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WILL YOUR EXEMPT EMPLOYEES BE RECLASSIFIED AS NON-EXEMPT AND ENTITLED TO OVERTIME UNDER THE PROPOSED FLSA OVERTIME REGULATIONS?

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by Marjorie M. Obod and Katharine V. Hartman

One of the biggest current issues affecting employers is the United States Department of Labor's ("DOL") recent proposed changes to the Fair Labor Standards Act ("FLSA") overtime regulations. The proposed regulations would significantly modify the minimum salary thresholds for employees to be considered exempt from overtime under the FLSA and will require reclassification of those employees who do not meet the new minimum salary threshold as non-exempt. Dilworth Paxson LLP can provide both creative solutions and the necessary documents to ensure that legal requirements are met, while still reducing unnecessary overtime expenditures.

Current Regulations and Proposed Changes

The FLSA provides for certain categories of employees to be exempt from overtime due to the nature of their job and/or the amount they are paid. Part 541 of the FLSA regulations governs the overtime exemptions for executive, administrative, and professional employees (the "White Collar Exemptions") under the FLSA. Each of these exemptions requires that an employee be paid at least $455 per week and perform certain job duties. The proposed changes to the FLSA would change the salary threshold for employees to be considered exempt from overtime under the White Collar Exemptions to the FLSA.

The proposed regulations would set the base salary level for the White Collar Exemptions at the 40th percentile of weekly earnings for full-time salaried workers. Under these proposed regulations, the base salary to be considered exempt in 2016 is $970 per week ($50,440 per year) as opposed to the prior standard of $455/per week ($23,000 per year). Because the base salary is set on an annual basis, the number is likely to change every year and, therefore, needs to be monitored.

The second key change in the proposed regulations is an increase in the base salary for a "highly compensated employee" ("HCE"). Presently, HCEs are exempt from the overtime pay requirement under the FLSA if they are paid a total annual compensation of at least $100,000. Under the proposed regulations this amount would also be adjusted annually, so that the HCE base salary would be at the 90th percentile of the weekly earnings of full-time salaried workers. Therefore, in 2016, the base salary exemption for an HCE would increase by nearly 25 percent, from $100,000 to $122,148 per year.

Compliance Deadline

The DOL sent a final version of the proposed regulations to the Office of Information and Regulatory Affairs ("OIRA") of the Office of Management and Budget on March 14, 2016. Pursuant to Executive Order 12866, OIRA has 90 days to review the proposed regulations. Following OIRA's review of the proposed regulations, Congress has 60 days under the Congressional Review Act to pass a joint resolution of disapproval to stop the proposed rule. However, even if the joint resolution is passed, President Obama can veto the resolution, and the regulations would take effect unless Congress can override the President's veto. After the proposed regulations are implemented, there will presumably be a limited amount of time for employers to start complying with the new regulations.

Though there appear to be many procedural steps in between the proposed regulations and the final regulations taking effect, it is possible that employers will have to comply with the proposed regulations by early Fall. Because the proposed regulations are in the final stages, employers need to prepare now for these regulations to take effect.

What You Can Do

Though the proposed regulations have not yet taken effect, best practices suggest that employers start taking action now to prepare for their implementation. An audit would not only capture employees classifications, but also actual hours worked by each employee. Taking this step now will help an employer minimize unnecessary costs and ensure a smooth transition to the new regulations. A failure to act quickly and to adequately review workforce compensation could open up an employer to liability for a failure to properly classify employees and pay them appropriately. By seeking legal advice, employers will be better able to understand the proposed regulations and what steps can be taken to minimize additional costs and/or decreased productivity.

If the analysis and adjustments are not undertaken beforehand, the new regulations could seriously impact an employer's payroll, as many salaried employees that were exempt previously must now be paid overtime. For example, consider an exempt employee earning $25,000 per year who regularly works more than 40 hours in a given work week. That employee, under the proposed regulations, would now be classified as non-exempt, and must be paid overtime for all hours worked over 40.

Due to the potential problems this may cause, employers should look for creative solutions for increased overtime costs. Such solutions could include flexible schedules for non-exempt employees, based on whether the need for overtime is determined by the need for certain hours to be covered, rather than longer hours being worked. Similarly, employers may consider shift work or staggering of employee hours to reduce overtime compensation. Another alternative employers may consider is hiring part-time employees and independent contractors. In addition to providing guidance on how the proposed FLSA regulations may affect your workplace, Dilworth counsel can

assist you in performing a wage and hour audit that will take into consideration the proposed ruling and the alternatives to reducing its impact on your business while maintaining compliance. Because the base salary for these exemptions under the FLSA is nearly doubling, it is very important for employers to know how many hours their salaried employees are working and what duties they are actually performing. A wage and hour audit would not just address salaries and hours, but would also focus on the classification of employees into certain FLSA categories. Particularly, a July 15, 2015 memo, from the Wage and Hour Division of the DOL, provides guidance on how the DOL is now more actively reviewing the misclassification of employees as independent contractors. A wage and hour audit will help to make sure that employee classifications are in compliance with the FLSA, and will assist in ensuring compliance with the proposed regulations when they take effect in final form.

-Marjorie M. Obod is a partner at Dilworth Paxson LLP and Chair of its Labor and Employment Group. Katharine V. Hartman is a partner at the Firm and both attorneys counseled and defended clients in all kinds of wage and hour disputes, ranging from individual claims to class and collective actions, in matters involving: misclassification of employees as exemptions under the "white collar" administrative executive and professional exemptions; misclassification of workers as independent contractors, failure to pay for alleged pre- and post- shift "off the clock" activities for non-exempt employees; improper calculation at the regular rate; improper tip credit and tip sharing and "service charge" practices; and other pay practice irregularities under state strategy and common laws.