HR Answers

June 2016

HR advantage

ANSWERS, Inc.

Table of Contents

Portland Office
7650 SW Beveland Street
Suite 130
Tigard, OR 97223
(503) 885-9815

Willamette Valley Office
7287 Park Terrace Dr. NE Ste. 101
Keizer, OR 97303
(503) 463-7269

HR Answers
HR ANSWERS, Inc. advantage
June 2016

DEPARTMENT OF LABOR RELEASES FINAL RULE: OVERTIME CHANGES

Perhaps you have heard by now, but if you have not, it is time to pay attention to overtime!

Rule effective date: December 1, 2016. According to the Labor Department, the changes to the Labor Department's overtime rule are to simplify and modernize the nation's overtime regulation − to ensure that extra work means extra pay. There is a misperception out there that there is only one way for employers to comply with our new overtime rule when they have white-collar employees who earn less than $47,476 per year: change them from salaried to hourly employees. That is just not true. We want to give you other options. You may not like them any better, but you do have choices.

Raise salary and keep the employee exempt from overtime: Employers may choose to raise the salaries of employees to at or above the salary level to maintain their exempt status, if those employees meet the duties test (that is, the duties are truly those of an executive, administrative or professional employee). This option works for employees who have salaries close to the new salary level and regularly work overtime.

Pay overtime in addition to the employee's current salary when necessary: Employers also can continue to pay their newly overtime-eligible employees the same salary, and pay them overtime whenever they work more than 40 hours in a week. This approach works for employees who generally work 40 hours or fewer in a typical workweek, but have occasional spikes that require overtime for which employers can plan and budget the extra pay during those periods. Remember that there is no requirement to convert employees from salaried to hourly in order to calculate their overtime pay!

Evaluate and realign hours and staff workload: Employers can ensure that workload distribution, time and staffing levels are all managed appropriately for their white-collar workers who earn below the salary threshold. For example, employers may hire additional workers, decide some reports are need only on a quarterly basis instead of every month, etc.

The overtime rule broadens the definition of salary basis to allow nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary test requirement. We don't have much information about how this is calculated or how often the extra money must be paid, so we urge your caution on this one.

As we've said before: Nothing in the Fair Labor Standards Act – or in the overtime rule – requires the choice between flexible work arrangements or opportunities for career advancement and complying with basic labor standards. There is no requirement that a worker must have a predetermined schedule, and nothing prohibits working whenever, wherever or however you and your employee agree.

Finally, although the FLSA requires that employers keep certain records to ensure that workers get paid the wages they earn and are owed, it's up to you to choose the method that works best for you and the needs of their workforce. There's no requirement that employees "punch in" and "punch out." Employers have flexibility in designing systems to make sure appropriate records are kept to track the number of hours worked each day. Here is some special information for different employers.

- Guidance for employers in the private sector
- Guidance for employers in the nonprofit sector
- Guidance for employers in higher education

HR Answers, Inc. will be holding free workshops over the coming months to discuss ways you can prepare and plan for this change. And if you want personalized assistance, please give us a call.

Dates:

July 7, 2016, 8:30-10:30am
August 11, 2016, 2:30-4:30pm
September 15, 2016, 8:30-10:30am
October 13, 2016, 2:30-4:30pm
November 10, 2016, 8:30-10:30am

Please visit our website for registration.

Portland Office
7650 SW Beveland Street
Suite 130
Tigard, OR 97223
(503) 885-9815

Willamette Valley Office
7287 Park Terrace Dr. NE Ste. 101
Keizer, OR 97303
(503) 463-7269

WHEN AN APPLICANT OR EMPLOYEE LIES

Whether the state of the economy is causing desperation in candidates or we are experiencing a surge of dishonest people, resume and application fraud is increasing. These lies can be as small as incorrect dates of employment to an entire resume filled with falsified work history, education, and skills. Employers expect small embellishments, but finding outright lies on applications is too much. Whether it is the cost or a timing concern, background checks are not done as often as they should be and some say don't produce enough information. If these last observations are true; how can an employer protect itself from hiring dishonest people or a negligent hiring claim?

Negligent hiring occurs when an employer knew or should have known that an employee poses a threat, thus the organization is held responsible for the actions of the employee on the job. Organizations should be checking references to ensure that they are not hiring employees who are likely to harm clients or other employees. However, employers worry they will be sued for libel if they provide information during reference checks, so they provide no information at all. With the challenge of not getting information, avoiding negligent hiring becomes more difficult. Furthermore, the Fair Credit Reporting Act requires the employer to have the applicant sign a release if a third party will be used in obtaining a background check.

