgc&feature=youtu.be) to learn more.

SHRM’s A-Team Advocacy Captains

I am thrilled to announce that we have a full Advocacy Captain team in Colorado! Every United States House and Senate member representing Colorado has a designated SHRM A-Team Advocacy Captain assigned to them to help build a local relationship as well as work with them on employment issues. If you would like to get involved please reach out to the Advocacy Captain for your legislators to let them know!

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News from the Affordable Care Act

# **The ACA’s Health Insurance Marketplace Begins Reaching Out To Employers**

*Fisher Phillips reports:*

Last week, employers began receiving notices from the Federal Health Insurance Marketplace / Exchange regarding employees who applied for Exchange coverage and were determined eligible for a tax subsidy to defray part of the cost. These notices offer employers a first line of defense against penalties under the Affordable Care Act's (ACA) employer mandate. If you receive a notice, you should act quickly to determine whether an appeal is appropriate. Click [here](https://www.fisherphillips.com/resources-alerts-the-aca-s-health-insurance-marketplace-begins-reaching-out-to-employers?click_source=sitepilot06!295!bG1ha2luZW5AcGJzai5jb20=) to read more.

News from the EEOC

**EEOC Issues Position Statement Procedures**

*Jackson Lewis reports:*

The Equal Employment Opportunity Commission has issued its first-ever nationwide [procedures](https://www.eeoc.gov/employers/position_statements.cfm) on respondent position statements and guidance on effective position statements. These procedures, along with the EEOC’s Digital Charge system, make significant changes in some jurisdictions, while formalizing the existing practices in others.

The procedures state that:

1. Charging Parties will have the ability to review position statements after they are filed;
2. Respondents must identify and maintain confidential information provided as part of position statements;
3. Respondents must provide support for any requested extensions of time to submit position statements; and
4. The substance of position statements must meet certain expectations.

Click [here](http://www.jacksonlewis.com/publication/eeoc-issues-position-statement-procedures) to read more.

# http://ts4.mm.bing.net/th?id=HN.607995033649679809&pid=1.7News from the OFCCP

**OFCCP’s New Sex Discrimination Regulations Imposes a Few New Obligations on Employers**

***Jackson Lewis reports:***

The Final Rule on Sex Discrimination from the Office of Federal Contract Compliance Programs recognizes the expanding interpretation of “because of sex” as a basis for discrimination, but does not impose on federal contractors new “equal pay” requirements, a new posting, new subcontract or purchase order updates, or a new tagline on job postings. Instead, the Final Rule updates OFCCP’s 1970’s-era sex discrimination guidelines to reflect changes in attitudes and changes in the law broadly defining “sex” as well as recent interpretations of the OFCCP and the Equal Employment Opportunity Commission. (See, for example, our article, EEOC Stresses Title VII Bars Discrimination against Transgender Workers, Including Regarding Bathroom Access.)

The Rule, published in the *Federal Register* on June 15, 2016, and going into effect on August 15, 2016, addresses areas where OFCCP believes discrimination remains a “pervasive problem,” such as in sex-based occupational segregation (known as “steering”), wage disparities, discrimination based on pregnancy or family caregiving responsibilities, sex-based stereotyping, and sex harassment. The agency addresses those concerns with recommended “Best Practices,” not specific new legal requirements. Click [here](http://www.jacksonlewis.com/publication/ofccp-s-new-sex-discrimination-regulations-imposes-few-new-obligations-employers) to read more.

[](http://www.bing.com/images/search?q=osha&view=detailv2&&id=2F8255636CECA3397B91BCE704B25E899A8F9C86&selectedIndex=7&ccid=PgnyTyQ1&simid=608023510247867644&thid=OIP.M3e09f24f2435fd82f94966b221a07a10o0)

# News from OSHA

## **OSHA Issues New Electronic Recordkeeping Requirements and Creates a New Cause of Action for Employees**

***Ogletree Deakins reports:***

The Occupational Safety and Health Administration (OSHA) has amended its recordkeeping regulation, 29 CFR Part 1904, to require many employers to submit OSHA 300 Logs, OSHA 301 forms, and OSHA 300A summaries to the agency electronically. The amendments, which will be published in the Federal Register on May 12, also include provisions designed to prevent employers from retaliating against employees for reporting work-related injuries or illnesses. To abate alleged violations of these provisions, OSHA may order employers to reinstate employees or pay them back pay. The changes will allow OSHA and other stakeholders—including labor unions and plaintiffs’ attorneys—to access injury and illness data and also create a new cause of action for employees who claim their employer retaliated against them for reporting a work-related injury or illness. The final regulation also raises serious questions regarding whether OSHA has the authority under the Occupational Safety and Health Act to enact these changes. Click [here](http://www.ogletreedeakins.com/shared-content/content/blog/2016/may/osha-issues-new-electronic-recordkeeping-requirements-creates-new-cause-of-action-for-employees) to read more.

