Downey & Lenkov LLC

Labor & Employment Newsletter

July 2024

Department of Labor Announces Final Overtime Rule

On April 23, 2024, the U.S. Department of Labor announced the finalized overtime rule extending overtime protections to millions of salaried workers. The final rule went into effect on July 1, 2024.

The final rule restores and extends the right to overtime pay to many salaried workers, including those who historically were entitled to overtime pay under the FLSA because of their lower pay or the type of work they performed. There is no change to the duties test.

Currently, salaried workers who earn less than $684/week ($35,568/year) are eligible for overtime. Beginning on July 1, salaried workers who earn less than $844 per week ($43,888/year) will become eligible for overtime pay. On January 1, 2025, the amount will increase and salaried workers who earn less than $1,128 per week ($58,656/year) will become eligible for overtime pay.

The final rule also increases the total annual compensation requirement for highly compensated employees (who are not entitled to overtime pay under the FLSA if certain requirements are met) from $107,432 per year to $132,964 per year on July 1, 2024, and then to $151,164 per year on January 1, 2025.

Starting July 1, 2027, these thresholds will be updated every three years.

Practice Tip:
Employers should audit their pay practices and implement this new rule into their pay practices immediately if not already done so to ensure compliance. If employees are misclassified as exempt, employers could subject themselves to significant damages and penalties. Please contact us for more information and assistance.

New Chicago Minimum Wage Effective Jul 1, 2024

Effective July 1, 2024, the minimum wage for Chicago employees is $16.20 ($24.30 overtime rate). This rate applies to employers in Chicago with 4 or more employees.

The new minimum hourly wage for tipped workers is $11.02 ($19.12 overtime rate). If the tipped wage plus tips does not equal the standard minimum wage, the employer must make up the difference.

Employers must comply with notice and posting requirements. Employers that maintain a business facility within Chicago must post an updated notice of the current minimum wage (and other information about the Chicago Fair Workweek (if applicable), Chicago Paid Leave and Paid Sick Leave, and Chicago Wage Theft in a conspicuous space at each facility in Chicago. Employers may view and download a free copy of this public notice on the City of Chicago's website. If the employer does not have a Chicago-based facility, the employer may comply with this requirement by disseminating the notice through electronic communications such as email or on an internal intranet, etc.

All covered employers are required to provide a copy of the notice of the updated current minimum wage with each employee's first paycheck, and annually with a paycheck issued within 30 days of July 1, 2024.

Practice Tip:
All covered employers must comply with the new minimum wage rate beginning on July 1, 2024. Failure to comply could result in significant penalties.

Reminder: July 1 Implementation Date of Chicago Paid Leave and Paid Sick and Safe Leave Ordinance

On July 1, 2024, the Chicago Paid Leave and Paid Sick and Safe Leave Ordinance was implemented. Below is an overview of only the core requirements of the ordinance. This article is not intended to be an exhaustive review of all aspects of the ordinance.

Definitions:

- A covered employee is anyone who works at least 80 hours within a 120-day period within the geographical boundaries of Chicago.
- An Employer is anyone with 1 or more employees (not an independent contractor) working in Chicago.

Paid Leave:

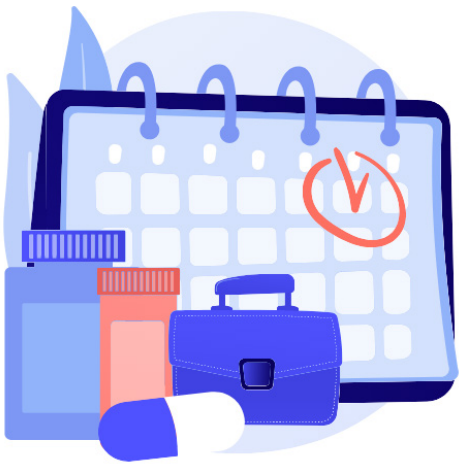
- 1 Hour of Paid Leave for every 35 hours worked (up to 40 hours (5 days) in a 12-month period)
- Can be used for any reason but request to use may be denied by Employer
- Can request to use 90 days after July 1, 2024, or after start of employment (whichever is later)
- Minimum usage increment not to exceed 4 hours