Though the task seems daunting, with sound recruiting and selection policies and procedures, protection against dishonest employees and libel suits is possible. Start by requiring all applicants interested in your organization to fill out an employment application. This application should include all necessary federal, state, and local regulations, a disclaimer that the applicant must sign stating the information given is accurate and truthful, and a release from liability due to damaging information that may arise from reference checks. Having these in place helps to discourage those applicants who have something to hide. Reviewing the application for certain critical points can help identify a dishonest candidate. The following is a list of red flags to look for on applications and resumes:

- Applicant does not sign application.
- Applicant does not sign consent for background screening.
- Applicant fails to explain why he or she left past jobs.
- Applicant fails to explain gaps in employment history.
- Applicant leaves out short-term jobs in work history.
- Applicant gives an explanation that doesn't make sense for an employment gap or reason for leaving a previous job.
- There are excessive cross-outs and changes on application.
- Applicant fails to give complete information.
- Applicant fails to indicate or cannot recall the name of a former supervisor.
- Resume includes falsified degrees or level of education obtained.
- Job responsibilities, skills, and titles held are falsified.
- *Remember!* A question on the employment application about criminal convictions is not longer allowed.

The above items signal the need for further probing during the interview with the candidate.

While the employment application is a good starting point for avoiding negligent hiring, it's not enough. All employment and personal references should be checked. If you are able to obtain information on past performance, this information is one of the greatest indicators of future performance. Ask the applicant who you can actually speak with to get previous job information.

Negative information gathered during a reference check cannot serve as an automatic dismissal of the candidate. It is important to perform an analysis of the information received to ensure it is applicable to the job and situation. A policy for handling this information and documentation should be established in order to ensure uniformity, privacy, and legal compliance. This policy should be strictly enforced, especially when the negative information involves a criminal record (remember, not all criminal information can be grounds for denying employment).

Your responsibility, as an employer, does not stop after the person has been hired. If you follow the above, you will be able to show that you have demonstrated good faith efforts up to the point of hire. You must continue these efforts while employees are working for you. Reviewing your employees' performance and skills can show if they were honest in what they could accomplish. Documenting these

Editor: Deborah Jeffries, PHR, CPC. Advantage is published monthly and is designed to provide information on regulations, HR practices and management ideas and concerns. The intended audience is managers, supervisors, business owners, human resource and employee relations professionals. If you have questions about the content, an opinion about the information, questions about your subscription, or if you need additional Advantage binders, please give us a call at (503) 885-9815 or e-mail djeffries@hranswers.com.

reviews can provide the paper trail that you continued to watch for negligent hiring. If inconsistencies are found, or if you discover your employee has lied, regardless of when it is discovered, in most cases this is grounds for termination. You must analyze the severity of the lie and be consistent in handling all such situations.

Sound hiring practices and good faith efforts can lead to protection against negligent hiring. This can also protect your organization from losing assets through fraud and ignorance of employees. It makes good business sense to thoroughly check out all potential candidates. In cases where a fraudulent employee surfaces, consistent, immediate termination, for almost any lie, is the safest course of action. And one last comment, both Oregon and Washington have laws that protect employers from liability as long as the information they are providing in the reference is factual. Call us if you have questions about these laws.

POWER IN THE WORKPLACE

Usually we broadly define power as someone or something that possesses or exercises authority or influence (potentially over another). So in essence, when we use our power we are trying to get something.

Everyone has power. ***Everyone***. And, power does not have to be a bad thing. The issue becomes what kind of power a person has and how someone uses that power matters. Here is a look at the common types of power found in the workplace.

- Coercive power is associated with people who are in a position to punish others. There can be threats associated with this – or the perceived element of a threat. People fear the consequences of not doing what has been asked of them.
- Connection power is based upon who you know. This person knows, and has the ear of, other powerful people within the organization and outside too.
- Expert power comes from a person's expertise. This is commonly a person with an acclaimed skill, talent or accomplishment.
- A person who has access to valuable or important information possesses informational power.
- Legitimate power comes from the position a person holds. This is related to a person's title and job responsibilities. You might also hear this referred to as positional power.
- People who are well-liked and respected can have referent power.
- Reward power is based upon a person's ability to bestow rewards. Those rewards might come in the form of job assignments, schedules, pay or benefits.

So no more saying "I don't have any power." As you can see, there are lots of different ways power can manifest itself. And for that reason, it's important to realize that power exists in *all of us*. It's also possible that you have different kinds of power with different groups or situations. This is an important conversation to have with your leads, supervisors and managers. Appropriate usage of power is a good thing.