# News from the Department of Labor

# **Wage and Hour Division Fact Sheet: Final Rule to Update the Regulations Defining and Delimiting the Exemption for Executive, Administrative, and Professional Employees**

In 2014, President Obama directed the Department of Labor to update and modernize the regulations governing the exemption of executive, administrative, and professional (“EAP”) employees from the minimum wage and overtime pay protections of the Fair Labor Standards Act (“FLSA” or “Act”). The Department published a notice of proposed rulemaking on July 6, 2015, and received more than 270,000 comments. On May 18, 2016, the Department announced that it will publish a Final Rule to update the regulations. The full text of the Final Rule will be available at the Federal Register Site.

Although the FLSA ensures minimum wage and overtime pay protections for most employees covered by the Act, some workers, including bona fide EAP employees, are exempt from those protections. Since 1940, the Department’s regulations have generally required each of three tests to be met for the FLSA’s EAP exemption to apply: (1) the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (“salary basis test”); (2) the amount of salary paid must meet a minimum specified amount (“salary level test”); and (3) the employee’s job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (“duties test”). The Department last updated these regulations in 2004, when it set the weekly salary level at $455 ($23,660 annually) and made other changes to the regulations, including collapsing the short and long duties tests into a single standard duties test and introducing a new exemption for highly compensated employees.

This Final Rule updates the salary level required for exemption to ensure that the FLSA’s intended overtime protections are fully implemented, and to simplify the identification of overtime-protected employees, thus making the EAP exemption easier for employers and workers to understand and apply. Without intervening action by their employers, it extends the right to overtime pay to an estimated 4.2 million workers who are currently exempt. It also strengthens existing overtime protections for 5.7 million additional white collar salaried workers and 3.2 million salaried blue collar workers whose entitlement to overtime pay will no longer rely on the application of the duties test.

### \* Key Provisions of the Final Rule \*

The Final Rule focuses primarily on updating the salary and compensation levels needed for EAP workers to be exempt. Specifically, the Final Rule:

1. Sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, currently the South, which is $913 per week or $47,476 annually for a full-year worker;
2. Sets the total annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally, which is $134,004; and
3. Establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles and to ensure that they continue to provide useful and effective tests for exemption.

Additionally, the Final Rule amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level. The Final Rule makes no changes to the duties tests.

### Effective Date

The effective date of the Final Rule is December 1, 2016. The initial increases to the standard salary level (from $455 to $913 per week) and HCE total annual compensation requirement (from $100,000 to $134,004 per year) will be effective on that date. Future automatic updates to those thresholds will occur every three years, beginning on January 1, 2020.

### Standard Salary Level

The Final Rule sets the standard salary level at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region, currently the South ($913 per week, equivalent to $47,476 per year for a full-year worker).

The standard salary level set in this Final Rule addresses our conclusion that the salary level set in 2004 was too low given the Department’s elimination of the more rigorous long duties test. For many decades the long duties test—which limited the amount of time an exempt employee could spend on nonexempt duties and was paired with a lower salary level—existed in tandem with a short duties test—which did not contain a specific limit on the amount of nonexempt work and was paired with a salary level that was approximately 130 to 180 percent of the long test salary level. In 2004, the long and short duties tests were eliminated and the new standard duties test was created based on the short duties test and was paired with a salary test based on the long test.

The effect of the 2004 Final Rule’s pairing of a standard duties test based on the short duties test (for higher paid employees) with a salary test based on the long test (for lower paid employees) was to exempt from overtime many lower paid workers who performed few EAP duties and whose work was otherwise indistinguishable from their overtime-eligible colleagues. This has resulted in the inappropriate classification of employees as EAP exempt who pass the standard duties test but would have failed the long duties test.

