



CALVO FISHER & JACOB LLP

GUAM SAIPAN SAN FRANCISCO



Employment Law Update

SHRM Guam Breakfast Briefing

May 2, 2018

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Disclaimer

Dana is a lawyer. But she isn't necessarily your lawyer. Therefore, please keep in mind:

- Even though we are talking about the law, nothing here is legal advice.
- Nothing here creates an attorney-client relationship between us.
- Rather, I consider all of your questions to be hypothetical and assume that you are asking for a friend.



Final Overtime Rule

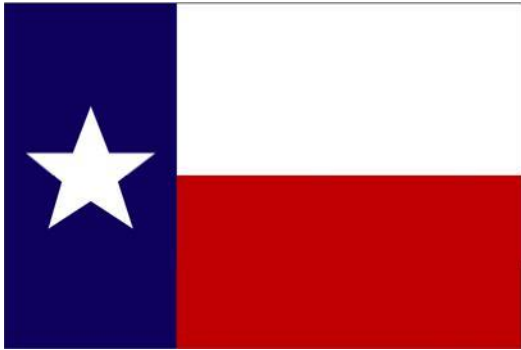
Overtime Rule – Is It Dead?

Remember the 2016 Final Rule?

- Minimum salary level was more than doubled from current \$455 per week (\$23,660 annual) to \$913 per week (\$47,476 annual)
- Provided for automatic increases of the salary levels every three years, beginning 2020
- Effective December 1, 2016

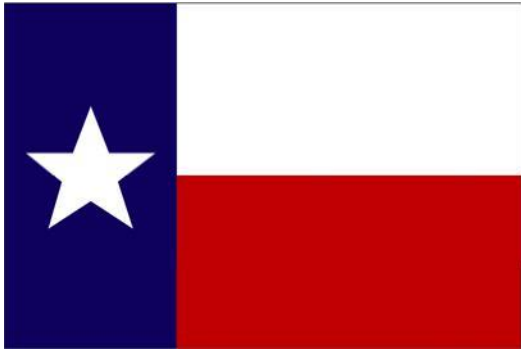


Preliminary Injunction - Texas Court



- District Court (E.D. Texas) granted preliminary injunction on 11/22/16
- DOL appealed to the Fifth Circuit, seeking expedited review before Presidential inauguration
- In its reply brief, DOL asked the 5th Circuit to reaffirm it has authority to adopt a minimum salary test, but not to rule on the \$913 level
- Oral arguments were set for 10/2/2017

Permanent Injunction - Texas Court



- District Court granted summary judgment, permanently enjoining the rule on 8/31/2017
- The court reaffirmed DOL's authority to set a minimum salary level, but found that the \$913 level exceeded DOL's authority by making "overtime status depend on a minimum salary level"
- Appeal of the preliminary injunction was dismissed as moot

Resurrection of Rule?

The Litigation

- In October 2017, DOL appealed the District Court's permanent injunction
- A week later, DOL filed a motion to stay its Fifth Circuit appeal pending the outcome of a new rulemaking
- Appeal is still pending

The DOL

- Issued a Request for Information (RFI) on July 25, 2017, comments due September 25th

The RFI Asked

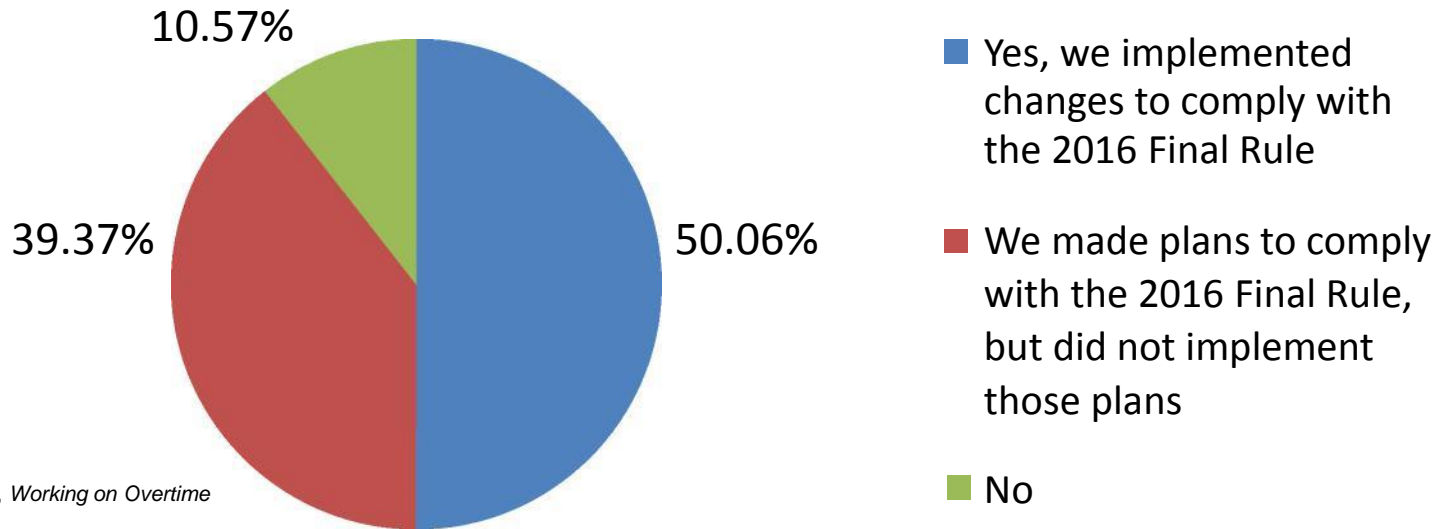
In anticipation of complying with the 2016 Final Rule, did employers:

