

## Hot Topics in Employment Law

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### 1. INTRODUCTION

Employment law always has been a complex and ever-shifting landscape of laws, rules, and regulations focused on the one place Americans spend most of their time: work. County governments large and small must contend and comply with these rules on a daily basis. Because of how much of life takes place at work, the biggest social, cultural, and political debates often play out through the development of employment law – this is especially true for government employers and employees.

Three big issues facing county governments today are: The Department of Labor's (DOL) substantial increase in the salary threshold for exemption from overtime under the Fair Labor Standards Act (FLSA), issues arising from employees' ever-increasing use of social media, and the potholes and pitfalls of employee drug testing. In light of these issues, county governments need to know how to handle issues like: should a salaried worker be converted to an hourly worker? Can we discipline an employee for criticizing her boss on social media? Do we have to suspect an employee of using drugs before testing him? This presentation is intended to help county supervisors as they navigate these new and emerging issues.

### 2. THE DEPARTMENT OF LABOR RAISES THE STAKES

The Fair Labor Standards Act of 1938 (FLSA) established the now taken-for-granted forty-hour workweek, minimum wage, and time-and-a-half overtime. The FLSA exempted from these rules “white collar” or “salaried” workers, whose less labor-intensive, higher paid, and guaranteed-salary positions were considered less at risk of the perceived exploitations the act

was enacted to prevent. The essence of the exemption was determining the actual job duties of the proposed exempt employee and her salary. If an employee's salary was high enough, the FLSA's drafters assumed the employee did not need the typical FLSA protections. But how much money is enough? The DOL has, seven times between 1938 and 2004, updated the minimum salary level for the white-collar exemption. Effective from 2004, the salary threshold was \$23,660 per year, or \$455 per week.

On May 23, 2016, the DOL announced it was *doubling* the salary level required to meet the white-collar exemption: The salary threshold now stands at \$47,476, or \$913 per week. The new threshold takes effect on December 1, 2016. If this were not enough, the DOL also set the threshold to increase, *automatically*, every three years beginning January 1, 2020. The sheer magnitude of the increased threshold is enough to substantially impact many county employees, casting expectations aside and portending a significant adjustment period. To comply with the new regulation, county employers will have to grapple with tough decisions about how to treat employees who currently are exempt and whose salary is below the new threshold.

Here are a few things county supervisors should keep in mind as they consider how best to comply with the new regulation. First, county employers need to compile the information needed to make an informed decision. County employers need to know: (1) which employees are affected by this change? (2) how many hours do they work in a week? (3) what are some of the individualized factors that will affect the employee? For example, does a particular employee appreciate being salaried such that she has the flexibility to go pick up her child from school without clocking out and back in?

Second, county employers should consider all the options for compliance. Is there an employee whose salary is close enough to \$47,476 that a small bump won't bust the budget?

Would it be simpler to keep paying the employee a salary, but begin paying overtime for hours worked beyond forty in a week? This might be easier, but could end up busting the budget more than a salary increase. Further, if utilizing “fluctuating workweek overtime,” a special and less expensive hybrid of salaried and hourly classifications, county employers must take care to compute correctly the employee’s hourly rate and compensation. Conversely, might it be easier merely to limit the employee’s hours to forty per week? This is a simple solution, but what if the employee is needed at a time or for an emergency that occurs after she has already worked forty hours? County employers, unlike private employers, also have the option to provide employees with “compensatory time,” or additional paid time off for hours worked in excess of forty in a given week. This is not a perfect solution, either, because at some point the employee either must be allowed to take time off with pay or be paid for the accrued compensatory time.

Third, county employers should prepare for the three-year threshold increases. It might not be best to increase an employee’s salary, only to have the goalposts moved again on January 1, 2020. On the other hand, is there an employee currently making just above the new threshold? She very easily could fall below the new threshold in three years.

In sum, the time to gather information, prepare, and plan for the shift is now, so that when December 1, 2016 arrives, county employers will be ready.

### 3. OVERSHARING ON SOCIAL MEDIA

Almost everyone either uses or consumes social media. Facebook is the most popular social network and is a platform where people share a huge amount of information about their lives. Since many people spend many hours at work, it should come as no surprise that occasionally employees share matters involving their jobs on social media. Most employers, government and private, readily can identify some problems with this: If one employee insults another on social media, it is doubtful that dispute will stay out of the workplace. Worse yet,

what if an employee makes openly insubordinate or mean-spirited comments about her boss or supervisor? Is discipline always appropriate? And how can discipline be managed?

County employers, unlike private employers, also must contend with the fact that the First Amendment provides a measure of protection to employee speech. For any given statement, writing, or other expression of an employee, whether made on social media or elsewhere, courts use a two-part test: First, was the employee's speech made in her capacity as citizen and on a matter of public concern? Second, if so, does the government employer's interest in controlling the speech outweigh the public interest in allowing the employee to make the speech? A recent Mississippi lawsuit, *Graziosi v. City of Greenville* is a good example of how these cases can occur – and how they may be resolved.