The Final Rule’s salary level represents the most appropriate line of demarcation between overtime-protected employees and employees who may be EAP exempt and works appropriately with the current duties test, which does not limit non-EAP work.

The Department also is updating the special salary level for employees in American Samoa (to $767 per week) and the special “base rate” for employees in the motion picture industry (to $1,397 per week).

### HCE Total Annual Compensation Requirement

The Final Rule sets the HCE total annual compensation level equal to the 90th percentile of earnings of full-time salaried workers nationally ($134,004 annually). To be exempt as an HCE, an employee must also receive at least the new standard salary amount of $913 per week on a salary or fee basis and pass a minimal duties test. The HCE annual compensation level set in this Final Rule brings this threshold more in line with the level established in 2004 and will avoid the unintended exemption of large numbers of employees in high-wage areas who are clearly not performing EAP duties.

### Automatic Updating

The Final Rule includes a mechanism to automatically update the standard salary level requirement every three years to ensure that it remains a meaningful test for distinguishing between overtime-protected white collar workers and bona fide EAP workers who may not be entitled to overtime pay and to provide predictability and more graduated salary changes for employers. Specifically, the standard salary level will be updated to maintain a threshold equal to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region. Similarly, the Final Rule includes a mechanism for automatically updating the HCE compensation level to maintain the threshold equal to the 90th percentile of annual earnings of full-time salaried workers nationally. The Final Rule will also automatically update the special salary level test for employees in American Samoa and the base rate test for motion picture industry employees. The Department will publish all updated rates in the Federal Register at least 150 days before their effective date, and also post them on the Wage and Hour Division’s website.

Regularly updating the salary and compensation levels is the best method to ensure that these tests continue to provide an effective means of distinguishing between overtime-eligible white collar employees and those who may be bona fide EAP employees. Experience has shown that these earning thresholds are only effective measures of exempt status if they are kept up to date.

### Inclusion of Nondiscretionary Bonuses and Incentive Payments

For the first time, employers will be able to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. Such payments may include, for example, nondiscretionary incentive bonuses tied to productivity and profitability. For employers to credit nondiscretionary bonuses and incentive payments toward a portion of the standard salary level test, the Final Rule requires such payments to be paid on a quarterly or more frequent basis and permits the employer to make a “catch-up” payment. The Department recognizes that some businesses pay significantly larger bonuses; where larger bonuses are paid, however, the amount attributable toward the standard salary level is capped at 10 percent of the required salary amount.

The Final Rule continues the requirement that HCEs must receive at least the full standard salary amount each pay period on a salary or fee basis without regard to the payment of nondiscretionary bonuses and incentive payments, and continues to permit nondiscretionary bonuses and incentive payments (including commissions) to count toward the total annual compensation requirement. The Department concludes that permitting employers to use nondiscretionary bonuses and incentive payments to satisfy the standard salary amount for HCEs is not appropriate because employers are already permitted to fulfill almost two-thirds of the total annual compensation requirement with commissions, nondiscretionary bonuses, and other forms of nondiscretionary deferred compensation.

### Duties Tests

The Final Rule is not changing any of the existing job duty requirements to qualify for exemption. The Department expects that the standard salary level set in this Final Rule and automatic updating will work effectively with the duties test to distinguish between overtime-eligible workers and those who may be exempt. As a result of the change to the salary level, the number of workers for whom employers must apply the duties test to determine exempt status is reduced, thus simplifying the exemption. Both the standard duties test and the HCE duties test remain unchanged.

Reprinted from: <https://www.dol.gov/whd/overtime/final2016/overtime-factsheet.htm>.

# **New DOL Rule Gives Agency Broader License to Sue for Pay Discrimination - Federal contractors may now be exposed to more liability**

*SHRM reports:*

Department of Labor (DOL) sex discrimination regulations for federal contractors—updated for the first time in 40 years on June 14—will increase pay discrimination claims, according to management attorneys. The new rule permits comparisons between men and women working in different jobs when determining whether there has been pay discrimination.

