Changing Scope of “White Collar” Overtime Exemptions

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History

• Back in April of 2004, the United States Department of Labor (“DOL”) issued final regulations under the FLSA which clarified the white collar exemptions – to become effective August 2004

• That was the last time those regulations were revised
Wage and Hour Laws

- The Fair Labor Standards Act
- The New Jersey Wage and Hour Law

Back in September 2011, the NJ DOL adopted the “white collar” exemptions contained within the FLSA
Overtime

• Overtime must be paid at the rate of one and one-half times an employee’s regular hourly rate for all hours worked in excess of forty

• Need not be paid for any hours worked in excess of eight (8) in one day or for holiday hours under state and/or federal law
Hours Worked

- Overtime must be paid for all “hours worked” in excess of forty
- Ordinarily includes “all the time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed workplace”
To whom do the overtime rules apply?

- **Non-exempt employees**: All employees are entitled to overtime unless they are specifically covered by one of the statutory exemptions.

- **Exempt employees**:
  - Executives
  - Administrators
  - Professionals
  - Outside salespeople
  - Computer professionals
  - Highly compensated employees
  - Certain employees subject to Department of Transportation regulations
“White Collar” Exemptions

- Executives
- Administrators
- Professionals
- Outside Salespeople
- Computer Workers
- Highly compensated employees
Independent Contractors

- Only employees are covered by the wage and hour laws
- Independent contractor status is determined by considering whether the individual is economically dependent upon the business with whom he contracts
With a few exceptions, three broad requirements must be met for an employee to be exempt under one of the white collar exemptions:

- **Salary Level Test**: Employee must be paid a certain weekly minimum.
- **Salary Basis Test**: Employee must be paid on a salary (rather than hourly) basis.
- **Duties Test**: Employee must perform certain exempt duties, as set out in the specific exemptions.
Salary Level Test

• The salary level for white collar exemptions is currently $455/week ($23,660 annually)

• For highly compensated employees, currently the total annual compensation must be at least $100,000
Salary Basis Test

- To be salaried, employee must receive each pay period a predetermined amount that is not subject to reduction based on the quality or quantity of work performed.
- Salary basis and exempt status may be lost if improper deductions are made to salary.
Additional Compensation to Exempt Employees

• Additional compensation, paid on an hourly basis, explicitly allowed for exempt employees
• Cleared up conflicting federal case law
Executive Exemption

- **Primary Duty Test**: Employee’s “primary duty” must be management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof.

- **Supervision**: Must “customarily and regularly direct the work of two or more other employees”.

- **Authority to change status**: Must have “the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight”.

- In addition to a minimum weekly salary of $455, executive employees must meet all of the 3 requirements related to their duties.
Administrative Exemption

• In addition to a minimum weekly salary of $455, an administrative employee must meet two other tests:
  – **Primary Duty 1**: “Primary duty” must be “the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers”
  – **Primary Duty 2**: “Primary duty” must include “the exercise of discretion and independent judgment with respect to matters of significance”
Professional Exemption

• **Learned Professional** – The primary duty must be the performance of work:
  – Requiring knowledge of an advanced type,
  – Knowledge must be in a field of science or learning; and
  – The knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction

• **Creative Professionals**: Primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor
Outside Sales Exemption

• Employee’s primary duty must be making sales, or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client

• The employee must be customarily and regularly engaged away from the employer’s place or places of business

• The salary requirements of the regulation DO NOT apply to outside salespeople
Computer Worker Exemption

• Must be paid at least $455/week or on an hourly basis of not less than $27.63
• Must be employed as a computer systems analyst, computer programmer or other similarly skilled worker in the computer field
Computer Worker Exemption

• Primary duties consist of:
  – The application of systems analysis techniques and procedure,
  – The design, development, documentation, analysis, creation, testing or modification of computer systems or programs,
  – The design, documentation, testing, creation or modification of computer programs related to machine operating systems, or
  – A combination of the aforementioned duties, the performance of which requires the same level of skills.
Exemption for Highly Compensated Employees

- Exemption for employees making over $100,000 per year, including being paid at least $455 per week
  - Employee earns at least $100,000 a year (including nondiscretionary bonuses and commissions); and
  - Customarily and regularly performs at least one of the exempt responsibilities of an exempt executive, administrative or professional employee; and
  - Primary duty involves performing office or non-manual work
Recent History

• On March 13, 2014, President Obama signed a memorandum directing the Secretary of Labor to revise the overtime pay regulations under the FLSA.