- Increase salaries or reclassify?
- Decrease hours of newly non-exempt employees?
- Convert worker pay from salaries to hourly wages?
- Change effective hourly rates so total comp remained the same?
- Make changes to workplace policies (e.g., working from home, travel time, smart phones)?



Employer Responses?

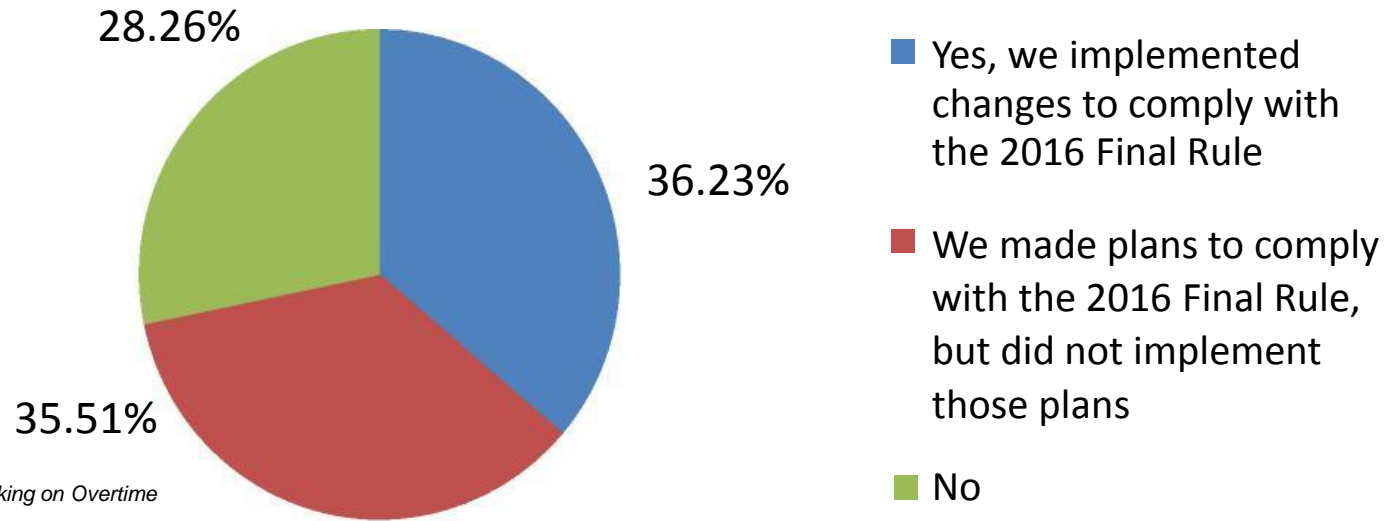
Did your organization take any steps to implement the 2016 Final Rule before it was enjoined?



Tammy McCutchen, *Working on Overtime*

Small Business Responses

Did your organization take any steps to implement the 2016 Final Rule before it was enjoined?



Tammy McCutchen, *Working on Overtime*

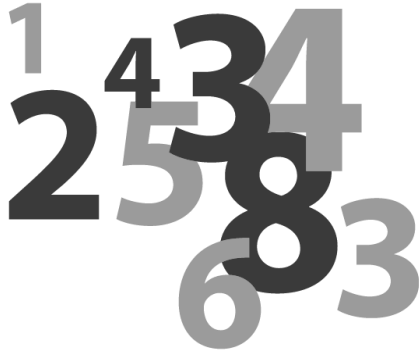
The RFI Also Asked

Should DOL:

- Set the minimum salary level by inflation or using the 2004 methodology?
- If DOL uses either of these methods, would changes to the duties tests be necessary?
- Set multiple salary levels by geography, size of business, or by exemption (exec, admin or prof)?
- Provide for automatic updates to the salary level?
- Adopt a duties-only test?



