Overtime Rules Change on December 1, 2016

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BACKGROUND

According to the federal Fair Labor Standards Act (FLSA), all employees should be paid hourly and must receive time-and-a-half overtime pay for all hours worked in excess of forty in any given work week. According to what are called the "White Collar Exemptions," the FLSA allows employers to "exempt" certain employees from being paid hourly and being paid overtime if the employee meets certain criteria:

1. ***The salary basis/salary level test***
   Employee earns a weekly salary of $455 or more each and every single week, *and*
2. ***The primary duties test***
   Employee's primary duties are the performance of certain office, non-manual tasks, and those duties fall within one of the enumerated exemption categories of the FLSA, most commonly, the Executive exemption, the Administrative exemption, or the Professional exemption.

WHAT IS CHANGING ON DECEMBER 1, 2016

Minimum Weekly Salary Threshold Is Increasing

The most significant change for most employers with salaried employees is an increased weekly salary threshold. Currently, the salary threshold is $455 per week. Effective December 1, 2016, no employee can be classified as an exempt employee if his or her salary is not at least $913 per week ($47,476 per year). While there had been requests from industry to stair-step the implementation of the salary increases over a period of time, the new weekly wage rate increase will happen all at once. The new regulations will, however, allow an employer to include the value of non-discretionary bonuses and other employee incentive pay when calculating the employee's weekly wages – but only if these payments do not exceed ten percent of the employee's total weekly compensation and are made no less frequently than quarterly. Employer-provided retirement plan contributions, discretionary bonuses, and other employer-provided benefits cannot be included when calculating an exempt employee's weekly salary rate.

"Highly Compensated Employee" Threshold Is Also Increased

While most exempt employees are classified as exempt because they meet both elements of the two-part test (salary basis and primary duties), there is another means by which an employee can be considered "exempt" for purposes of being salaried and not subject to overtime pay. This occurs when an employee is considered to be a "highly compensated employee" (HCE) -- meaning he or she has an annual salary of not less than $100,000 and he or she regularly performs at least one (as opposed to all) of the exempt duties customarily performed by an exempt Executive, Administrative, or Professional employee. As stated above, the key distinction between the HCE exemption and the other exemptions (e.g. Executive, Administrative, Professional) is that, under the HCE Exemption, the employee need not perform *all* of the primary duties of one of these other exemptions. Rather, he or she need only perform one or more of the primary duties of one of these other exemptions. Because most employees who presently earn more than $100,000 per year are likely exempt because they already perform all, rather than just one or two, of the duties tied to a particular exemption category, the change to the HCE exemption will not impact many employers. If your company has an employee whose exempt employee status is based on the HCE exemption category rather than one of the others, the HCE annual salary threshold is increasing from $100,000 to $134,000 on December 1, 2016.

Automatic Increases to the Salary Threshold Every Three Years

The threshold of $913 per week was based on the standard salary paid to full-time employees at the fortieth percentile in the lowest wage census region (the South) in the country. Rather than allowing the minimum weekly salary to remain largely unchanged for many years (as was the case with the current $455 weekly salary), the new regulations provide for automatic increases every three years. Starting on January 1, 2020, the minimum weekly salary will automatically increase, as needed, to meet the then-current weekly salary paid to full-time employees at the fortieth percentile of whatever is the then-current lowest wage census region.

The new HCE was based on the ninetieth percentile of annual earnings of full-time salaried employees nationally. It too will receive automatic increases, as needed, every three years to remain at the ninetieth percentile.

What Employers Should Do to Prepare for the Upcoming Salary Test Change

Employers should take a look at their exempt/salaried employees who are exempt because they are covered by the Executive, Administrative, or Professional exemptions. Are any of these employees currently earning less than $913 per week (or less than $134,000 annually if he or she is a HCE)? If yes, the employer has two choices:

1. Increase the employee's weekly salary to $913 or more.

2. Convert the exempt employee to an hourly paid employee.

Employers who choose the second option and wish to pay the employee the same amount he or she is presently paid each week must calculate the proper hourly wage, as follows:

a. Determine how many hours the employee in question presently works, on average, during any given week. If the employee never, or hardly ever, exceeds forty hours per week, it is simple to calculate their new hourly rate.

b. If the employee routinely exceeds forty hours per week, the employer must calculate what the hourly rate would need to be at straight time so that the straight time hourly rate, when added to the employee's time-and-a-half rate for the overtime hours he or she customarily works, gets him or her back to their present weekly salary.

This second option may be very workable for employers whose exempt employees *never* work beyond forty hours or whose exempt employees *always* work the same number of overtime hours. But this analysis becomes more complicated for employers whose employees work varied hours each week.

Additionally, employers who convert formerly exempt employees to hourly-paid employees must bear in mind that the FLSA and the Massachusetts Wage Act require that hourly employees must be paid for *all* hours worked. This includes the time spent checking, generating, and or replying to work related emails, voicemails and phone calls after regular work hours. Failure to pay an hourly paid employee for all time worked subjects a Massachusetts employer to treble damages and the employee's legal fees if a case is pursued and the employer is found liable. Additionally, employers are reminded that all hourly paid employees' daily hours (e.g., start time and end time) must be documented each day and those records must be retained by the employer.

CONCLUSION

Employers must examine the salaries paid to their exempt employees. For any of its salaried/exempt employees who earn less than the above described salary thresholds, the employer must either increase the employee's salary to comply with the new salary threshold or it must convert the employee to hourly paid and then pay him or her overtime for all hours worked in excess of forty hours. Any necessary changes must be implemented before December 1 when the new salary figure takes effect. **FT**

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