Sick Leave:

- 1 Hour of Paid Sick Leave for every 35 hours worked (up to 40 hours (5 days) in a 12-month period)
- Can be used to recover from illness, take care of family member, address domestic violence, and public health emergencies
- Can be used 30 days after July 1, 2024, or after start of employment (whichever is later)
- Minimum usage increment not to exceed 2 hours

Carryover:

- Up to 16 hours of Paid Leave (if not front-loaded)
- Up to 80 hours of Sick Leave



Payout:

- Not required for Sick Leave
- Paid Leave payout depends on size of Employer:
- Required for Large Employers (101+ employees)
- 2 Days (16 hours) for Medium Employer (51-101 employees) until July 1, 2025, full payout will be required past this date
- Not required for Small Employers (1-50 employees) Maximum payout is 7 days

Practice Tip:

All covered Employers must ensure compliance with this ordinance as of July 1, 2024. For more information about additional requirements of the ordinance, please visit the City of Chicago's website which has further information including the ordinance's final rules and the required poster. Downey & Lenkov's employment attorneys are also available to assist.

FMLA Turned 30: Time for a Refresher

The Family and Medical Leave Act, known as the FMLA, turned 30 recently. Below is a refresher on the basics of the FMLA and an overview of some updated guidance.

FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.

Employers are subject to FMLA if they have 50 or more employees who worked at least 20 weeks in the current or preceding calendar year. To be eligible, an employee must have worked for an employer for at least 12 months and a minimum of 1,250 hours.

Eligible employees are entitled to:

- 12 work weeks of leave in a 12-month period for:
  - the birth of a child and to care for the newborn child within one year of birth;
  - the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
  - to care for the employee's spouse, child, or parent who has a serious health condition;
  - a serious health condition that makes the employee unable to perform the essential functions of his or her job;
  - any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty;" or
- 26 work weeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness if the eligible employee is the servicemember's spouse, son, daughter, parent, or next of kin (military caregiver leave).

FMLA also requires that employers maintain employees' health benefits during leave and restore employees to their same or equivalent job after leave.

FMLA sets requirements for notice, by both the employee and the employer, and provides employers with the right to require certification of the need for FMLA leave in certain circumstances.

Employees are protected from interference and retaliation for exercising or attempting to exercise their FMLA rights.

The law also includes certain employer recordkeeping requirements.

Recent Interpretations of FMLA

In February 2023, the DOL released Opinion Letter FMLA 2023-1-A in response to an employer whose work schedule typically exceeds an eight-hour workday. The DOL confirmed that under FMLA, an employee may continue to use FMLA leave for an indefinite period of time beyond the 12-month period as long as they continue to be eligible and have a qualifying reason for leave provided they did not exhaust their leave entitlement.

In February 2023, the DOL also published Field Assistance Bulletin (FAB) No. 2023-1, which confirms that employees who work remotely are eligible for FMLA leave on the same basis as onsite employees. The DOL further explained that for FMLA eligibility purposes, the employee's personal residence is not a worksite. When an employee works from home or otherwise teleworks, their worksite for FMLA eligibility purposes is the office to which they report or from which their assignments are made. Thus, if 50 employees are employed within 75 miles from the employer's worksite (the location to which the employee reports or from which their assignments are made), the employee meets that FMLA eligibility requirement.

In April 2023, the DOL released a redesigned employee rights poster, which includes updated language on how covered employers are defined under the law. You can download the poster directly.

In May 2023, Opinion Letter FMLA2023-2-A explained that under FMLA, the employee's normal workweek is the basis of the employee's leave entitlement and if a holiday occurs during an employee's normal workweek, and the employee works for part of the week and uses FMLA leave for part of the week, the holiday does not reduce the amount of the employee's FMLA leave entitlement unless the employee was required to report for work on the holiday. Therefore, if the employee was not expected or scheduled to work on the holiday, the portion of the workweek of leave used would be the amount of FMLA leave taken (which would not include the holiday) divided by the total workweek (which would include the holiday).