Susan Graziosi, a twenty-five year veteran of the Greenville Police Department, learned upon her return to work for an unrelated suspension that the Department and its Chief had not provided transportation for other officers wishing to attend an out-of-town funeral for a fallen officer of another jurisdiction. At issue was the apparent basis of the Chief's decision: That due to budgetary constraints, officers could not use their own patrol cars to drive to the funeral and that no other city-owned and funded vehicles could be used for travel to the funeral. Angry at the Chief's decision, Graziosi took to Facebook, making a series of posts on her personal page and on the Mayor's public page criticizing the Chief's decision with regard to the use of the vehicles, ranting that he lacked leadership ability, and vowing that her criticism of his leadership ability would continue even as she continued to work for the Department and Chief. The Department concluded her statements violated, among others, departmental policies against insubordination and terminated her employment. Graziosi sued the City, claiming her Facebook posts were speech protected by the First Amendment. Applying the test described above, the

Fifth Circuit concluded that Graziosi was in fact speaking as a private citizen. Specifically, the Supreme Court has emphasized that a government employee's speech typically is considered that of a private citizen, *unless* that person's actual job duties include speech – which Graziosi's did not. The Fifth Circuit continued, however, characterizing the speech itself as comprised not only of criticism of the Chief's decision to deny officers the use of the patrol cars, but also a frontal attack on his ability to lead the Department and its officers. That is, Graziosi's criticism about the use of the patrol cars arguably could be of public concern, but her attack on the Chief's leadership ability meant her speech primarily was an openly insubordinate criticism of her superior officer – which was *not* a matter of public concern. For this reason, the Fifth Circuit concluded that such speech was not a matter of public concern and thus not protected. Even assuming the speech was protected, the Fifth Circuit continued by concluding that police departments, as paramilitary organizations, have a unique need for high morale and respect for superior officers in order to perform its duties. This need, thus, outweighed any interest Graziosi had in sharing her criticisms of the Chief with the public.

So what should county employers make of this decision? First, and most importantly, most speech made on social media by employees likely will be considered as having been made in the employee's capacity as a private citizen. As described in *Graziosi*, the mere fact that an employee is a government employee, or even that she identifies herself explicitly as a government employee, is not enough to establish that the speech is being made as an employee rather than a citizen. On the other hand, matters of public concern are not always as broad as they may seem. As the *Graziosi* Court noted, criticizing a police chief for a decision he made or his leadership ability touches on issues of concern to the public, to whom officials such as police

chiefs are accountable, but this alone does not make such criticism speech on a matter of public concern.

#### 4. DRUG TESTING

For some time, employers public and private have grappled with how to manage employees who they suspect of using drugs or being under the influence of drugs while at work. As with social media and other speech, government employers are subject to constitutional limitations on their ability to test employees for drugs. The courts consistently have held that any drug test, which typically involves collection of a sample of urine, blood, breath, hair, or other bodily fluid is a “search” within the meaning of the Fourth Amendment. Consequently, a drug test is subject to analyzing whether the employee’s privacy interests outweigh the government employer’s legitimate interests in maintaining a drug-free workplace and workforce.

In light of this, county employers may wonder whether they can conduct random drug-testing or if they must have some suspicion of a particular employee. Further, how suspicious must an employee’s behavior be to permit a non-random test? The basics are that random drug testing is permitted only for employees whose job functions are “safety-sensitive.” That is, the employee’s regular job functions must implicate the safety of the public. A common gray area is that of driving. A school bus driver, for example, drives every day and driving is an integral part of the job, which means random drug-testing of bus drivers likely is permissible. Other employees, however, may only occasionally be required to drive on county business and random testing of those employees may not be constitutionally permissible. As might be expected, there is no clear line dividing “safety-sensitive” employees and others. Some courts have held that elementary school janitors are in “safety-sensitive” positions because they use power tools and hazardous chemicals on the job, but also because they work around small children. Other courts have found that certain maintenance professionals, even those who work on equipment used by

the public such as public transit tracks, are *not* safety-sensitive because they are closely supervised in their work and individual suspicion would be easier to discern for non-random testing.

The other major issue with drug testing concerns how much individualized suspicion a government employer must have to drug test a particular employee. The first common question is whether a supervisor's "hunch" that an employee is on drugs is enough – it is not. The supervisor must be able to identify specific facts and reasonable inferences from those facts to support a drug test of the employee. Such specific facts might include: Actually witnessing the employee using or possessing drugs, actually witnessing the employee acting consistent with the symptoms of drug use, witnessing the employee acting erratically, discovery of an arrest or conviction for drug use, possession, or distribution, discovery that the employee tampered with a prior drug test, or information provided by reliable sources. The last set of facts is the most complex. How "reliable" must a tipster be before an employer may act on the tip? Must the employer independently corroborate the tipster's information, or attempt to, before requiring the test? Yet again, there is not a simple rule. Even if the tipster is known to be reliable or credible, the tipster may not have enough knowledge or understanding of drug use that their account can be trusted.

In sum, county employers should maintain a fair and transparent random drug-testing policy which applies to safety-sensitive positions. Likewise, county employers should develop a policy and process for individual drug testing that involves careful corroboration of both supervisors' observations and tips from other individuals.