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The U.S. Department of Labor's Revised White Collar Regulations

Part II: Considerations and Strategies for Nonprofit Compliance

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September 8, 2017 Update: ***On November 22, 2016, a federal district court in Texas issued a preliminary injunction blocking the implementation of nearly all of the 2016 revisions that the United States Department of Labor (DOL) made to its regulations governing the overtime exemptions for executive, administrative, and professional employees and which are discussed in this article. See State of Nevada v. United States Department of Labor to read the November 2016 decision. On August 31, 2017, the district court issued summary judgment in favor of the plaintiffs and declared the DOL's 2016 revisions invalid and unenforceable. See State of Nevada v. United States Department of Labor to read the August 2017 decision. On September 6, 2017, the U.S. Court of Appeals for the Fifth Circuit dismissed the DOL's appeal from the preliminary injunction.***

It appears that the litigation is now over. In view of these developments, an employer currently is not obligated to pay white collar employees a weekly salary of more than $455 in order for the employees to retain their exempt status under federal law and New Jersey law.

However, an employer still must comply with state laws that establish a minimum weekly salary that is higher than $455 in order for white collar employees to be deemed exempt from overtime requirements in those states. For example, in Connecticut, the minimum weekly salary for white collar employees to be deemed exempt from overtime requirements is $475 and in New York it is $825 for New York City employers with 11 or more employees, $787.50 for New York City employees with 10 or fewer employees, $750 for employers in Westchester, Nassau, and Suffolk Counties, and $727.50 for those employers outside of New York City and Westchester, Nassau, and Suffolk Counties.

Note that the DOL has started new rulemaking, which still might result in an increase in the federal and New Jersey minimum weekly salary for white collar workers. If and when those regulations are issued, Pro Bono Partnership will post a revised version of this two-part article.

In May 2016, the U.S. Department of Labor ("DOL") published revised regulations governing the minimum salary that must be paid to "white collar" employees in order for those employees to be exempt from an entitlement to overtime ("OT") pay for hours worked in excess of 40 per week. The revised regulations go into effect on December 1, 2016.

In Part I of this two-part article, Michael A. Frankel, Esq. and Joseph J. DiPalma, Esq., from Jackson Lewis P.C., explain in detail the major changes made by the DOL and how those changes will impact the nonprofit community. They also discuss the obligation of nonprofits to simultaneously comply with both the federal Fair Labor Standards Act and applicable state wage and hour laws, and they provide a brief reminder to nonprofits about some of the limits on the use of volunteers.

Here, in Part II, Christine Michelle Duffy, Esq., from Pro Bono Partnership, provides employers an overview of some considerations and strategies for addressing the new federal minimum weekly salary level of $913 ($47,476 annualized) for employees who are employed in a bona fide executive, administrative, or professional ("EAP") capacity. Part II will help nonprofits navigate decisions relating to whether to reclassify exempt employees as nonexempt, (2) alert nonprofits to some hidden landmines, and (3) provide nonprofits tips for complying with the revised regulations. An abbreviated version of Part II is posted on The Geraldine R. Dodge Foundation blog.

It should be noted that the DOL also increased the minimum annual salary level for highly-compensated white collar employees to $134,004, of which at least $913 must be paid weekly. In addition, employers need to remember that each state has its own wage-hour laws, which may have different rules governing the classification of employees as exempt from OT. As explained in Part I, employers must comply with both the federal and state rules.

The first thing an employer needs to do is identify and evaluate all of its positions that are currently classified as exempt and compensated below the new $47,476 minimum salary threshold. Then, the employer must decide whether to raise their salaries to at least $47,476 or reclassify them as nonexempt.

A similar analysis needs to be conducted with respect to any highly-compensated exempt employees who are currently compensated below the new $134,004 minimum salary threshold. An employer will need to either raise their salaries to at least $134,004 or make sure they meet one or more of the more demanding standard EAP duties tests.

The Exempt Option

If the employer wants to keep one or more employees exempt from OT, it will need to increase their salary to at least $913 a week ($47,476 annualized). This would be a good time to also verify that their current actual duties—as opposed to what their job descriptions say their duties are—still warrant that they be classified as exempt EAP

employees. If you don't recall what the minimum duties are in order for an employee to be deemed exempt from OT, then you should review the DOL's regulations at 29 C.F.R. Part 541 and the DOL Series 17 Fact Sheets. Also, if current job duties don't match the employee's job description, then you should update the written description.

One benefit of the DOL's changes is that employers that have had doubts about whether some of their exempt employees' duties legitimately qualified the employees for one of the EAP exemptions can now reclassify some or all of those employees as nonexempt and use the change in salary level as cover for the reclassification. Even if an employer hasn't had any such doubts, it should consider reviewing all of its exempt employees' duties to ensure they are sufficient to meet one or more of the EAP duties tests.

Employers can use *non*discretionary bonus, incentive, and commission payments to satisfy up to 10% of the $913 minimum weekly salary of an exempt employee. The employee would still need to be paid a weekly salary of at least $821.70 (90% of $913). The nondiscretionary bonus, incentive, and commission payments would need to be paid on a quarterly or more frequent basis. Thus, annual and semi-annual nondiscretionary bonuses will not qualify for this purpose.