Pending FMLA Legislation:

The Job Protection Act (S.210) proposes to expand FMLA to cover all employers with 1 or more employees and the employment period required to become eligible would be reduced from 12 months to 90 days.

7th Circuit: No Causal Link Between Protected Activity and Adverse Action

In *Adebiyi v. South Suburban College*, No. 22-2516 (7th Cir. April 17, 2024) the Seventh Circuit held that the district court did not err in granting summary judgment for the defendant where plaintiff did not present evidence supporting a causal link between the charge she filed with the EEOC and the IDHR and the adverse employment action she suffered. The court noted that while plaintiff's termination happened after she filed a charge with the EEOC and IDHR, plaintiff failed to identify evidence allowing a reasonable person to find that the defendant's concerns about her performance lacked credibility or other evidence that would support evidence of her allegations of suspicious timing.

Plaintiff, who is African American, began working at South Suburban College as a manager in 2000. She received promotions over the years and, in 2008, became Vice President of Student Services. In this role, she oversaw certain departments and programs. She reported directly to the college president from 2012 until 2018 before he retired. In 2018, a new president was elected, an African American female. A few days before she was elected president, complaints were raised against plaintiff and were discussed in a meeting with administrative staff including the new president and HR. Several employees complained about plaintiff's leadership style and accused her of enabling a toxic work environment. At the time, it was concluded that the concerns raised were unfounded and no disciplinary action was taken against plaintiff.

Plaintiff thereafter sought a two-week medical leave. At the end of the medical leave, plaintiff filed formal internal complaint alleging race discrimination, harassment, and bullying. About two weeks later, she also filed a charge with the EEOC and the IDHR alleging harassment based on race, retaliation for opposing discrimination, and unequal pay. The internal complaint was investigated for two months, and it was concluded that plaintiff's complaint was unfounded. Plaintiff appealed the report to the board of directors, but was unsuccessful.

About four months later, plaintiff alleged that someone covertly entered her office after hours, removed files from her computer, and placed her personal emails and files on the college's network. In response, the college initiated an investigation and hired an external forensic examiner. The investigation did not reveal any improper access to plaintiff's computer and the college deemed her complaint to have been frivolous.

Shortly thereafter the new president took office, she had more concerns about plaintiff's performance. After reviewing confidential documents she did not previously have access to, she had several meetings with plaintiff.

While plaintiff's charges were still pending, and three days before a scheduled meeting with the IDHR, plaintiff was informed that her contract would not be renewed and was immediately relieved of her duties.

Plaintiff sued the college alleging racial discrimination and retaliation under § 1981 and Title VII, as well as breach of contract. The college moved for summary judgment on all claims and the district court granted the motion. Plaintiff appealed and the Seventh Circuit affirmed the judgment.

The court found that although the college terminated plaintiff after she filed charges with the EEOC and the IDHR, she presented no evidence drawing a causal link between her charge and the adverse employment action she later suffered and that was her burden to survive summary judgment. Specifically, plaintiff did not identify evidence allowing a reasonable person to find the college's asserted issues with her performance unworthy of credence, nor evidence that would support her allegations of suspicious timing.

Practice Tip:
This case demonstrates the importance of documenting performance problems prior to termination. Employers must be able to prove that a termination is not causally connected to a protected activity to overcome a retaliation claim, and the best practice to do so is by having documentation evidencing legitimate reasons for termination.

EEOC Sues Illinois Employer for Discrimination Based on Sexual Orientation, Gender Identity and Gender Stereotypes

In a recent case filed in the Northern District of Illinois, the EEOC sued a Chicago area employer for discrimination against an employee because of his sexual orientation, gender identity, and/or failure to adhere to gender stereotypes in violation of Title VII. *See EEOC v. LAS Hardwoods, Inc., Civil Action* No. 1:24-cv-04899).

The EEOC's lawsuit alleges that the employer created a hostile work environment for a sales associate because of his sexual orientation. Specifically, the lawsuit alleges the employee was harassed, including being subject to the frequent use of gay slurs, because of his perceived feminine style of dress, speech and mannerisms. It further claims the employer ignored the employee's complaints and did nothing to stop the harassment by various managers and employees.

