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Evaluating Your FLSA Compliance in Advance of the 2016 Updates:

A Checklist for Employers

The U.S. Department of Labor ("DOL") recently issued its proposed updates to the Fair Labor Standards Act's white collar overtime exemptions. These revisions, particularly the proposed increase in the salary level test, will significantly impact an employer's business and its wallet. This article provides a brief background of the Fair Labor Standards Act ("FLSA"), a discussion of the proposed changes, and a recommend--ation on how to proceed in light of the proposal.

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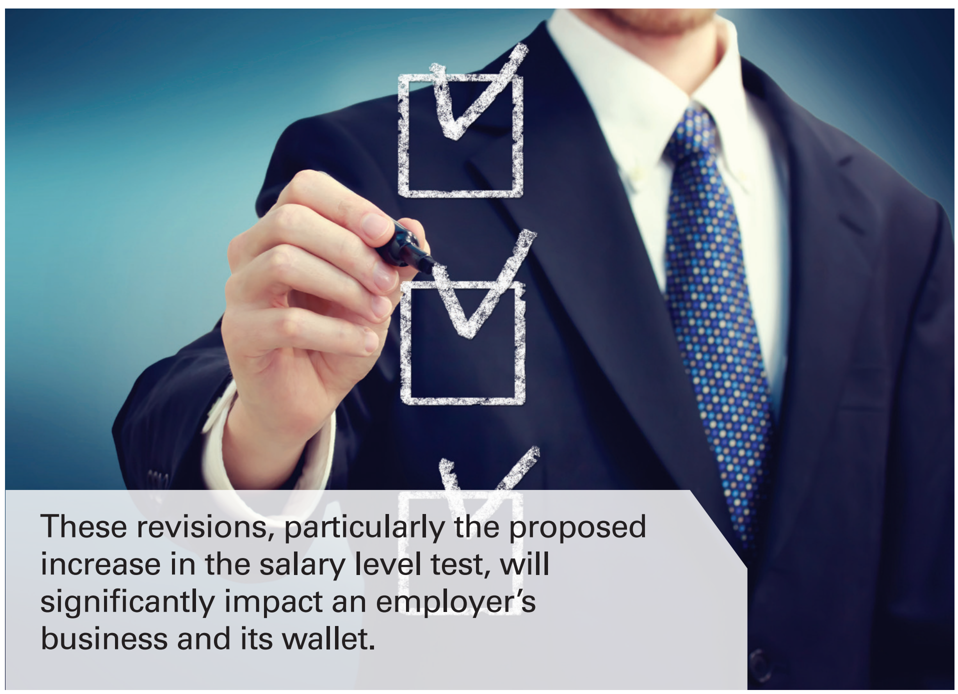

Background

The FLSA requires certain employers to pay non-exempt workers at least minimum wage for every hour worked as well as overtime at a rate of one and a half times the regular hourly rate for all hours worked over forty in a workweek. Additionally, the FLSA requires employers to keep certain records for every non-exempt worker, including:

1) the employee's full name and social security number;

2) address, including zip code;

3) birth date if younger than 19;

4) sex and occupation;

5) the time and day of week when an employee's workweek begins;

6) hours worked each day;

7) total hours worked each workweek;

8) basis on which the employee's wages are paid;

9) regular hourly pay rate;

10)total daily or weekly straight-time earnings;

11)total overtime earnings for the workweek;

12)all additions to or deductions from the employee's wages;

13)total wages paid each pay period; and,

14) the date of payment and the pay period covered by the payment.

Some employees, however, are subject to one of several narrowly tailored exemptions commonly known as the white collar exemptions. The white collar exemptions apply to employees employed as bona fide executive, administrative, or professional employees as well as certain computer, outside sales, and highly compensated employees. To be exempt, employees must perform certain duties and be paid on a salary basis of not less than $455 per week. The most common exemptions—the executive, administrative, and professional exemptions—require the duties listed in Figure A (below).

Another commonly utilized exemption, the highly compensated employee exemption, borrows from the executive, administrative, and professional exemptions. The highly compensated employee exemption requires employees to: (i) perform office or non-manual work; (ii) receive total annual compensation of at least $100,000 (including a weekly salary of at least $455); and (iii) customarily and regularly perform at least one of the duties identified in the executive, administrative, or professional employee exemptions.

An employer's failure to comply with the FLSA carries significant penalties. First, the FLSA provides for the payment of back wages for up to three years. While the statute of limitations for a general FLSA claim is two years, the statute of limitations extends to three years if an FLSA violation is willful, *i.e.*, that the employer either knew or showed reckless disregard for whether its conduct violated the FLSA. To exploit the third year, the employee must show that the employer willfully violated the FLSA.