“Title VII [of the Civil Rights Act of 1964] limits comparisons to ‘similarly situated’ employees, meaning employees working in the same job, usually in the same facility,” said David Goldstein, an attorney with Littler in Minneapolis. “In the new rule, however, the OFCCP [Office of Federal Contract Compliance Programs] has defined ‘similarly situated’ in a way that would appear to contemplate the possibility of broader comparisons. Contractors will want to be alert to any efforts by the OFCCP to expand on Title VII standards for analyzing claims of pay discrimination.”

“The actual language in the sex discrimination regulations provides the OFCCP with such wide latitude in determining which employees should be considered ‘similarly situated’ that it will be easy for the OFCCP to compare employees who hold jobs that are very much dissimilar in nature,” said Bill Osterndorf, president of HR Analytical Services, a provider of affirmative action consulting services in Hales Corners, Wis.

Expect the OFCCP to rely heavily on its regulatory provisions dealing with compensation in future OFCCP compliance reviews, said Alissa Horvitz, an attorney with Roffman Horvitz in McLean, Va. Government contractors could conduct a self-analysis now, under the attorney-client privilege, to make sure they are complying “before an audit commences,” she said. The rule’s publication also “is an important reminder to all HR professionals, given the increased emphasis placed on pay equity enforcement during audits, of the role that good records play in explaining compensation decisions,” Horvitz added. Click [here](https://www.shrm.org/legalissues/federalresources/pages/dol-rule-gives-agency-greater-latitude.aspx?utm_source=SHRM%20Workplace%20Compliance%20_%20PublishThis_NewTemplate%20(36)&utm_medium=email&utm_content=June%2017,%202016&MID=00730338&spMailingID=25767149&spUserID=ODM1OTI0NTkxNDES1&spJobID=822672599&spReportId=ODIyNjcyNTk5S0) to read more.

[](http://www.bing.com/images/search?q=VETS+100&view=detailv2&&id=81CB5AAAF86E33769B33DBA1DB37D08297E53B70&selectedIndex=2&ccid=QRi/uEHZ&simid=608020838781685130&thid=OIP.M4118bfb841d99b29e0bca21c4404f5e7o0)

In Other News….

## **VETS-4212 Report**

The 2016 filing season for the VETS-4212 will start on August 1, 2016 and ends on September 30, 2016.

NOTE: Any reports entered prior to August 1, 2016 are considered part of the 2015 filing cycle.

* [File VETS-4212 Report](https://vets4212.dol.gov/vets4212)
* 2016 Filing Cycle starts August 1, 2016

If you have any questions about reporting please consult our [Frequently Asked Questions](https://www.dol.gov/vets/contractor/main.htm).

You may also submit your reports via EMAIL: [VETS4212-customersupport@dol.gov](mailto:VETS4212-customersupport@dol.gov)

OR POSTAL MAIL: VETS-4212 Service Center

C/O Department of Labor National Contact Center (DOL-NCC)

15000 Conference Center Drive, Suite B0132

Chantilly, VA 20151

Reprinted from: <https://www.dol.gov/vets/vets4212.htm>.

# Image result for department of justice

# Interesting Cases…

# **Distributed Over Time to Comply with FLSA Retail Sales Exemption**

*SHRM reports:*

The overtime exemption for employees of retail and service establishments does not require that those employees receive minimum pay for each week they work if the minimum is met annually, the U.S. District Court for the Southern District of Florida ruled.

Sean Freixa was a personal vacation consultant for three associated cruise companies, Prestige Cruise Services LLC, Prestige Cruise Holdings Inc., and Prestige Cruises International Inc. (collectively referred to as Prestige), from Dec. 1, 2013, to Dec. 19, 2014. Prestige specializes in cruise services and sales. Freixa sold cruises to the general public and earned commissions from cruise bookings. Each week, Prestige paid Freixa $500 as a fixed salary, and Freixa earned over 60 percent of his pay from commissions, boosting his earnings to $70,343 during his employment.

Freixa filed a federal lawsuit against Prestige claiming that he was not paid overtime wages, despite working 60- and 70-hour weeks, in violation of the Fair Labor Standards Act (FLSA). Prestige filed a motion for summary judgment to have the lawsuit dismissed prior to trial, claiming that Freixa was a commissioned employee and his position fit the FLSA’s retail sales exemption. Freixa argued that the exemption did not apply because he did not receive the minimum pay required and because Prestige did not comply with the record-keeping requirements for the exemption. Click [here](https://www.shrm.org/legalissues/federalresources/pages/commissions-over-time-.aspx?utm_source=SHRM%20Workplace%20Compliance%20_%20PublishThis_NewTemplate%20(36)&utm_medium=email&utm_content=June%2017,%202016&MID=00730338&spMailingID=25767149&spUserID=ODM1OTI0NTkxNDES1&spJobID=822672599&spReportId=ODIyNjcyNTk5S0) to read more.