In connection with this lawsuit, the EEOC General Counsel stated that "federal civil rights law, as interpreted by the Supreme *Court in Bostock v. Clayton County*, makes it illegal to discriminate against an employee for their sexual orientation or gender identity, and the EEOC will vigorously enforce those protections." Accordingly, the EEOC asserts the conduct alleged in this lawsuit violates Title VII, which prohibits employment discrimination because of sex, including discrimination because of sexual orientation, gender identity or gender stereotypes.

Implications of FTC Rule Banning Employers Use of Non-Compete Agreements

In April 2024, the Federal Trade Commission (FTC), issued a final rule that will go into effect 120 days after it is published banning most non-compete agreements.

Non-compete clauses are defined as any term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from 1) seeking or accepting work in the United States with a different person for such work would begin after the conclusion of the employment that includes the term or condition or 2) operating a business in the United States after the conclusion of the employment that includes the term or condition. The rule effectively covers all persons or businesses operating for profit.

All existing non-compete agreements for workers who do not qualify as "senior executives" are effectively banned. The regulation defines senior executives as a worker 1) in a policy-making position, and 2) earning an actual or annualized sum of $151,164. A "policy-making position," according to the final rule, is a businesses' president, CEO or equivalent position or any other person with policy-making authority (i.e. controlling significant aspects of the business entity or common enterprise).

For all individuals not defined as "senior executives" their employers are required to provide "clear and conspicuous notice" to all workers whose agreements have been declared unenforceable by the final rule and that the non-terminated employees' non-compete agreements cannot legally be enforced against the worker by the effective date.
This notice must be provided in written form and delivered by hand, email, mail or text message.

Other exceptions to the rule, non-compete clauses entered into with the seller of a business entity are not invalidated, so long as the sale involves disposition of the person's ownership interest in the business entity, or of all substantially all of the business entity's operating asset. Further, the ban does not apply where a cause of action related to a non-competes clause accrued before the effective date. This means the regulation does not make currently ongoing litigation seeking to enforce non-competes unlawful.

The regulation makes clear that the final rule "shall supersede all state laws, regulations, orders and interpretations of them that are not consistent with the final requirements discussed above. States could impose stricter restrictions than those provided by the FTC.

For current enforcement, the rule is being challenged in two lawsuits seeking a temporary stay of rule of effective date, including a case in the US District Court for the Northern District of Texas, which indicated it will rule on whether to issue a stay by July 3, 2024. If a stay is not issued by August 1, 2024, employers should begin planning for the rule to take effect by September 4, 2024 (120 days from the rules May 7th publication date in the Federal Register).

Practice Tip:
Implications of this rule are obviously profound. All employers, given the notice requirement required under the rule, must examine all outstanding contracts or other agreements for their current and former employees to determine whether there is a non-compete agreement that has been invalidated under the rule. Once that non-compete is located, it will be necessary to determine whether the individual(s) who signed that non-compete agreement qualifies as an exception to this FTC rule. Lastly, assuming the FTC rule goes into full effect, it will be necessary to provide specific written notice pursuant to the FTC rule.

To help any employers navigate the intricacies of this rule, its implications, and its impact on your business, attorneys at Downey & Lenkov are available to assist.

Firm **News**

Welcome to the Team

Please join us in welcoming our new attorneys, Brianne Scott, Kristin Lechowicz, Rachell Horebenko, and Matthew Hobson.

Illinois & Indiana

With 15 years of dedicated experience, Brianne focuses her practice in general liability. She handles litigation in the areas of premises liability, slip and fall, subrogation, and transportation common carrier claims.

Illinois

Kristin focuses her practice on workers' compensation defense. Her experience representing both employees and employers in workers' compensation claims gives her a unique perspective on strategizing and resolving claims.