Comments on the RFI



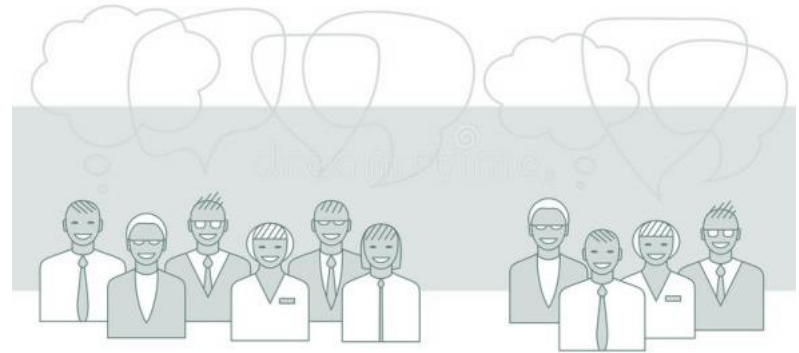
By the numbers:

- 214,444 total
- 140,607 posted @ [regulations.gov](https://www.regulations.gov)
- 134,247 identical comments from employee advocate websites
- 5,071 non-duplicative comments

Comments to the RFI

Employer comments:

- Most support a modest increase to the minimum salary level, using the 2004 methodology, and no changes to the duties tests
- Few supported multiple salary levels, duties-only tests or automatic updates to the salary level



What Should the Salary Level Be?

Applying 2004 methodology

- \$612 per week
- \$31,824 per year

Increase current minimum salary level by level by inflation:

- \$588 per week
- \$30,576 per year

****Most believe will end up around \$30,000 - \$35,000***



What's Next?

DOL reviewing the RFI comments and will publish a new Notice of Proposed Rulemaking

- RFI expected to be published October 2018
- 60 to 90 day comment period
- No final overtime rule this year
- But DOL appeal still pending





Interns under the FLSA

Interns in the Private Sector

- Unpaid internships for public sector and non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible
- But when does the FLSA require “for profit” employers to pay interns?
- If they are deemed to be employees subject to minimum wage & overtime
- DOL Fact Sheet #71 issued in April 2000 contained a 6-part test that many courts rejected as being too rigid because it required that all 6 criteria be met in order for the internship to be unpaid



Primary Beneficiary Test

- January 5, 2018, DOL issued an updated Fact Sheet #71 and adopted a “primary beneficiary test” to determine whether an intern is an employee under the FLSA
- Under the “primary beneficiary test” – is the intern or employer the primary beneficiary of the relationship?



Primary Beneficiary – Seven Factor Balancing Test

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

Primary Beneficiary – Seven Factor Balancing Test

4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship

Primary Beneficiary Test

- Flexible, 7-factor test but does not require each of the factors to be met
- No one factor is determinative; determination will depend on the unique circumstances of each case
- If at least 51% of the benefits go to the intern, then the intern is the primary beneficiary and does not have to be paid
- If not, then the employer must pay the intern, including minimum wage and overtime



Primary Beneficiary Test

- Consider having agreements in place with interns incorporating the language of the 7-part test to ensure a clear understanding of the relationship can be demonstrated without dispute or potential liability





The PAID Program

The PAID Program

Wage and Hour Division (WHD)

PAID Program

The Wage and Hour Division's (WHD) new nationwide pilot program, the Payroll Audit Independent Determination (PAID) program, facilitates resolution of potential **overtime and minimum wage** violations under the Fair Labor Standards Act (FLSA). The program's primary objectives are to resolve such claims expeditiously and without litigation, to improve employers' compliance with overtime and minimum wage obligations, and to ensure that more employees receive the back wages they are owed—faster.

Under the PAID program, employers are encouraged to conduct audits and, if they discover overtime or minimum wage violations, to self-report those violations to correct their mistakes and to quickly provide 100% of the back wages due.



Announced by DOL, the new PAID Program provides employers with a new option for correcting FLSA compliance issues

- **Stands for “Payroll Audit Independent Determination”**
- **Launched April 3, 2018 as a six-month pilot program**

The PAID Program

- **Employer's Obligations:**

- Conduct a self-audit
- Discover overtime or minimum wage violations, self-report
- Work in good faith with DOL to calculate back wages due
- Pay back wages by end of next full pay period after receiving summary of wages from DOL
- Correct issues going forward

- **Not available to employers:**

- With existing DOL investigations
- When private litigation has already been threatened or filed
- With a history of violations

The PAID Program

- **DOL's Commitments:**

- No liquidated damages
- No civil money penalties
- Will issue waiver forms to employees to release right to privately sue for unpaid wages

- **Objectives of PAID Program:**

- Resolve claims expeditiously and without litigation
- Improve employers' compliance with overtime and minimum wage obligations
- Ensure that more employees receive back wages faster

Things That Make You Go Hmm...