HR BY THE NUMBERS

Robotics and automation will play a big role in tomorrow's workforce. According to the technology research firm Gartner, by the year 2018 we can expect more than 3 million workers globally to be supervised by a roboboss.

Fifty-three million Americans, or 34% of the workforce, holds a freelance job. Approximately 68% of those freelances earn extra income, while the remaining 42% do it to have a flexible schedule.

It's predicted that, this year, 63 million Americans will be working in a virtual or flexible role, up sharply from 2010's 34 million.

These statistics show us that the definition of talent is changing. With it organizations must adjust their recruiting strategies and practices to align with the new workforce. It also means that organizations must make this transformation a priority or risk losing top talent to their competitive set. The conversation starts with redefining talent needed.

According to the US Bureau of Labor Statistics 20% of Americans 65 or older are working.

CENTRALIZE PAY DECISIONS IN RESPONSE TO CALIFORNIA'S NEW FAIR PAY LAW

California's newly amended Equal Pay Act will, as a practical matter, require employers to centralize their pay decisions more than in the past. The amended law has eliminated the requirement that plaintiffs alleging pay discrimination work in the same establishment as the individuals whose pay is perceived as unlawfully higher. Now employers with multiple facilities will have to defend themselves from claims that there are wage disparities across the state.

Attorneys anticipate that this will result in an increase in litigation is this area. One class action already has been brought and settled by five female lawyers against Farmers Insurance.

While summary judgment used to be easy for employers to obtain against state Equal Pay Act plaintiffs, the substitution of the phrase "substantially similar work" in place of "equal work" in the amended law, which took effect Jan. 1, will make it much harder for employers to prevail.

The old law provided that an employer could not pay an employee at a wage rate less than that paid to a worker of the opposite sex in the same establishment for equal work when doing equal jobs. Now, in addition to the "same establishment" provision being eliminated, employees need only show there was "substantially similar work."

So, minor differences in skill, effort and responsibility no longer will be relevant. And the focus is on the duties actually performed, not the job description. The work performed must be viewed as a composite of skill, effort and responsibility under similar working conditions.

Let's define a couple of words. "Skill" is measured by factors such as experience, ability, education and training required to perform the job. "Effort" is the amount of physical or mental exertion needed to perform the work. "Responsibility" is the extent to which the employee works without supervision and the impact of the employee's exercise of his/her job functions on the employer's business.

To determine whether jobs are substantially similar, the focus is on whether the positions have primary duties in common. So, additional secondary duties do not necessarily disqualify jobs from being substantially similar.

Here are several compliance recommendations for your consideration - employers should:

- Develop job-related standards for setting wage rates.
- Implement effective record-keeping of employees' education, experience and training.
- Develop and implement management training.
- Identify and address the use of discretion or subjective decision-making in the setting of pay.
- Document the basis for pay decisions.
- Place controls on management discretion in setting pay.
- Be sure you have identified and eliminated prohibitions on discussing pay.
- Understand that compliance must be ongoing, which may require pay audits at intervals.
- Make sure your job descriptions are accurate and that they identify any substantive differences in responsibility and qualifications as needed.

HRA HAPPENINGS

Recently HR Answers participated in a Thought Leaders Forum and the discussion was on Workplace Culture. The Event was sponsored by The Portland Business Journal. There was a write up covering the dialog in the Journal on June 3, 2016. To read about the conversation click here:http://www.bizjournals.com/portland/feature/table-of-experts/thought-leader-forum-workplace-culture.html

OSHA ELECTRONIC TRACKING

The new rule, which takes effect Jan. 1, 2017, requires certain employers to electronically submit injury and illness data that they are already required to record on their onsite OSHA Injury and Illness forms. Analysis of this data will enable OSHA to use its enforcement and compliance assistance resources more efficiently. Some of the data will also be posted to the OSHA website. OSHA believes that public disclosure will encourage employers to improve workplace safety and provide valuable information to workers, job seekers, customers, researchers and the general public. The amount of data submitted will vary depending on the size of company and type of industry.

The rule also prohibits employers from discouraging workers from reporting an injury or illness. The final rule requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation; clarifies the existing implicit requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and incorporates the existing statutory prohibition on retaliating against employees for reporting work-related injuries or illnesses. **These provisions become effective August 10, 2016.**

The new reporting requirements will be phased in over two years. Organizations with 250 or more employees in industries covered by the recordkeeping regulation must submit information from their 2016 Form 300A by July 1, 2017. These same employers will be required to submit information from all 2017 forms (300A, 300, and 301) by July 1, 2018. Beginning in 2019 and every year thereafter, the information must be submitted by March 2. We suggest that employers speak to their workers comp insurance provider to ask their assistance in meeting the new requirements.