# **‘I Didn’t Know’ Defense on Overtime Claim Given Some Deference**

*SHRM reports:*

Suppose an employee is nonexempt and that employee works over 40 hours per week. The employee is entitled to overtime. It is a 1 + 1 = 2 equation that unaware employers have repeatedly met with chagrin when served with a lawsuit claiming owed overtime pay. However, one easily overlooked question is, what if the employer didn’t know an employee was working overtime? A 6th U.S. Circuit Court of Appeals decision considered that question. Click [here](https://www.shrm.org/legalissues/federalresources/pages/defense-overtime-claim.aspx?utm_source=SHRM%20Workplace%20Compliance%20_%20PublishThis_NewTemplate%20(36)&utm_medium=email&utm_content=June%2017,%202016&MID=00730338&spMailingID=25767149&spUserID=ODM1OTI0NTkxNDES1&spJobID=822672599&spReportId=ODIyNjcyNTk5S0) to read more.

# **Call Center Employee’s ADA Claims Fail Due to Poor Attendance**

# *SHRM reports:*

An AT&T call center employee could not go to trial on Americans with Disabilities Act (ADA) claims of failure to accommodate, discriminatory discharge and retaliation because of her violation of the attendance guidelines, the U.S. District Court for the Western District of Tennessee ruled. Click [here](https://www.shrm.org/legalissues/federalresources/pages/ada-absenteeism.aspx?utm_source=SHRM%20Workplace%20Compliance%20_%20PublishThis_NewTemplate%20(39)&utm_medium=email&utm_content=July%2008,%202016&MID=00730338&spMailingID=25930583&spUserID=ODM1OTI0NTkxNDES1&spJobID=841013618&spReportId=ODQxMDEzNjE4S0) to read more.

# [http://tse1.mm.bing.net/th?&id=OIP.Mf966c32f8a61bb348d88bbe27edad7cco0&w=300&h=195&c=0&pid=1.9&rs=0&p=0&r=0](http://www.bing.com/images/search?q=department+of+education&view=detailv2&&id=7BCC5D20EB6560A355E0CFE54DB62DE50D6ACCED&selectedIndex=2&ccid=+WbDL4ph&simid=608031421580315456&thid=OIP.Mf966c32f8a61bb348d88bbe27edad7cco0)Education Corner

This section contains educational opportunities pertaining to legal, employment law and legislative issues.

**Understanding the DOL’s New Overtime Rule**

*SHRM*

On Demand

Click [here](https://event.on24.com/eventRegistration/EventLobbyServlet?target=reg20.jsp&partnerref=wc520&eventid=1186073&sessionid=1&key=66FF9E6C3DFE351CAB83500B84CA82D8&regTag=&sourcepage=register) to register.

**What’s Next for FLSA Compliance: Proven Strategies to Minimize Risk**

*SHRM*

July 27th at Noon

Click [here](https://event.on24.com/eventRegistration/EventLobbyServlet?target=reg20.jsp&referrer=&eventid=1217752&sessionid=1&key=6DF8D8DD47E327725BD246087B7999E4&regTag=&sourcepage=register) to register.

If you have knowledge of other employment law and/or legislative educational opportunities, please forward them to [Lara Makinen](mailto:makinen.co.lad@gmail.com) for submittal in the next edition of *Legislative Snippets*.



# Check Out the CO-SHRM Government Affairs Page

Have you been to the CO-SHRM Government Affairs page lately? Here are some of the links you can find at [www.coshrm.org](http://www.coshrm.org) on the Government Affairs page:

**Colorado SHRM**

**State Council**

**Lara J. Makinen, SHRM-CP, PHR**

*Colorado SHRM*

*Legislative Affairs Director*

10900 W. 120th Ave., Unit B7Broomfield, CO 80021

CELL:

(303) 808-4378

E-Mail:

[makinen.co.lad@gmail.com](mailto:makinen.co.lad@gmail.com)

GENERAL INQUIRIES:

[info@coshrm.org](mailto:info@coshrm.org)

* SHRM Government Affairs News
* Back issues of Legislative Snippets
* SHRM Monthly Legislative Update
* Colorado Legislative Information
* Colorado General Assembly Information
* Local Chapter Legislative Affairs Contact Information
* Colorado Voting Information
* As well as numerous internet resource links.