- What type of documentation will DOL require?
- What is the impact on attorney-client privilege if employers conduct a comprehensive audit, but bring only a few issues to DOL?
- Will DOL seek two or three years of back wages?
- What if an employee refuses to participate in the PAID program?
- Will DOL examine the employer's records for other violations?



Opinion Letters Reinstated

DOL Reinstates Opinion Letters

Request an opinion letter at www.dol.gov/whd/opinion/

US DEPARTMENT OF LABOR REINSTATES WAGE AND HOUR OPINION LETTERS


WASHINGTON – The U.S. Department of Labor will reinstate the issuance of opinion letters, U.S. Secretary of Labor Alexander Acosta announced today. The action allows the department's Wage and Hour Division to use opinion letters as one of its methods for providing guidance to covered employers and employees.

An opinion letter is an official, written opinion by the Wage and Hour Division of how a particular law applies in specific circumstances presented by an employer, employee or other entity requesting the opinion. The letters were a division practice for more than 70 years until being stopped and replaced by general guidance in 2010.

"Reinstating opinion letters will benefit employees and employers as they provide a means by which both can develop a clearer understanding of the Fair Labor Standards Act and other statutes," said Secretary Acosta. "The U.S. Department of Labor is committed to helping employers and employees clearly understand their labor responsibilities so employers can concentrate on doing what they do best: growing their businesses and creating jobs."

The division has established a webpage where the public can see if existing agency guidance already addresses their questions or submit a request for an opinion letter. The webpage explains what to include in the request, where to submit the request, and where to review existing guidance. The division will exercise discretion in determining which requests for opinion letters will be responded to, and the appropriate form of guidance to be issued.

WHD News Release: 09/27/2017



How to Request an Opinion Letter

Workers	Employers
Are you a Worker? Go to our Worker Resource Page for information on how to file a complaint, workers' rights in specific industries, online advisors, and more.	Are you an Employer? Go to our Employer Resource Page for links to our regulatory library, online advisors, poster requirements, industry specific resources, and more.
Request an Opinion Letter	

DOL Opinion Letters

- Opinion letters address specific questions submitted to the DOL/WHd
- Important form of guidance for employers & employees with respect to FLSA & other wage & hour laws
- Obama Administration stopped the practice of issuing Opinion letters
- New Secretary of DOL announced practice would be reinstated
- DOL reissued 17 Opinion letters previously withdrawn for further consideration by the Obama administration
- The 17 Opinion letters were signed in January 2009 as former Pres George W. Bush was leaving office

January 2009 Opinion Letters Reissued

2009 Opinion Letters - Reinstated

2018 OL #	2009 OL #	Topic	Date	Link
FLSA2018-1	FLSA2009-7	Ambulance personnel on-call time and hours worked	5-Jan-18	(PDF)
FLSA2018-2	FLSA2009-8	Plumbing sales/service technicians and section 7(i)	5-Jan-18	(PDF)
FLSA2018-3	FLSA2009-9	Helicopter pilots and section 13(a)(1)	5-Jan-18	(PDF)
FLSA2018-4	FLSA2009-1NA	Commercial construction project superintendents and section 13(a)(1)	5-Jan-18	(PDF)
FLSA2018-5	FLSA2009-2NA	Regular rate calculation for fire fighters and alarm operators	5-Jan-18	(PDF)
FLSA2018-6	FLSA2009-10	Coaches and the teacher exemption under section 13(a)(1)	5-Jan-18	(PDF)
FLSA2018-7	FLSA2009-25	Salary deductions for full-day absences based on hours missed and section 13(a)(1) salary basis	5-Jan-18	(PDF)
FLSA2018-8	FLSA2009-26	Client service managers and section 13(a)(1)	5-Jan-18	(PDF)

2009 Opinion Letters - Reinstated

2018 OL #	2009 OL #	Topic	Date	Link
FLSA2018-9	FLSA2009-27	Year-end non-discretionary bonus and section 7(e)	5-Jan-18	(PDF)
FLSA2018-10	FLSA2009-29	Residential construction project supervisor	5-Jan-18	(PDF)
FLSA2018-11	FLSA2009-30	Job bonuses and section 7(e)	5-Jan-18	(PDF)
FLSA2018-12	FLSA2009-31	Consultants, clinical coordinators, coordinators , and business development managers	5-Jan-18	(PDF)
FLSA2018-13	FLSA2009-32	Fraud/theft analysts and agents under section 13(a)(1)	5-Jan-18	(PDF)
FLSA2018-14	FLSA2009-33	Calculation of salary deductions and section 13(a)(1)salary basis	5-Jan-18	(PDF)
FLSA2018-15	FLSA2009-34	Product demonstration coordinators and section 13(a)(1)	5-Jan-18	(PDF)
FLSA2018-16	FLSA2009-35	Volunteer fire company contracting for paid EMTs – joint employment and volunteer status	5-Jan-18	(PDF)
FLSA2018-17	FLSA2009-36	Construction supervisors employed by homebuilders	5-Jan-18	(PDF)