Second, the FLSA provides that an employer who violates the FLSA "shall be liable" for liquidated damages in an amount equal to unpaid back wages. (29 U.S.C. §216(b)) To avoid liquidated damages, an employer must show that it acted in good faith and had reasonable grounds for believing it was in compliance with the FLSA.

Lastly, and perhaps most significantly, the FLSA requires the employer to pay for the prevailing employee's attorneys' fees. Because of this fee shifting provision, FLSA violations can be very costly, even if the actual wages owed are relatively low. Given the substantial liability that employers may face in FLSA litigation, compliance is essential.

Proposed Changes and Status

Earlier this spring, President Obama issued a Presidential Memorandum instructing the DOL to update the white collar exemptions, last amended in August of 2004. In response, on July 6, 2015 the DOL published a Notice of Proposed Rulemaking ("NPRM") in which it advanced several significant changes. First, the NPRM proposes to increase the salary level from $455 per week to the 40th percentile of weekly earnings for full-time salaried workers. The estimated 2016 level is approximately $970 per week ($50,440 annually) or more than double the current salary level of $455.

The second recommended change relates to the highly compensated employee exemption. The NPRM proposes to increase the salary from $100,000 annually to the 90th percentile

FIGURE A

EXECUTIVE	ADMINISTRATIVE	PROFESSIONAL
• The employee's primary duty must be management; • The employee must customarily and regularly direct the work of at least two full time employees or their equivalent; **and**, • The employee must be able to hire or fire others, or the employer must give particular weight to the employee's recommendations on hiring, firing, promoting or demoting other employees.	• The employee's primary duty must be non-manual, office work related to the employer or the employer's customers' management or business operations; • The primary duty includes the exercise of discretion and independent judgment in matters of significance.	• The employee's primary duty requires the performance of work requiring advanced knowledge in a field of science or learning that is acquired through a prolonged course of specialized intellectual instruction.

of earnings for full-time salaried workers or $122,148.

Additionally, the NPRM considers whether to include nondiscretionary bonuses and incentive payments as a part of the new salary level test for the executive, administrative, and professional exemptions. Currently, the DOL only considers an employee's actual salary when determining compliance with the executive, administrative, and professional exemptions.

Lastly, the NPRM proposes to establish a mechanism for annual, automatic updates of the salary and compensation levels to ensure that the salary levels are based on current data.

The DOL is currently reviewing the comments submitted during the 60-day comment period that recently ended on September 4, 2015. We anticipate that the DOL will issue the final rule sometime in late 2015 or in the first quarter of 2016. After publication of the final rule, employers will have at least 30 days, and potentially longer, before the rule becomes effective.

Checklist for Compliance

To ensure FLSA compliance, we recommend that employers reevaluate their current exempt workforce by following the checklist below. This checklist also provides a good guideline for determining whether any employees are currently misclassified as either exempt or non-exempt.

- ☐ Determine how many, if any, workers (whether currently exempt or not), currently exceed the $455 weekly salary level, but will fall below the proposed $970 weekly salary level.
- ☐ Confirm that the affected workers satisfy the duties tests under the applicable exemptions.
- ☐ Assess, to the extent possible, the amount of overtime hours the affected employees currently work (and are likely to work in the future).
- ☐ Assess the amount of annual overtime each affected employee is likely to receive based on the estimated overtime hours.
- ☐ Assess the proportion of the affected workers' salaries that are paid as discretionary bonus, as opposed to base salary. Can more of the salary be paid as base salary instead of discretionary bonus? If so, enough to satisfy the new salary basis test?
- ☐ Assess whether it would be more financially reasonable to hire additional part-time/full-time/seasonal employee(s) to avoid the need for any overtime hours.
- ☐ Determine how to best to comply with the salary level changes, based on the estimated economic costs involved:
    - ☐ Increase the affected employees' salary to meet the new salary level (assuming the employees satisfy the duties test) or adjust bonus plan to ensure more of annual salary is paid as base salary;

    OR

    - ☐ Reclassify the affected employees as non-exempt, with a detailed understanding of potential overtime costs;

    OR

    - ☐ Hire additional employees as needed to ensure no overtime hours for current employees.
- ☐ If choosing to reclassify the affected employees as nonexempt, develop recordkeeping procedure to satisfy the FLSA's recordkeeping requirements.

This brief discussion introduces you to a brief background of the FLSA and the implications of the DOL's proposed changes to the white collar exemptions.

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