Last-Minute Reprieve to Exempt Employee Law Changes has Employers Asking, "Now What Do I Do?"

By Joseph T. Bartulis, Esq.

The revised U.S. Department of Labor (DOL) regulations which were set to take effect December 1 would have changed the requirements for an employee to be considered Exempt/Salaried (ineligible for overtime). Called the "White Collar Exemptions," the revisions provided that employees could not be considered Exempt unless their weekly salary was $913 or more, a huge increase over the current requirement of $455 per week.

Employers who do not have any Exempt employees, or whose Exempt employees are already earning more than $913 per week, did not have to make any changes to comply with the new law. All other employers have been diligently analyzing their Exempt employees who earn less than $913 per week and making necessary adjustments to the weekly pay, changing the employee classification, or changing job duties and hours, etc. in an effort to comply.

At the seminars I presented this fall on the Exempt employee law changes, I mentioned that there was a lawsuit filed in September by twenty-one states to stop the implementation of these revised regulations. We were awaiting the decision on the emergency motion for preliminary injunction that was also filed. **The judge overseeing the case granted the injunction on November 22nd.** By granting the preliminary injunction, the judge has ruled that the status quo (meaning the law as it presently exists, *without* the salary minimum increases) be maintained pending a trial on the merits. Even though only twenty one states were part of the lawsuit, the judge ruled that the injunction applies to the entire United States.

While the status quo will be maintained for the immediate, if not the indefinite future (depending on the outcome of the case), **the question being asked now by employers is "What do we need to do now?"**

For employers who have not yet changed anything, the answer is "nothing." Because the law is *not* taking effect as planned on December 1st, employers who have not already implemented any changes can choose to do nothing for now. This would only change if the case is later adjudicated and the DOL regulations are upheld, which could take years, not months. By virtue of the preliminary injunction having been granted, a DOL victory is far from certain.

For employers who *have* already proactively taken steps to increase Exempt employees' salaries to meet the $913 figure or have already reclassified employees as hourly paid, rearranged workloads, etc., they have a number of choices. The employer can either continue to honor the changes, rescind them in total, or implement some of the anticipated changes while rescinding others.

To simplify the analysis, I have divided presently Exempt employees into four categories. Those categories—and current recommendations for each—are below:

1) Exempt employees who presently earn $47,476 ($913/week) or more

   For Exempt employees who already earn $47,476/year ($913/week), no changes were needed and no new action is required now.

2) Exempt employees who earn $45,000 - $47,475

   In the seminars, I suggested that all Exempt employees who earn $45,000 but less than $47,476 should be given the necessary salary increase to keep them Exempt -- since the number of weekly time-and-one-half overtime hours needed to actually earn the amount of the wage difference is quite low.

   If you have already taken or promised this action, I suggest that the wage increases given to those workers in this Category 2 be maintained. While an employer *could* reduce the affected Category 2 employees' wages back to the previous level, doing so may have a negative impact on morale that might outweigh any employer savings. That said, the employer may wish simply to maintain the salary increase but delay or limit subsequent scheduled increases.

3) Exempt employees who earn between $40,000 and $44,999

   Before the injunction, I suggested that employers with Exempt employees in this category look at each employee

individually and decide what action to take regarding the employee's classification status. That same analysis should now be undertaken once again to decide whether to keep or modify whatever changes were made for employees in this category. Regarding those Category 3 employees who were converted to hourly, the employer can simply restore the employee to Exempt status and return to previous work hours and obligations. For Category 3 employees whose salaries were increased to the new minimum, the employer will need to make a determination on a case-by-case basis whether to proceed with the raised salary or reduce it back to its previous level, or do something in between.

4) Exempt employees who earn between $23,660 (the current Exempt minimum) and $39,999.

At the seminars, I suggested that any Exempt employees who earn less than $40,000 (category 4) should likely be converted to hourly since the necessary pay increase to keep them Exempt would likely be too expensive for most employers, and paying overtime would actually be more cost-effective. Assuming the employer is satisfied that the employee otherwise meets the "duties" test requirements under the Act, employees in this category who were converted to hourly may be returned to Exempt status. This should occur before December 1st so that no (additional) overtime hours are accrued.

Until the DOL's case is adjudicated, employers should not assume the present injunction will continue indefinitely. If and when the DOL's increases are upheld, employers will need to be in a position to implement expeditiously whatever changes are needed regarding their then-affected Exempt employees. We will keep you updated as new information becomes available. In the meantime, please feel free to contact me with any questions about best practices for your particular company or organization. **FT**

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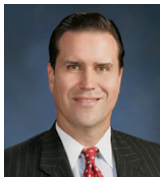

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