January 2009 Opinion Letters *Not* Reinstated

2009 Opinion Letters – Not Reinstated			
2009 OL #	Topic	Date	Link
FLSA2009-24	Premium pay for Sunday and holiday work and fluctuating – workweek method payment	16-Jan-09	(PDF)
FLSA2009-23	Tip credit for dual jobs and related duties under section 3(m)	16-Jan-09	(PDF)
FLSA2009-22	State minimum wage and tip credit under section 3(m)	16-Jan-09	(PDF)



Guam Minimum Wage

Guam Minimum Wage

- Appears stalled
- Back in November 2017, Sen BJ Cruz stated, "I remain committed to it and it will be considered at the appropriate time." - Guam Daily Post
- Based on economic downturn in tourism (e.g., North Korea, declining tourists from Japan)
- Election year... but Senator Cruz said he's likely retiring
- Wait & see

I Mina'Trentai Kuåttro Na Liheslaturan
BILL STATUS

TITLE	DATE INTRODUCED	DATE REFERRED	CMTE REFERRED	PUBLIC HEARING DATE	DATE COMMITTEE REPORT FILED
AN ACT TO REPEAL AND REENACT § 3105 OF ARTICLE 1, CHAPTER 3, TITLE 22, GUAM CODE ANNOTATED, RELATIVE TO RESPONSIBLY RAISING THE MINIMUM WAGE.	2/13/17 1:45 p.m. AS CORRECTED 03/11/17 5:06 p.m.	03/02/17	Committee on Appropriations and Adjudication		





Fair Chances Hiring Process Act (FCHPA)

Fair Chances Hiring Process Act (FCHPA)

Where are we?

- July 13, 2017: Signed into law
- Delays an employer, with 16 or more employees, from asking about an applicant's criminal history until after a conditional offer of employment is made unless an exemption applies
- Restricts the type of criminal information that may be requested as part of the application process (conviction, plea of nolo contendere or deferred adjudication arising from felony/misdemeanor & pending criminal cases allowed)

Fair Chances Hiring Process Act (FCHPA)

Where are we?

- February 8, 2018: FCHPA became effective
- February 12, 2018: Guam DOL held public hearing on proposed Rules and Regs (“R & R”)
- May 3, 2018: Legislative public hearing at 9 a.m.
- Final R & R usually passed by legislature within 90 days
- Interpretation/implementation not clear until final R & R issued because legislature can approve, disapprove or amend proposed R & R

Fair Chances Hiring Process Act (FCHPA)

What is GDOL enforcing pending final R & R?

- GDOL enforcement of best practices pending promulgation of R & R
- Penalties may be waived if employer can demonstrate best practices/good faith
- Deferred adjudication for willful violations until R & R in place

Fair Chances Hiring Process Act (FCHPA)

What do the proposed R & Rs appear to say (as of today)?

- Employer may not make reference to any requirement for police or court clearance in a job advertisement, job posting, interview or any other means prior to extending conditional offer of employment
 - Unless exemption applies
- If conditional offer proffered, written notice must be given to the applicant no later than 15 calendar days after applicant provides police report/court clearance “detailing” the results of the employer’s decision whether to hire or not
- Appears legitimate business reasons must be given when conditional offer rescinded, not upon request for Statement of Denial
 - No specific reference to Statement of Denial

Fair Chances Hiring Process Act (FCHPA)

What do the proposed R & Rs appear to say (as of today)?

- Employer may withdraw conditional offer if applicant fails to submit required police/court clearance within 10 calendar days
- Employer may request additional information from applicant upon receipt of police/court clearance
- Not clear when 90 day period to file administrative complaint commences
 - upon notification of rescission of conditional offer (statute)?
 - upon employer's receipt of police/court clearances (R &R)?
- Also not clear if 90 calendar days or 90 business days?

