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THE NEW FLSA REGULATIONS: IMPACT WILL BE MORE THAN JUST HIGHER SALARIES FOR EXEMPT EMPLOYEES

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As has been widely publicized in the press, on May 18, 2016, the U.S. Department of Labor ("DOL") released the final rule updating the regulations regarding the white collar exemptions from overtime compensation under the Fair Labor Standards Act ("FLSA"). These regulations apply to workers who fall under the executive, administrative, or professional exemptions from the FLSA's minimum wage and overtime protections as well as to the highly compensated employee. The new regulations will likely be challenged, but, barring a court injunction or other action, they will go into effect on December 1, 2016. While the DOL did not alter the duties test for the overtime exemptions, the impact on employers will be much more profound than just higher salary levels.

THE NEW REGULATIONS

Under the new regulations:

- The salary threshold increases from $455 per week (i.e., $23,660 per year) to $913 per week (i.e., $47,476 per year).
- The total annual compensation requirement for highly compensated employees increases from $100,000 to $134,004 (the employer must pay the salary threshold ($913/week) each week exclusive of any nondiscretionary bonuses or incentive payments).
- These amounts will automatically update every three years, with the first update effective January 1, 2020.
- Nondiscretionary bonuses and incentive payments, including commissions, may satisfy up to 10 percent of the salary basis requirement (but there are specific requirements that must be met, such as payments must be made on a quarterly or more frequent basis).
- Small businesses, nonprofit organizations, and higher education institutions must comply with the new requirements and the DOL issued specific technical guidance for both non-profit and higher education employers.

CHALLENGES TO THE NEW REGULATIONS

The DOL's decision to provide nearly 200 days before the new regulations take effect gives employers time to analyze the impact of the regulations on their workforce, but also puts the effective date after the election and provides time for additional challenges to the regulations.

A coalition of major trade associations representing employers is lobbying for a bill introduced in March that would block the implementation of the regulations. A number of trade associations have stated they plan additional challenges to the regulations. Press reports indicate that a motion of disapproval under the Congressional Review Act and an appropriation policy rider have also been under consideration. The potential for court challenge and an accompanying injunction also looms as a possibility. Despite these potential issues, employers should act now to prepare for the new requirements.

PLANNING FOR THE CHANGE

Planning for the change to the new regulations will require a thoughtful process, both to assure compliance and to anticipate the concerns of employees who may change from exempt to nonexempt. As to compliance, the initial step will be to identify those currently exempt employees who have a salary below the new threshold of $47,476 and decide whether to raise salaries (including whether to institute non-discretionary bonus or incentive programs) or to reclassify those employees to non-exempt status. This will require careful planning and consideration of a number of issues, including (i) the anticipated overtime hours and expense, (ii) whether such hours may be controlled or mitigated, (iii) the concerns of employees; (iv) how hours worked will be recorded, and (v) the impact on employee retention.

The change from salary based pay to hourly based pay is not a simple issue. Mechanically, one can simply divide the employee's current salary by 52 weeks and then by 40 (or some other regularly worked number of hours) to arrive at the "hourly" rate. However, if the employee typically worked any overtime hours, this new hourly rate will provide the employee with additional compensation (overtime) and increase employer costs. There are many options to consider in terms of reverse engineering a currently exempt employee's annual salary into an hourly rate or continuing to pay them on a salary basis with overtime. The agreed upon work week can be for a fixed schedule that exceeds 40 hours or on a "fluctuating" work week basis. Further, employers must anticipate the impact of more individuals being classified as "non-exempt" on related issues such as travel time and responding to/drafting work-related communications outside of the workplace.

One of the largest unintended impacts on employers may be from increased litigation exposure due to allegations of unpaid off the clock work. Employee work habits are hard to change. Both employers and employees have become accustomed to the flexibility and lack of record keeping attendant to being a salaried exempt employee. Both employers and employees may find it difficult to adjust their work routines to either avoid work outside of the workplace or to make sure that such time is properly recorded. While nonexempt employees may be told not to work overtime, not to work through lunch or rest periods, or not to take work-related calls and e-mails from home, these instructions may be ignored resulting in potential employer liability for unpaid wages, overtime, attorney fees and liquidated damages.

Employee concerns with the change from exempt to nonexempt must also be anticipated. Newly nonexempt employees may regard the change to hourly pay as a loss of status and they may feel that their career advancement may be adversely impacted. Employers should also take into account whether any changes to benefit eligibility will be triggered by a change to nonexempt status. Many employees will have concerns that they may make less money because they are not earning a guaranteed salary. This is especially the case when the hourly rate is adjusted downward to account for overtime hours worked.

The new regulations necessitate careful consideration of multiple issues and employers are encouraged to begin their analysis of these issues and plan for the change now. The DOL has created a final rule webpage which contains a number of fact sheets and guidance papers and our attorneys are happy to discuss any of these issues with you.

MEET THE TEAM

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