If you have legislative links to share, please send them to [Lara Makinen](mailto:makinen.co.lad@gmail.com) so they can be posted on this resource page as well.

# Let Recruiters Find You!

SHRM’s Resume Center attracts employers who are in search of the best HR candidates. (Your name and your employer’s name can remain anonymous.) Add your resume to the Center and get noticed by employers.

Click [here](http://jobs.shrm.org/?utm_source=HR%20Week%20August%203%202015%20(1)&utm_medium=email&utm_content=August%2003,%202015&MID=00730338&LN=Makinen) for the SHRM Jobs page.

Reprinted from [www.shrm.org](http://www.shrm.org)

# If You Are Certified, You Should Read This:

Many HR professionals are certified and seek to obtain the necessary credits in order to recertify every three years. But, many also do not know simple tricks to help rack up credits in a very easy way. For example, did you know that you can receive credit for:

**Chapter Legislative Affairs Directors:**

**BAHRA:**

Betsy Cohen

[dailyjoy24@hotmail.com](mailto:BHendrick@celaw.com)

**CSSHRM:**

Bernie Maclean

[bernie.maclean@usav.org](mailto:bernie.maclean@usav.org)

**HCHRA:**

Linda Giordano

[idolindac@yahoo.com](mailto:idolindac@yahoo.com)

**MHSHRM**

Colin Walker

[cwalker@fwlaw.com](mailto:cwalker@fwlaw.com)

**NCHRA:**

Franchesca Lata

[flata@msec.org](mailto:DDixon@msec.org)

* attending conferences
* being a member of SHRM
* being a member of the SHRM Advocacy Team
* writing letters to Congress
* participating in certain SHRM surveys
* attending certain webinars
* volunteering with your local SHRM chapter

# Info Calls

Join the Colorado State Legislative Information Calls to get involved and stay informed. Here is a schedule of upcoming calls:**Tuesday, July 19th at 11:30am**

**Tuesday, October 18th at 11:30am**Call Number: (866) 461-6772

Pass Code: 53931909

# Stay Informed…

Here are some resources to help keep you up to date:

[www.whitehouse.gov](http://www.whitehouse.gov)

[www.dol.gov](http://www.dol.gov)

[www.justice.gov](http://www.justice.gov)

[www.supremecourt.gov](http://www.supremecourt.gov)

[www.senate.gov](http://www.senate.gov)

[www.house.gov](http://www.house.gov)

[www.congress.org/news](http://www.congress.org/news)

www.congress.gov

[www.leg.state.co.us](http://www.leg.state.co.us)

[www.colorado.gov/cs/Satellite/CGA-LegislativeCouncil/CLC/1200536089188](http://www.colorado.gov/cs/Satellite/CGA-LegislativeCouncil/CLC/1200536089188)

We’re on the Web!

*Check us out at:*

**www.COSHRM.org**

[www.findlaw.com](http://www.findlaw.com)

[www.realclearpolitics.com](http://www.realclearpolitics.com)

[www.pocketgov.com](http://www.pocketgov.com)

www.legispeak.com

[www.shrm.org](http://www.shrm.org)/advocacy

[www.hrlegalnews.com](http://www.hrlegalnews.com)

[www.blr.com](http://www.blr.com)

[www.elt.com](http://www.elt.com)

**SHRM Express Request: Colorado State Law Resources**

SHRM's Information Center has compiled a variety of online employment law resources applicable to your state. Click [here](http://apps2.shrm.org/HRResources/ExpressRequests.aspx?type=2) to sign up.

SHRM’s Focus on HR video series can be found at: <http://www.shrm.org/multimedia/video/focusonhr/Pages/2012_5_24.aspx>.

If you know of other great resources, please notify [Lara Makinen](mailto:makinen.co.lad@gmail.com) so she can include them in the next *Legislative Snippet**s*