Sample Best Practices Process

Proposed by: Toney Earl & Elizabeth Speck, PhD

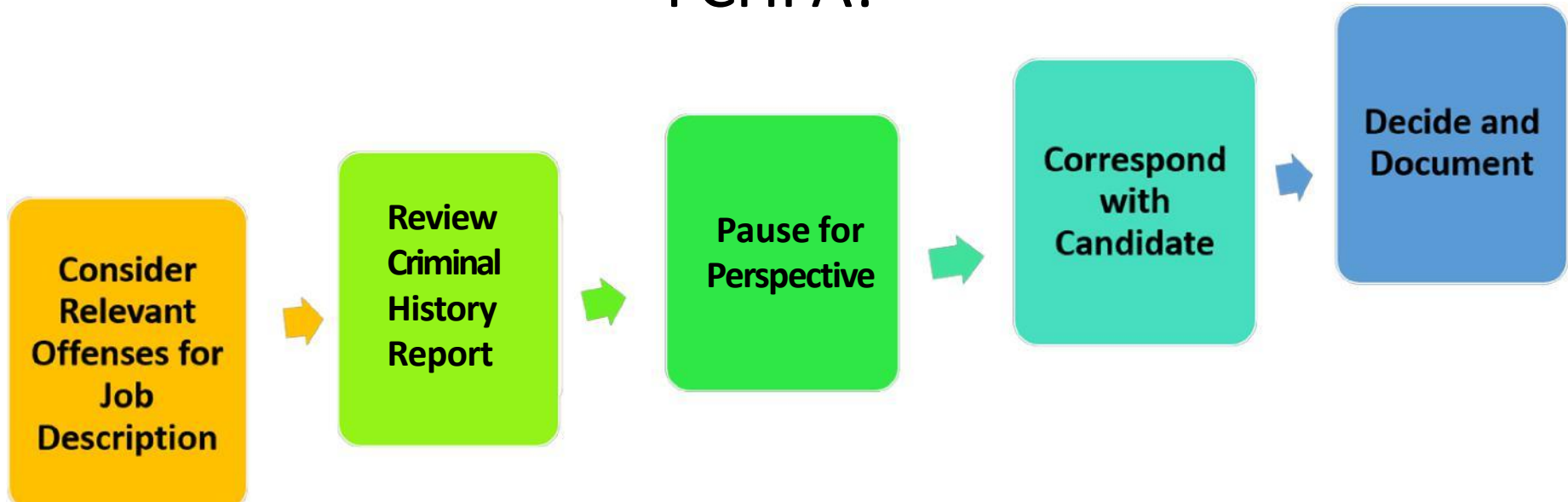


Scenario

Kim is the Human Resources Director for a regional franchise of hardware stores. The franchise owner is hiring for a Store Manager, who will replace a longtime manager who is retiring. This particular store has a need for a new manager who can update operational processes and ensure staff adopt new technology, and who is also proficient at customer service.

Khloe has applied for the job, and is the leading finalist. She has impressed the store team at each step of the interview process with her knowledge and enthusiasm. She holds an Associate's degree in Computer Science, and certificates in Project Management and Forklift Operation. Her experience includes 3 years as a Store Manager for a major technology retail chain, where she earned an Employee of the Year award. She was laid off when the chain was bought out in 2015, and has had a series of part-time hourly wage retail jobs since then.

What process should an employer use under the FCHPA?



Step One

Consider Relevant Offenses for Job Description

The store and its corporate office are in an area that has recently adopted Fair Chance policies for employers. Two months ago Kim attended a SHRM Guam Breakfast Briefing, and since then has guided the company to update its hiring procedures. The company has **taken the criminal record question off of the job application**, no longer runs a credit check on applicants, and only asks about criminal record for candidates who are given conditional offers of employment.

Before posting the job opening, Kim took a fresh look at the Store Manager job description, and noted what kinds of criminal charges would be relevant to the job duties.

Kim's Risk Analysis

Job Duty	Relevant Offenses
Hold keys, open and close store	Theft, Drugs
Manage daily ledger and close out cash register	Theft, Deception
Respond to customer complaints	Assault, Violence

Step Two

Review Criminal History Report

Khloe is given a conditional offer of employment

Kim requests Khloe's references and permission to run a criminal record check

Khloe responds promptly and gives Kim permission

Two days later, Kim receives the following report from the company's Background Screening Provider:

Criminal History Report

Category: Arrest

State: GU

Charges Filed Date: 08/07/2006

Offense Date: 08/04/2006

Offense Type: Misdemeanor

Offense Description: Theft by Receiving Stolen Property

Offense Code: 9 GCA §43.20

Disposition Date: 10/15/2006

Disposition: Conviction, Offender Plead Guilty

Sentence: Probation

Sentence Date: 12/10/2006

Incarceration: N/A

Probation Expiration Date: 12/01/2011

Criminal History Report

Category: Arrest

State: GU

Charges Filed Date: 05/03/2008

Offense Date: 04/30/2008

Offense Type: Felony

Offense Description: Possession of Controlled Substance, Schedule I

Offense Code: 9 GCA §67.401.2

Disposition Date: 08/13/2008

Disposition: Conviction, Offender Plead Guilty

Sentence: Indeterminate

Sentence Date: 09/05/2008

Earliest Release Date: 10/09/10

Max Release Date: 05/01/2016

Incarceration: Mangilao Detention Facility

Parole Date: 10/13/2011

Parole Expiration Date: 05/01/2013

Step Three

Pause for Perspective

Kim's first thoughts:

"&*%#(*!!! She sounded so great!"

