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Client Alert: From Overtime to Trade Secrets, New Federal Rules and Regulations Will Impact Your Business

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A FREEBORN & PETERS LLP CLIENT ALERT

ABOUT THIS CLIENT ALERT:

Employment rules and regulations are consistently changing. Are you keeping up? This Client Alert details the updated overtime regulations recently issued by the Department of Labor as well as the recently signed Defend Trade Secrets Act ("DTSA").

Section 1: Punch the Clock: New Overtime Regulations Will Become Effective December 1, 2016

On May 18, 2016, President Obama, along with the Department of Labor, announced the publication of the Department's Final Rule updating overtime regulations. The Final Rule focuses on updating the salary and compensation levels needed for Executive, Administrative and Professional workers to be exempt from the Fair Labor Standards Act's ("FLSA") overtime requirements. The Final Rule can be viewed **here**.

Currently, in order to qualify as exempt from the FLSA's overtime requirements, an Executive, Administrative or Professional employee generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455.00 per week. However, effective December 1, 2016, that salary level will now change to $913.00 per week ($47,476.00 per year). This salary level will be increased every three years, starting in 2020.

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The Final Rule also made changes to the annual compensation requirement for Highly Compensated Employees, another group exempt from the FLSA's overtime requirements. Currently, Highly Compensated Employees performing office or non-manual work, including the customary and regular performance of the duties of an Executive, Administrative or Professional employee, and paid a total annual compensation of $100,000.00 or more (which must include at least $455.00 paid per week on a salary or fee basis), are exempt from the FLSA's overtime requirements. As of December 1, 2016, the salary level will rise to $134,004.00 per year (the annual equivalent of the 90th percentile of full-time salaried workers nationally).

Additionally, the Final Rule now allows employers to use nondiscretionary bonuses and incentive payments, including commissions, to satisfy up to 10% of the new standard salary level.

As a practical matter, employers will need to carefully examine those employees classified as exempt pursuant to the Executive, Administrative and Professional exemptions to determine whether those employees will continue to properly qualify as exempt given the salary level increase. If the employees continue to meet the duties associated with the exemptions and earn at least $913.00 per week then no changes are needed. If the employees continue to meet the duties associated with the exemptions but are not paid on a salary basis of at least $913.00 per week, then those employees will no longer qualify as exempt and they will be eligible for overtime. Alternatively, employers may elect to raise salary levels to meet the new salary requirements (assuming the respective duties tests are met for the particular exemption).

Section 2: Update Your Employment Agreements In Response to the Defend Trade Secrets Act (DSTA)

On May 11, 2016, the Defend Trade Secrets Act ("DTSA") was signed by President Obama and enacted into law. The DTSA provides a federal law enforcing companies' and individuals' rights in trade secrets. More specifically, it creates a federal cause of action for misappropriation of trade secrets and nearly adopts as federal law the Uniform Trade Secret Act that had been state law, in various forms, in many states. Trade secret owners are now armed with a powerful tool to enforce their rights in federal courts throughout the country and to avoid some of the inconsistency of trade secret rights that resulted from the many different state trade secret laws and differing interpretations of trade secret rights that had arisen in the various states. Moreover, because state trade secret laws are not pre-empted by the new federal law, trade-secret owners will have additional options in choosing where and how to enforce their rights. For reference, the text of the new law can be accessed directly from www.congress.gov **here**.

While the adoption of the law provides new and valuable options for litigants, it is important to note that there are some actions that employers seeking to avail themselves of all of the remedies available under the law must take right now. There are notice requirements that must be added into employers' confidentiality agreements with employees. These notices relate to the DTSA's

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protections for potential whistleblowers and individuals involved in lawsuits or certain investigations. The law provides that individuals who disclose trade secrets or other confidential information in the course of reporting a suspected violation of the law to a governmental entity (i.e. whistleblower conduct) are protected from liability for that disclosure. Individuals can also disclose information to their attorneys and to courts (if the information is sealed) as part of a lawsuit for retaliation based on whistleblower conduct. Related to these rights, Section 7(b)(3) of the DTSA requires that "any contract or agreement that governs the use of trade secret or other confidential information" (i.e. confidentiality agreements that may be part of your existing employee on-boarding procedures) must include notice of the protections provided by the act. That notice must be provided to all employees, contractors and consultants because Section 7(b)(4) expressly includes contractors and consultants in the definition of "employee." The DTSA's notice requirement may not impact contracts executed before the law was enacted on May 11, 2016 but, going forward, all contracts need to have notice or an employer's remedies in a lawsuit to enforce its trade-secret rights will be limited. For instance, the exemplary damages and attorneys' fees that may otherwise be available pursuant to the new law would not be available.

Practically, there are several items employers should consider adding into any new agreements covering the use of trade secret or confidential information including, at a minimum, notice that:

(a) the agreement does not interfere with the employee's rights outlined in the DTSA;

(b) the employee cannot and will not be liable for disclosing trade secret or confidential information in a manner consistent with Section 7 of the act;

(c) the company will not retaliate for an employee acting consistent with Section 7 of the Act; and

(d) if the employee were to file a retaliation claim against their employer based on a purported disclosure of trade secret or confidential information consistent with the DTSA, the employee will be permitted to disclose trade secret or confidential information to their attorneys and appropriate courts (under seal).

The specific language of any agreement will depend on the particular employers' situation. It will be important to reach out to your legal professionals to discuss your specific situation.

If you have questions about either of these issues, please contact David Becker at dbecker@freeborn.com and Rachel Atterberry at ratterberry@freeborn.com.

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