• The directive was to “propose revisions to modernize and streamline the existing overtime regulations”
Recent History

• On June 30, 2015, the DOL released a 295 page Notice of Proposed Rulemaking, seeking public comments on the proposed changes to the “white collar” overtime exemption regulations.
• The comment period ended on September 4, 2015.
• These changes are inevitable, and were designed to extend overtime protections to millions of employees.
Proposed Regulations

• There are three key proposed changes:
  – 1) A new minimum salary level, which is set at the 40th percentile of weekly earning for full-time salaried workers ($921/week as of 2013; predicted to be $970/week or $50,440 annually in 2016)
  – 2) A new minimum total annual compensation for highly compensated employees set at the 90th percentile of weekly earnings for full-time salaried workers (in 2013 it was $122,148; the DOL has not predicted 2016)
Proposed Regulations

• There are three key proposed changes (con’t):
  – 3) Establishes a mechanism for annually updating the minimum salary and compensation levels for these exemptions going forward
Requests for Comments

• Whether to allow incentive compensation and nondiscretionary bonuses (i.e., production bonus) to be considered in determining whether salary level test met

• Whether commissions should be included as part of nondiscretionary bonuses and other incentive pay to partially satisfy the salary level test
Requests for Comments

• What type of methodology should the DOL use to update the minimum salary and compensation levels going forward - the DOL has proposed two methods:
  • Keep them based on the 40th and 90th percentiles of earning; or
  • Adjust them based on changes in inflation as measured by the Consumer Price Index

• How often should updates be made
Requests for Comments

- Although there are currently no proposed changes to the "duties tests," the DOL was seeking comment on whether, with the revised salary level test, any changes would be necessary.
What are the consequences of failure to comply with the FLSA?

They can be scary!
What are the consequences of failure to comply with the FLSA?

- Lawsuits
  - Given the publicity of these changes, it may cause employees to question their proper classification
  - Suit for failure to properly pay overtime compensation
  - Suit for retaliation under the FLSA
More Consequences

• Collective Actions Under FLSA
  – Similarly situated employees can sue, as a group, to recover for wage and hour violations

• Class Actions Under State Law
  – Must satisfy class action rules
Statute of Limitations

- Non-willful violations: 2 years to file suit
- Willful violations: 3 years to file suit if the employer knew the conduct violated the FLSA or showed reckless disregard for compliance
Damages

- Lost wages
- Liquidated damages
- Civil penalties
- Attorneys’ fees
- Interest on unpaid wages
- Costs
- Fines
- Possible imprisonment/criminal fines
DOL Audits

- Audits may be undertaken by the state or federal government and may be triggered by:
  - Employee complaints
  - Random audits
  - Domino effect
Practice Pointers

• Planning ahead is critical to managing the risk associated with reclassification
• List employees and job titles, job descriptions, salaries, and current classifications
• Identify and set aside employees who are easy to classify
As to individuals who are not “easy” to classify:

- Review salary levels of all employees
- If an employee no longer qualifies as exempt under the new salary levels, an employer may choose to treat the worker as nonexempt and pay him or her overtime wages, or raise the employee’s salary to at least the minimum per week, if he or she performs exempt duties that meet one of the exemptions’ duties tests
- Review the actual duties
Review Job Descriptions Of All Employees

- Incorporate terminology that appears in the regulations
- Document why each position is classified as exempt or nonexempt
- The regulations remind employers that certain “blue collar” employees are not intended to be considered exempt under any of the “white collar” exemptions
Highly Compensated Employees

- Those who are currently “highly compensated” should be reviewed for exemption compliance
- Consider raising the salary of such a worker or make an end-of-the-year lump-sum payment to put the worker over the dollar threshold
- Ensure that employee at least meets “new” salary level test
- **Good news**: most highly compensated employees meet one of the other white collar exemptions
Avoiding Litigation – Especially Costly Class or Collective Actions

• Address the concerns as to overtime entitlement of classes of employees
  – Exemptions are construed against the employer
  – Review the regulations that govern the particular class of employees
  – Previously issued judicial decisions and administrative rulings will – in many situations and with respect to numerous issues – continue to be relevant
No Retaliation

• Be sure that employees who are disciplined after raising such complaints are disciplined for legitimate reasons and that such reasons are clearly supported by timely and accurate documentation
• Warn supervisors of the dangers of retaliation
Proper Recordkeeping

- Keep appropriate records of hours worked by employees, including time cards and/or time clocks (don’t forget non-typical working hours!)
- Such records are required as to non-exempt employees (suggested for exempt)
- Explain deductions from pay to employees
Seek Help When Necessary

• The DOL has a compliance assistance plan in an effort to educate employers regarding their responsibilities
• Overtime rules on the DOL’s home page at www.dol.gov
• Seek competent legal advice when necessary
Thank you!

“We can ask our people to work eight days a week, but we’ll have to pay a royalty to The Beatles.”