Rachell focuses her practice in workers' compensation and general liability. Prior to joining Downey & Lenkov, Rachell was a sole practitioner where she gained extensive experience in real estate, estate planning, and corporate law. In addition to her law practice, Rachell is a licensed real estate broker and has acted as a member of the Mainstreet Association of Realtors Professional Standards Committee.

Indiana

Mat concentrates his practice in workers' compensation and general liability. He is a dedicated attorney who provides unique strategies and effective counsel to his clients.

Downey & Lenkov LLC

Downey & Lenkov Sponsored NIU College of Law's 19th Annual Golf Outing

Downey & Lenkov proudly sponsored Northern Illinois University College of Law's 19th Annual Golf Outing at River Heights Golf Course in DeKalb. Proceeds from the outing will be used for students' scholarships and other related alumni programs.

The NIU Alumni Council is comprised of alumni interested in networking and maintaining a strong connection with the school.

Rich Lenkov is a 1995 NIU College of Law alumnus. He has been honored as NIU College of Law Alumnus of the Year and NIU College of Law Outstanding College Alumni.

New Indianapolis Office

Our Indianapolis office has moved! We have relocated to Parkwood Crossing at 450 East 96th St, Ste 500, Indianapolis IN 46240. Our service, phone number and fax number remain the same.

Thank you for your continued confidence in our firm. We are always available to assist with your claims.

Downey & Lenkov Celebrates International Women's Day

We celebrated the remarkable women of Downey & Lenkov, acknowledging their invaluable contributions of intelligence, resilience, and unwavering determination to our firm.

Professional Liability Defense Federation Annual Meeting

Come to Atlanta on September 25-27 for the 2024 PLDF Annual Meeting. There will be lively discussions of developments in professional negligence claims and fantastic networking! For more information visit pdlf.org/events.

Management & Professional Liability Alliance™

We are a proud co-originating firm of the Management & Professional Liability Alliance (MPLA) which consists of independent law firms which share a commitment to excellence, affordable representation, and integrity in the representation of management and professionals.

The independent law firms of MPLA have extensive experience in handling all types of defense litigation including employment and all professional lines. MPLA firms practice in multiple states including Illinois, Indiana, and Wisconsin amongst several others.

They offer complimentary webinars and actively participate in regional and national conferences. For more information, please contact Storrs Downey and visit the website at https://www.mplalliance.org/.

Cutting Edge Continuing Legal Education

If you would like us to come to you for a free seminar, Click here or email Storrs Downey.

Our attorneys provide free seminars on a wide range of general liability topics regularly. We speak to individuals and companies of all sizes. Some national conferences that we've presented at are:

- American Conference Institute's National Conference on Employment Practices Liability Insurance
- Claims and Litigation Management Alliance Annual Conference
- CLM Retail, Restaurant & Hospitality Committee Mini-Conference
- Employment Practices Liability Insurance ExecuSummit
- National Workers' Compensation and Disability Conference & Expo
- National Workers' Compensation & Disability Conference
- RIMS Annual Conference

Who We Are

Downey & Lenkov LLC is a full-service law firm with offices in Illinois and Indiana. Our expertise spans across several practice areas, providing transactional, regulatory and business solutions for clients across the nation. The firm's continued growth is a result of an aggressive, resultsoriented approach. Unlike larger law firms however, we do not face massive overhead and are able to charge more reasonable rates that both small and larger employers can more readily afford.

We evolve with our clients, representing Fortune 500 and small companies alike in all types of disputes. Downey & Lenkov is a team of experienced, proactive and conscientious attorneys that have been named Leading Lawyers, Super Lawyers, Rising Stars and AV Preeminent

Newsletter Contributors

Jessica Jackler and Ryan Danahey contributed to this newsletter.

View more information on our **Labor & Employment practice.**

Our other practices Include:

- Appellate Law
- Business Law
- Condominium Law
- Construction Law
- Entertainment Law
- General Liability
- Healthcare Law
- Insurance Law
- Intellectual Property
- Products Liability
- Professional Liability
- Real Estate
- Transportation Law
- Workers' Compensation

Offices located in:

- **Chicago, IL**
- **Crown Point, IN**
- **Indianapolis, IN**
- **Milwaukee, WL**