"Why didn't she say anything when the owner interviewed her? He's a fair guy."

"She basically lied by not saying anything. Drug addicts lie."

"That explains the spotty job record."

"I can't afford to hire someone and have to fire them."

Consideration

Statistics show that risk of a *new* crime levels out after extended crime-free periods.

7.7 years for Robbery

3.8 years for Burglary

4.3 years for Aggravated Assault

Source: Blumstein & Nakamura, Carnegie Mellon Univ.

<https://www.nij.gov/journals/263/pages/redemption.aspx>

Step Four

Correspond with Candidate

Kim contacts Khloe to discuss the report, and provides her with an opportunity to respond:

Dear Candidate: You recently authorized [Company] to obtain reports about you from a consumer reporting agency. We are considering taking action based on specific information in the report, as attached. We will evaluate the information in your report on an individualized case-by-case basis in accordance with the law. If you believe that there is additional information that may help us better evaluate your fitness for this position, please contact us immediately. You may include evidence challenging the accuracy of the report, demonstrating rehabilitation, or describing mitigating circumstances. A copy of your criminal record report is attached for your review.

Khloe's Response

Dear [Company],

Thank you for your consideration of my application for employment as Store Manager. I am writing in response to your request for further information regarding my criminal record report. I have reviewed the copy you forwarded, and it is accurate.

Between the years of 2005 and 2008, I went through a series of personal setbacks that were interconnected with a drug addiction. My arrest and subsequent conviction in 2008 was a wakeup call, and I underwent treatment while incarcerated. I gained insight into the roots of my struggles with substance abuse, and have been in recovery ever since. I have taken responsibility for my crimes, including paying fines and restitution. I have continued my education and skills training since I came out of prison. I was discharged early from Parole in 2013, and have had no contact with the correctional system since then.

Khloe's "Evidence of Rehabilitation"

Thank you for your consideration and I look forward to hearing from you.

Sincerely,

Khloe

Please see attached:

- Copy of Employee of the Year Certificate
- Letter of Reference from former supervisor
- Letter of Support from former Parole Officer
- Copy of Associate's Degree Diploma
- Copy of Forklift Training Program Certificate of completion
- Copy of Project Management Program certificate (online course)
- Certificate of Completion of Substance Abuse Support Group

Individualized Assessment: FCHPA

The employer's determination of a legitimate business reasons must also be reasonable in light of the following factors:

1. the specific duties and responsibilities necessarily related to the employment sought or held by the person;
2. the bearing, if any, that the open criminal case or criminal history will have on the applicant's fitness or ability to perform one (1) or more such duties and responsibilities;



Individualized Assessment: FCHPA

3. the time which has elapsed since the occurrence of the pending criminal case or criminal history;
4. the age of the person at the time of the pending criminal case or criminal history;
5. the frequency and severity of the pending criminal case or criminal history; and
6. any information produced by the person, or produced on his/her behalf, in regard to his/her rehabilitation and good conduct since the occurrence of the pending criminal case or criminal history.



Decide and Document

Step Five

<i>Offense</i>	Nature/Gravity of Offense	Time of Offense (Time Since Offense)	Nature of Job Sought/ Opportunity
Theft by Receiving Stolen Property	Misdemeanor, Probation	2006 (12 years)	Relevant to access to keys, merchandise, information, and cash
Purchase of Controlled Substance	Felony, Prison	2008/ Released 2010/ Parole until 2013 (9 years)	Drug problems could go to possible theft and deception

Kim's Recommendation

Check one:



Advance in hiring process



Exclude based on criminal record



Request further information

List specific information required to make decision: NA

Fair Chances Hiring Process Act (FCHPA)

What's next?

- Stay tuned
- Don't expect many changes to the proposed R & R, just clarification
- For now, follow best practices



ADA Extended Leave Request

ADA Basics

Key terms:

“Individual with a Disability,” “Qualified Individual,”
“Reasonable Accommodation,”
“Essential Job Functions,” “Undue Hardship”

Good-faith, interactive dialogue

Who? What? When? Where? Why?