Establishments with 20-249 employees in certain high-risk industries must submit information from their 2016 Form 300A by July 1, 2017, and their 2017 Form 300A by July 1, 2018. Beginning in 2019 and every year thereafter, the information must be submitted by March 2. We suggest that employers speak to their Workers Comp Insurance provider to ask their assistance in meeting the new requirements.

HR LINK

New EEOC document addresses accommodation issues related to leave and disability.

The U.S. Equal Employment Opportunity Commission (EEOC) issued a new resource document that addresses the rights of employees with disabilities who seek leave as a reasonable accommodation under the ADA. The document is titled Employer-Provided Leave and the Americans with Disabilities Act.

According to the EEOC, disability charges filed with the agency reached a new high in fiscal year 2015, increasing over 6% from the previous year. The ADA requires employers to provide reasonable accommodations that allow people with disabilities to perform the essential functions of their jobs, unless they would pose an undue hardship for the employer.

EEOC regulations provide that reasonable accommodations may include leave, potentially including unpaid leave that exceeds an organization's normal leave allowances.

This resource is intended to help educate employers and employees about workplace leave under the ADA to prevent discriminatory denials of leave from occurring. The document creates no new agency policy, but it is one in a series of EEOC Resource Documents that explains how existing EEOC policies and guidance apply to specific situations. Additionally, the document:

- Responds to common questions employers and employees have raised about leave requests that concern an employee's disability.
- Consolidates existing guidance on ADA and leave into one place, addressing issues that arise frequently regarding leave as a reasonable accommodation, including the interactive process, maximum leave policies, "100 percent healed" policies, and reassignment.
- Provides numerous examples that illustrate existing legal requirements and obligations for both employees and employers

We find this to be a great resource and suggest that employers print it out and keep it handy.

Q & A

Q: Do insubordinate employees deserve a second chance? When does insubordination warrant termination?

A: There is no blanket answer to that question, since so much depends on context, but in many cases, workers should be given a second chance. Not all insubordination is created equal. For example, an employee cursing out his supervisor in the presence of coworkers may not be comparable to an employee refusing to sign a disciplinary action when required to do so. Employers must show three things to prove insubordination when a person refuses to follow a directive. These include:

- A supervisor made a direct request or order.
- The employee received and understood the directions.
- The worker refused to comply through action or noncompliance.

In some cases, one person may be fired for insubordination while another isn't because of the discharged person has a history of disciplinary issues and the other individual does not. We recommend that if a situation has gotten so tenuous that insubordination is on the table that is wise to inform the employee that "failure to comply with the request/order will be seen/viewed as insubordination." This way there can be no denying what is meant and what comes next.

Insubordination is one of the rare instances where differential treatment may be warranted, as long as it's done for legitimate reasons. Consider less-severe measures for a first-time offense. There are a number of options that are harsh, such as suspension without pay, that are effective disciplinary measures that are less lasting then termination. Corrective action less severe than termination can curb the conduct, but allow for course correction by an employee.

THOUGHTS TO THINK ABOUT

It is easier to do a job right than to explain why you didn't.

— President Martin Van Buren

When given an opportunity, deliver excellence and never quit.

— Robert Rodríguez

One man with courage is a majority.

— President Thomas Jefferson

A prudent man foresees the difficulties ahead and prepares for them; the simpleton goes blindly on and suffers the consequences.

— Proverbs 22:3

The only man who makes no mistake is the man who does nothing.

— President Theodore Roosevelt

Creativity, as has been said, consists largely of rearranging what we know in order to find out what we do not know. Hence, to think creatively, we must be able to look afresh at what we normally take for granted.

— George Kneller

Always vote for principle, though you may vote alone, and you may cherish the sweetest reflection that your vote is never lost.

— President John Quincy Adams

Hard work is a prison sentence only if it does not have meaning.

— Malcolm Gladwell

The greatest defeat of all would be to live without courage, for that would hardly be living at all.

— President Gerald R. Ford

FOR YOUR CALENDAR

Open up your Daytimers, Outlook, Palm Pilots, and all those Smart Phones. The following is a look at upcoming events, special days and other diverse and fun activities you will want to be aware of and get scheduled. ***To register for our workshops, please call any of our offices, or send an e-mail to Anna Loughlin at*** aloughlin@hranswers.com, ***or fax it to (503) 352-5582.***

JUNE

National Safety Month, Caribbean-American Heritage Month, Men's Health Month, and Cataract Awareness Month

June 29 — HR Lunch Bunch – Salem
Disaster Preparedness
12noon- 1pm

June 29 — HRA/UEA Workshop – UEA Office – Portland
First Aid/CPR
9:00am – 1:00pm
UEA Building, 906 NE 19th Ave, Portland
To register, call Rachel at (503) 595-2095, email us at rtroutt@ueainc.com, or visit our First Aid/CPR training page.

