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New Federal Overtime Regulations Are Coming: Will Your Pay Practices Comply?

Public concern was widespread, as the U.S. economy slowly recovered from the 2008 recession, that wages at the low end of the pay scale were slow to rise. In this context, on March 13, 2014, President Obama signed a Presidential Memorandum directing the Federal Department of Labor (the "DOL") to update the regulations defining which white collar workers are protected by the minimum wage and overtime requirements of the Fair Labor Standards Act (the "FLSA"). Consistent with the President's goal of ensuring workers receive a fair day's pay for a fair day's work -- by increasing wages and increasing overtime pay -- the Memorandum instructed the DOL to find ways to modernize and simplify the FLSA regulations while ensuring that the FLSA's intended overtime protections are fully implemented.

In July 2015, the DOL proposed a number of changes to the FLSA's regulations that will lead to approximately 5 million additional employees in the US being eligible for overtime pay. Those new regulations will be published in July 2016, and will become effective 60 days after publication, according to an announcement made by the Solicitor of Labor, Patricia Smith, at the 2016 American Bar Association's Midwinter Meeting.

Given the very brief anticipated deadline by which to bring pay practices into compliance, it is imperative that employers are aware of the proposed changes now in order to prepare appropriate budgets, bring pay practices into compliance swiftly, and implement any necessary training. Indeed, the new regulations present an ideal opportunity for employers to examine and, if necessary, change the exempt status of any currently misclassified employees.

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Raising the Salary Threshold

The most sweeping change is the increase in the minimum salary threshold required to be classified as a white collar employee who is "exempt," in FLSA parlance, from Federal overtime law requirements. Currently, employees whose duties satisfy the test for "executive," "administrative," "professional," or "computer" employees are considered exempt as long as they receive a minimum salary of $455 per week ($23,660 per year). This is the so-called "salary basis test." Under current rules, employees whose salaries are less than this amount, or who are not paid on a salary basis, are not considered exempt, no matter what their duties are.

The current salary threshold was set in 2004 and has not changed since. The proposed regulations raise the threshold from $455 per week to $970, which equals $50,440 per year.[1] Thus, an employee who does not receive a salary of at least $970 per week will not be considered exempt. For example, a project manager who earns $900 per week (and whose duties satisfy one of the white collar exemptions) may be currently considered exempt, and thus not entitled to overtime. But under the proposed regulations, that project manager would no longer be exempt, and the employer would be required to pay her one and a half times her regular rate for all hours worked over 40 in any given workweek. If the manager's employer does not want to pay overtime, it would have to raise her salary above the threshold, for example to $1,000 per week.

Of concern is the fact that the proposed regulations do not contain any language that would allow incentive payments, commissions, bonuses or the like to be considered together

[1] This number could increase by the time the Final Regulations are adopted. Additionally, the minimum salary threshold will increase every year based on a formula set forth in the proposed regulations.

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with the minimum guaranteed salary to satisfy the threshold. While the DOL has said that it will consider whether a portion of the salary requirement can be satisfied by furnishing such payments, its omission from the proposed regulations makes this seem unlikely, at least for the near future.

Highly Compensated Employees

An employee can also be considered exempt if she is a "highly compensated employee." Currently, this exemption requires that the employee receive total annual compensation of at least $100,000 and regularly perform any one or more (but not necessarily all) of the exempt duties or responsibilities of an executive, administrative or professional employee. Total annual compensation for the highly compensated employee exemption may include commissions, non-discretionary bonuses, and other non-discretionary compensation. When the proposed changes go into effect, the threshold for highly compensated employees will increase to at least $122,148 per year, which will likely be higher by the time the regulations are issued. The employee will still have to earn at least $970 on a weekly basis, with the rest being made up of commissions and other non-discretionary compensation. The annual compensation threshold for highly compensated employees will also be increased annually.

Other Possible Changes

Employers should be aware that the DOL is considering certain other changes as well, such as whether to make changes to the "duties" test for each of the white collar exemptions. In 2004, the DOL adopted a single duties test for each category, eliminating the use of "long" and "short" duties tests. The DOL is now considering whether to bring back the long and short duties tests. Also under consideration is whether to impose a requirement that an exempt

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employee must spend a certain percentage of work time performing exempt, versus non-exempt, duties. Finally, the DOL is considering whether to eliminate the regulation that allows executive employees to perform both exempt and non-exempt work concurrently.

Conclusion

In anticipation of sweeping changes to the salary threshold, employers should review the compensation of their currently exempt white collar and computer employees, as well as their highly compensated employees. Employers should also examine their personnel budgets and train their staff, and consider whether these changes present an opportunity to re-classify any currently misclassified employees. HNRK stands ready to assist you in these efforts.