If by the end of a quarter the weekly salary and nondiscretionary payments received by the employee during the quarter do not total at least $11,869 ($913 x 13), the employer must make a shortfall payment by no later than the first pay period of the following quarter. Note that this new 10% rule does not apply to the highly-compensated employee exemption.

As mentioned above, the new minimum salary level goes into effect on December 1, a Thursday, which likely will not be the first day of most employers' seven-day pay periods. Thus, employers will need to be sure paychecks for that pay week properly reflect any mid-week salary increases.

The Nonexempt Option

An important consideration will be the number of hours an employee who earns less than $913 a week actually works each week. If an employee never works more than 40 hours in a week (including from home or the beach), the issue is somewhat academic, because the employee would not be entitled to overtime as a newly-classified nonexempt employee—whether you continue to pay the employee on a salaried basis or on an equivalent hourly basis, the annualized compensation will be the same. Converting this employee to nonexempt would be cost neutral. However, be cautious in following this approach because you need to make sure you truly know how many hours the employee has been working. In today's world, with exempt employees always connected to e-mail and office servers, it may be difficult for employers to accurately measure the true number of hours an exempt (or soon-to-be-nonexempt) employee has been regularly working.

If the decision is made to reclassify an employee as nonexempt, then the employer will need to carefully monitor the hours worked, because if the hours worked in a week exceed 40, then the employee would be entitled to OT at time-and-one-half for the hours over 40. If an employee does work more than 40 hours in a week (including from home or the beach), then the employer will need to consider strategies for compensating the employee. Options include:

- Keeping the same total annual wages by backing into an hourly rate that would allow the employee to earn the same amount when OT pay is factored in. For example, if an employee typically works 50 hours and is paid $605 a week ($31,460 annually), then in order not to incur higher compensation costs, the employee would need to be paid $11 per hour:

  40 + (10 x 1.5) = 55 effective hours per week with the OT hours multiplier of 1.5 factored in

  $605 ÷ 55 = $11 an hour

  Here is a formula:

  (Current weekly salary) ÷ (40 hours + (OT Hours x 1.5))

- Keeping the same total annual wages by treating the employee as a salaried nonexempt employee. The DOL has special rules relating to paying nonexempt employees on a salaried basis at 29 C.F.R. Part 778. Employers should not adopt the "fluctuating work week" option for paying a salary without first consulting with legal counsel, as it can be difficult to implement and is not permissible under some state laws.

- Reducing the employee's workload so that the employee will not work over 40 hours and, if necessary, either distributing the extra work to employees who are not at risk of going over 40 hours a week or, possibly, hiring a second employee to pick up some or all of the extra work. For example, an employee who works, on average, 50 hours a week could have hours reduced by 50%, with a new employee working 25 hours as well. With some creative thinking, the employer potentially could change hours so that one or both of the employees would not qualify for some employee benefits for which full-time employees would otherwise qualify.

- Determining the overall fiscal impact of having to pay additional compensation as OT and possibly changing fringe benefits, such as reducing the size of the employer's matching contributions to its 401(k) plan, eliminating a vacation day for all employees, and/or eliminating or delaying pay increases, discretionary bonuses, and promotions that otherwise had been planned.

To the extent that reclassified employees previously were receiving bonuses, commissions, or other incentive compensation, employers will need to rethink those forms of compensation or carefully evaluate how to factor them into the weekly compensation of now-hourly employees. Some of these compensation payments might need to be included in the nonexempt employees' "regular hourly rate" for purposes of calculating any OT premium pay due. See the DOL's OT compensation rules at 29 C.F.R. Part 778 for more details.

Other Issues

Implementing the DOL changes has the potential to cause morale and legal issues, such as:

- *Potentially distorted salary bands*. If an employer decides to increase the minimum weekly salary in order to keep an employee classified as exempt, this might upset the overall salary structure within the nonprofit unless other pay adjustments are made. The employee's new (potentially significantly higher) salary will draw closer to the salary paid to higher-paid employees, whose salaries might be higher due to, e.g., supervisory duties, skill level, and/or seniority. Similarly, the higher salary may further widen the gap between lower-level employees and white collar employees. This review of the nonprofit's overall pay structure offers a good opportunity for the organization to address known and previously unidentified pay disparities that might have an adverse disparate impact based on a protected characteristic, such as race or sex.

- *Two employees doing the same job, one of whom is classified as exempt and the other as nonexempt*. Employment lawyers often advise that it is not a good idea to have two employees doing the same job where one is classified as exempt while the other is classified as nonexempt. That distinction is a potential red flag during an audit by the federal or state DOL, and it could raise employment discrimination issues (e.g., one employee is man and the other employee is a woman). Moreover, managers might have a hard time remembering that the two employees are classified differently, which could lead to problematic mistakes, such as impermissible pay-docking with respect to the exempt employee.