Source: “Facts About the Americans with Disabilities Act,” U.S. Equal Employment Opportunity Commission

<https://www.eeoc.gov/eeoc/publications/fs-ada.cfm>

Severson v. Heartland Woodcraft, Inc., 872 F.3d 476 (7th Cir. 2017).

- In early June 2013, Severson took a 12-week medical leave under the Family Medical Leave Act to deal with serious back pain.
- On the last day of his leave, he underwent back surgery, which required that he remain off of work for another two or three months.
- Severson asked Heartland to continue his medical leave, but by then he had exhausted his FMLA entitlement.
- The company denied his request and terminated his employment.
- About three months later, Severson's doctor lifted all restrictions and cleared him to resume work, but Severson did not reapply.

Extended Leave Requests

- Severson sued in the federal district court under the ADA alleging that Heartland should have accommodated him by providing two to three months of additional leave beyond his FMLA entitlement.
- Heartland moved for summary judgment & the district court granted summary judgment holding:
 - Only “qualified” individuals are entitled to reasonable accommodations
 - Whether an employee is qualified is examined at time of the adverse employment action
 - At the time of termination, he was unable to perform some of the essential functions of the position and would remain unable to perform those duties for as long as three months

Extended Leave Requests

- District court holding con't:
 - Accordingly, his request for leave of absence would not have been a reasonable accommodation
- Severson appealed the case to the 7th Circuit Court of Appeals (Illinois, Wisconsin, Indiana)

Extended Leave Requests

- EEOC filed an *amicus brief* arguing that the extended leave was reasonable in Severson's case because (1) it was for a definite period of time, (2) was requested in advance, and (3) would have enabled the employee to return to work
- EEOC argued that the inquiry as to whether an accommodation is reasonable should not focus on the employee's ability to perform the essential functions of the job at the point of termination, but rather, at the end of the requested leave
- The EEOC warned that the district court's focus on Severson's abilities at the time of the termination "would effectively rule out leave as a possible accommodation under the ADA."

Extended Leave Requests

- 7th Circuit rejected the EEOC's argument and held that Heartland was not obligated to provide ADA leave to Severson
 - 1st, the Court characterized the ADA as an “anti-discrimination” statute, not a “leave entitlement” statute
 - 2nd, even though the ADA's statutory text is “flexible” in that the examples of reasonable accommodation are illustrative and non-exhaustive, the statute is clear that it states that a reasonable accommodation is one that enables an employee “to perform the essential functions” of the job
 - 3rd, a leave of absence generally excuses the inability to work, rather than facilitating work
 - 4th, the EEOC confused “reasonable accommodation” with “effective accommodation”

Extended Leave Requests

- 5th, the Court criticized the EEOC's position that the length of leave does not matter
 - ❖ “If, as the EEOC argues, employees are entitled to extended time off as a reasonable accommodation, the ADA is transformed into a medical-leave statute—in effect, an open-ended extension of the FMLA. That’s an untenable interpretation of the term ‘reasonable accommodation.’”
- The Court did not hold that the ADA never requires leave as an accommodation
 - For example, multi-month leave of absence is different from a leave of absence that is “intermittent,” “a couple of days,” or “even a couple of weeks.”
- The Court left open the possibility that some forms of leave may be reasonable

Extended Leave Requests

- September 20, 2017: 7th Circuit issued its decision
- January 18, 2018: Severson petitioned the U.S. Supreme Court for review
 - Because employers are not sure how much leave is required under the ADA and the appeals courts have differing opinions, creating confusion, it was hoped that the Supreme Court would weigh in and clarify how much leave is required
- The 10th and 11th Circuits have issued opinions similar to the 7th Circuit
- April 2, 2018: Supreme Court declined to review case

What Does This Mean for Employers?

- Still uncertainty re: how much leave is required as a reasonable accommodation
- In the 7th Circuit, the law strongly supports an employer's refusal to accommodate multi-month requests for medical leave under the ADA
- Guam falls under the 9th Circuit so decision not binding here
- The 9th Circuit has recognized that an extended medical leave, or an extension of an existing leave period, may be a reasonable accommodation if it does not impose an undue hardship on the employer
- But the burden is still on the employee to establish that medical leave would be a reasonable accommodation

What Does This Mean for Employers?

- The decision may influence other circuits to follow the case and be more restrictive in granting requests for months-long medical leave under the ADA
- Short-term and intermittent medical leave continue to be seen as a reasonable accommodations
- If outside 7th, 10th and 11th Circuits and receive a requests for months-long medical leave,
 - continue to conduct an undue burden analysis in deciding whether the accommodation is reasonable; and
 - discuss with the employee whether there are alternative accommodations that will enable the employee to perform his/her duties

ADA Leave Issues

Best Practices

- Communicate
- Coordinate
- Consider alternatives
- Document
- Be flexible
- Train



Thank you!

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