Coming Up:

July 4 — HRA Offices will be Closed

June 6 — HR Lunch Bunch – HRA Office - Tigard
Diversity and Inclusion
12noon – 1pm

July 14 — HRA Workshop – Tigard
The Changing Nature of Work
8:30 am- 10:30 am

July 20 — HRA Workshop – Tigard
Internal Investigations
8:30 am- 10:30 am

July 27 — HR Lunch Bunch – CCBI – Salem
Diversity and Inclusion
12noon-1pm

Planning Ahead:

August 3 — HR Lunch Bunch – HRA Office – Tigard
12pm-1pm

Sept 27-Nov 1 — HRA Workshop Series— Tigard
Supervisory Success
8:30am – 12:30pm

August 31 — HR Lunch Bunch – CCBI – Salem
12pm-1pm

ON MY SOAPBOX

Several Soapboxes ago I wrote about thinking about thinking. I don't mean it to sound convoluted, but the idea was do we ever think about how we think so that we better understand where our thoughts and biases come from.

In this Soapbox I want to share with you some observation about instinct, the "gut" that talks to us so forcefully. One of my favorite shows on TV is NCIS. It is the number one TV show in the world. The cast is beloved by millions of people. If you are one of those fans, you know well that Gibbs (Mark Harmon) is known for his gut. It tells him if someone is being honest, if someone is likely to be the culprit, if something is off kilter. His staff learns about his famous gut and asks him what is it saying to you about this situation.

As I was watching reruns (isn't that pathetic – I prefer the reruns of NCIS to many of the new shows that are on … I know them so well that I can almost speak the lines with the cast). That particular episode had several instances of Gibb's gut. I got to thinking about how he sensed those things. And then I remembered my book Blink! by Malcolm Gladwell. I went to find the copy and see if I was correct about him writing about that subject. There it was on page 176 when he was writing about Gift of Expertise. He tells the story of two expert food tasters and what it has taken for them to become known as the best at what they do. In this chapter he states that we/everyone knows what they like and dislike. Whether it is Miracle Whip or mayonnaise, we have a preference. We are able to state that preference, but studies show that we are hard pressed to explain why that is true other than a personal preference. If challenged to cite a reason, we can "come up with a plausible-sounding reason for why we might like or dislike something and then we adjust our true preference to be in line with that statement." We aren't an expert on those two condiments so we use whatever words come to mind to explain why we prefer one to the other. If we were an expert in condiments, we would have become familiar with all the words about sweet, sour, texture, creaminess, presence of oil, etc, which would allow us to have an erudite conversation with other condiment experts.

Experts have the technical language to explain their assessments of things. Non-experts can only talk in generalities about what they experience. This is true of all of our senses – sight, sound, smell, touch, and taste. We know what we like and don't like, but we can only speak to it from a personal preference basis. True experts can say so much more. They have experiences that build their vocabulary. They can cite specifics. They can tell us why something is true or why they know that some course of action will not bear positive results. When we can talk about something not from our personal experience or preference, but from a deep understanding of the elements of a thing or its characteristics, that is when we become an expert. That is when we can tell someone what is likely to happen; we are telling them that based on our gut feeling or reaction. True experts aren't even sure that they had to think about it to reach that conclusion, they just know it. All experts exhibit this same trait, and it happens quickly when they are presented a situation. They can diagnose something based on tiny bits of information that others may not even notice.

And here's my theory – we are all experts on something. It may be our children, our spouse, our work specialty; it could be a big thing or a little thing, but there is something that we know so very well, that we don't have to think about it; we just know it deep inside us.

So give it some thought, identify what it is that you are expert at, and use that gut reason or knowledge to your advantage. You don't have to explain it; you just need to know it. If you want a better explanation of this process, then think of it as your subconscious talking to you. It is recalling everything you ever learned about that. It is a not so subtle nudge helping you offer your expertise to others. It is fun to be the one person in the room who knows something for certain. But it doesn't mean anything unless you share that knowledge, instinct, gut reaction with others. Don't be shy; tell folks about what you know. Chances are the rest of us don't know it nearly as well as you do.

- Judy Clark, President

ANSWERS, Inc.
"Whatever the Question"

PLEASE FEEL FREE TO VISIT OUR WEBSITE:
WWW.HRANSWERS.COM