  Beyond that, there are pragmatic issues to be concerned with if the employees' base weekly wages are the same and one of them is now OT eligible:

  - The nonexempt employee might end up with total compensation that is higher due to OT pay.

  - To avoid the situation described immediately above, a manager might decide to give more work to the OT-ineligible exempt employee.

- If a department needs to reduce its budget, the OT-eligible employee might be directed to work fewer hours (and, therefore, will receive less pay), with the exempt employee expected to pick up the extra work.

- The exempt employee will not have to complete a timesheet or punch a clock. This employee also would retain flexibility with respect to when to work and, therefore, can shift hours from one week to the next without the employer needing to worry about potential OT pay during the second week.

- *Employees seeking union representation*. If exempt employees are reclassified as nonexempt and their supervisory authority is eliminated, they become eligible for representation by a union. Employees who feel that their status and autonomy in the workplace have been greatly diminished might be more attentive to the uptick in messaging from unions that likely will occur during the following months.

Additionally, employers will need to train the newly nonexempt employees about the nonprofit's timesheet policies, as most if not all of them will not be accustomed to recording hours worked and not working overtime without express permission from their managers. Hours spent in training sessions and certain travel hours will now be compensable time that needs to be properly accounted for – see 29 C.F.R. Part 785. Work from home or the beach will now also be compensable time; hours that these employees will need to begin to track. If employers haven't done so already with respect to nonexempt employees, they should consider turning off e-mail access after normal working hours and/or regularly reinforcing the new limits on working more than 40 hours in a week.

Employers should also be prepared to follow up and audit the timekeeping practices of newly reclassified employees to ensure that they are following proper processes and procedures. This would include, for example, checking e-mail systems to see if the employees have been working off-hours but not recording those hours on their timesheets.

Culture Change for Formerly White-Collar Employees

These employees aren't used to tracking their hours and many of them likely have been working 24/7 for a long time. This will require a dramatic—and perhaps welcomed—change in the mindset of employees being converted to nonexempt status. Don't believe me? Consider the finding made by Jennifer Deal, Senior Research Scientist at the Center for Creative Leadership:

> *The use of smartphones to stay connected to work 24/7 is so common that it's now considered the "new normal." People are fatigued and angry about being always on and never done; the lines between their personal and professional lives blurred if not completely eliminated. . . . We've found that professionals,*

managers, and executives who carry smartphones for work report interacting with work a whopping 13.5 hours every workday (72 hours per week including weekend work).

Nonprofits will need to manage this. If the management of a nonprofit is aware of newly-classified nonexempt employees (as well as currently-classified nonexempt employees) working off the clock, it needs to stop that practice immediately, and it must pay the employees for any hours actually worked. Managers should issue a stern warning to the employees who fall to follow proper timekeeping practices and impose more significant discipline for repeat violators, as well as provide additional training regarding the organization's timekeeping practices. Failure to take appropriate corrective action could lead to significant back pay liability, penalties, and interest. Federal and state departments of labor and taxation can—and do—seek to hold supervisors and managers (including board members) personally liable for knowingly allowing (1) off-the-clock work to occur and/or (2) the failure to withhold income taxes on wages owed employees. Don't believe me? See the illustrative articles here, here, here, and here.

Communicating the Changes

Employees will have lots of questions and they will be talking among themselves. Don't try to stop employees from doing so. Generally, employees have a protected right to discuss their terms and conditions of employment, including compensation.

It is important for nonprofits to recognize the employees' concerns—their compensation is at stake. For those employees who will be reclassified as nonexempt, employers should consider preparing talking points for managers about the changes, to help explain, in a consistent manner, the reason for the changes, and how the changes will impact, if at all, the employees' compensation, benefits, and opportunities for career advancement. Some supervisors might not have the skill set to communicate on this topic, so consider having them direct employees who have detailed questions to a specific person, such as the manager who oversees human resources.

Give as much notice as possible to affected employees. At least 30 days would be ideal.

Keep Your Notes, As You Will Need Them in Three Years

Employers should make general notes regarding the considerations and strategies they evaluated this year in order to stay in compliance, and should keep copies of any talking points, FAQs, and other general communications they created, because the DOL will be updating the weekly minimum salary level every three years, with the first update going into effect on January 1, 2020. Based on historic wage trends, the DOL projects that the minimum salary levels in 2020 are likely to be approximately $51,168 (an increase of $3,692 from the new level) and $147,524. The DOL will give employers at least 150 days' advance notice of future changes in the salary levels.

The homework done this year likely will help save you time in 2019.

Questions?

If you have any questions regarding the DOL regulatory changes, please contact us. Connecticut and New York nonprofits should contact Jennifer Grudnowski, Esq., at (914) 328-0674 x335. New Jersey nonprofits should contact Christine Michelle Duffy, Esq., at (973) 240-6955 x303.

The Center for Non-Profits is New Jersey's statewide umbrella organization for the non-profit community. Through advocacy, public education, expert guidance, training, and cost-saving programs, the Center champions and strengthens non-profits individually and collectively.

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