Northwest Ohio Human Resource Association

AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

LEGISLATIVE UPDATE

September 2015

DOL proposes new regulations regarding classification of "exempt" employees

On July 6, 2015, the Department of Labor (DOL) published proposed regulations that dramatically change the criteria by which employees qualify as "exempt" from the overtime requirements of federal law. The regulations affect what are commonly known as "white collar" employees, those engaged in executive, administrative, professional and outside sales positions. By the DOL's own estimate, if these regulations go into effect as written, an additional 5 million employees will become entitled to receive overtime pay.

Under federal law employees must meet two tests before they are considered "exempt" from the overtime requirements. Those tests are known as the "salary basis" test and the "primary duty" test. The proposed regulations affect only the salary basis test, and raise the current minimum salary ($455.00 per week, or $23,660 per year) to a new, and indexed rate that is equal to the 40th percentile of weekly wages for all full time salaried employees as determined by the DOL's Bureau of Labor Statistics.

Current minimums for exempt employees:

- ***$455.00 / Week***
- ***$23,660 / Year***

Projected minimums for exempt employees in 2016:

- ***$970.00 / Week***
- ***$50,440 / Year***

By "indexing" the minimum salary, the DOL has insured that employers will have to closely monitor whatever salaries they pay, and to do so at least once every year, or risk the loss of the "exempt" status of certain employees simply due to the periodic increase in the minimum salary level. The 40th percentile for 2016 (the year during which these regulations are likely to become effective) is projected to be $970.00 per week, or $50,440.00 per year. This represents a dramatic increase of over 100%, and is likely to catch in its reach a large number of employees who have previously been treated as "exempt."

In addition, the DOL asked for public comments concerning whether additional forms of compensation should be included within the "salary" levels mandated by these new regulations. Historically, DOL regulations have excluded all bonus payments, but the DOL is now indicating its willingness to consider whether to include non-discretionary bonuses and other incentive payments when considering whether the new salary levels have been met.

Furthermore, the DOL said that it has no current intent to modify the "primary duty" test for the white collar exemptions. However, it did invite public comment on certain aspects of the primary duty test, most notably whether there should be some minimum amount of time that an employee must devote to specific duties (such as 50% of their normal work time) before qualifying for "exempt" status.

The time for public comment on these proposed regulations recently ended on September 4, 2015. They are, therefore, subject to change based upon input provided during the comment period. However, employers should begin now an immediate review of their current salary levels to determine how many of their employees, whom they might currently consider to be "exempt" and to whom no overtime is paid, would fall under the new salary thresholds and therefore qualify for overtime pay once they have worked more than 40 hours in a week. In addition to how these proposed regulations will affect current employees, employers should also be aware of how they will affect new hires, and how to structure any salary increases and incentive compensation programs in the meantime.

NLRB creates new "joint employer" status

In August, the National Labor Relations Board released an opinion that changes the definition of "joint employer" for purposes of organizing by or bargaining with a union, and both may be jointly held liable for unfair labor practices. Under the new definition, two or more entities may be considered "joint employers" if: (1) they are both employers under the common law, and (2) they share or co-determine, directly or indirectly, the essential terms and conditions of employment. This replaces the former definition, which limited joint employer status to those entities that possessed and exercised control over employees' terms and conditions of employment.

The NLRB noted the following decisions and actions are included in the "essential terms and conditions of employment": hiring, firing, discipline, supervision, direction, wages and hours, "dictating the number of workers to be supplied, controlling scheduling, seniority, and overtime, and assigning work and determining the manner and method of work performance." Under the new definition, merely having the right to control these terms, whether or not exercised, may be sufficient to invoke joint employer status.

In the case at issue before the NLRB, the employer, Browning-Ferris Industries (BFI) of California, used long term temporary employees, which the Teamsters sought to organize. The staffing agency had already been found to be the employer, and BFI was found to be a joint employer because it at least indirectly controlled certain terms and conditions of employment, including controlling who the staffing agency could hire, dictating times of shifts, and having a significant role in determining workers' wages.

Congress increases ACA penalties

With little fanfare, in June Congress approved significant increases to the penalties assessed to employers who fail to timely file, or who file incomplete or inaccurate tax returns. This increase not only affects the filing of returns employers are familiar with, such as W-2's and 1099's, but also the new forms required under the ACA. The penalties have increased from $100 per employee per day, to $250 per employee per day. The maximum penalty that may be assessed to employers has also increased from $1.5 million to $3 million.

Supreme Court ruling may create need to open special enrollment period

Since the Supreme Court's ruling in June in *Obergefell v. Hodges*, which legalized same-sex marriage in all states, employers who offer health insurance benefits to spouses and children, but who did not previously offer health insurance benefits to same sex spouses or their dependent children, may need to open a special enrollment period.

Newly married couples generally qualify for a special enrollment period due to a change in status. However, same sex couples who may have been married in other states where such marriages were legal, weeks, months, or years ago should also receive a special enrollment period if their marriages were not recognized for purposes of health insurance benefits on the same terms and conditions as other married couples.

Employers should check with their insurance provider to determine whether they need to open a special enrollment period.

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