The Rules of the FLSA Game Are A-Changin’

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Most nonprofit employers know that it’s critically important to distinguish between “exempt” and “non-exempt” employees or risk exposure to costly awards of multiples of back pay and penalties. For those of you who don’t know, “exempt” means exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act, or FLSA. In order to qualify as “exempt,” a position in an organization must meet specific tests — and these are changing.

The following article is graciously provided by attorneys at Bracewell & Patterson, LLP, to alert nonprofit employers to the proposed changes, but is not intended to constitute legal advice and should not be used as such. The accurate application of any law or regulation depends on the specific circumstances presented.

Department of Labor Issues Proposed Revisions to “White Collar” Exemptions

June 30 ended the public comment period on proposed changes to implementing regulations to the Fair Labor Standards Act (FLSA), a Depression-era federal law covering minimum wages, overtime pay, white collar exemptions, child labor, and related issues. The act has remained largely unchanged since its enactment in 1938. Many Department of Labor (DOL) regulations have been characterized as “seriously outdated,” and in recent years there have been widespread calls for revision of these regulations. In 2002, Secretary of Labor Elaine Chao reaffirmed the DOL’s commitment to changing these outdated rules. On March 31, 2003, the department published proposed new regulations covering “white collar” or “exempt” employees. (For the full version of the proposed regulation printed in the March 31, 2003 Federal Register click here.)

According to the U.S. Department of Labor, the impact of these changes would include: (i) 1.3 million low-wage workers gaining overtime protection; (ii) overtime protection being strengthened for an additional 10.7 million workers; and (iii) regulatory red tape and litigation costs being reduced, resulting in more resources and stimulation of economic growth.

“White Collar” Exemptions

The FLSA generally requires an employer to pay covered employees the established federal minimum wage (currently $5.15/hour) and time and one-half the employer’s regular rate of pay in overtime pay for hours worked above 40 in any workweek. However, the FLSA includes a number of exemptions to these general rules.

The “white collar” exemptions currently exclude from the FLSA’s overtime and minimum wage protections any employee who meets the regulatory description of an executive, administrative, professional, outside sales, or computer employee. In general, the current DOL regulations require that each of three tests be met before the executive, administrative, professional, outside sales, or computer exemptions apply: (i) the “salary basis test” — the employee must be paid a predetermined and fixed salary, not an hourly wage that is subject to reductions due to variations in the quantity or quality of work; (ii) the “salary level test” — the amount of salary paid must meet the minimum amounts specified in the regulations; and (iii) the “duties test” — the employee’s job duties must primarily involve managerial, administrative, or professional skills as defined in the regulations. The proposed regulations substantially revise these three tests.

Summary of Proposed Changes for Executive, Administrative and Professional Exemptions

1. Salary Basis

Current DOL regulations severely restrict an employer’s ability to take deductions from an exempt employee’s pay for absences for disciplinary reasons. The proposed rules would significantly broaden this option, permitting employers to make deductions for *full-day absences* imposed for disciplinary reasons, such as a suspension for sexual harassment or violation of other policies.

2. Safe Harbor Provision

Under current DOL regulations, an employer that makes improper deductions from the pay of an exempt employee can lose the exemption for an entire class of employees. However, under current DOL rules, an employer that inadvertently makes an impermissible deduction is provided a “window of correction,” whereby it can retain the exemption by reimbursing the employees for the improper deductions. Citing difficulties with the “window of correction,” the DOL now proposes that the exemption would be lost only if there is a pattern and practice of improper deductions from exempt employee’s pay. Further, the loss of the exemption would apply only narrowly to employees in the same job classification and working for the same manager who is responsible for the improper pay-docking decision or policy. In addition, under the proposed DOL regulations, if an employer has a written policy prohibiting improper pay deductions, notifies employees of the policy, and reimburses employees for any improper deductions, then the employer will not lose the exemption for any employees unless it repeatedly and willfully violates the policy or continues to make improper deductions after receiving employee complaints.

3. Exemption Tests

The charts attached to this summary show a comparison between the current DOL “white collar” exemption tests and the new tests under the DOL’s proposed regulations, including the new “highly compensated employee” category for employees making at least $65,000 annually.

Conclusion

The proposed DOL regulations, if finalized in their current form, would result in substantial changes in overtime exempt status in the American workplace. Many currently “exempt” employees would no longer meet the minimum salary requirements and would lose their exempt status, regardless of their duties. Employers will be required to pay them overtime for hours worked over 40 in a workweek.

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