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Wage and Hour

DOL's White-Collar Exemptions: To Reclassify or Not?

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Following the delivery of the Final Rule on the Fair Labor Standards Act's (FLSA) "white-collar" exemptions to the Office of Information and Regulatory Affairs of the Office of Management and Budget on March 14, we are one step closer to publication of the Final Rule. As employers wait with bated breath, many are busily planning for an expected doubling (or more) of the salary level for an employee to qualify as an exempt executive, administrative, or professional employee who need not be paid overtime for hours worked over 40 in a work week under the FLSA.

In preparing for the issuance of the Final Rule, many employer efforts likely are focused on analyzing employees currently classified as exempt and paid between \$455 per week—the current salary level required to be exempt under the FLSA's executive, administrative or professional exemptions—and \$970 per week, the projected level included by the U.S. Department of Labor (DOL) in the proposed regulations issued last summer. However, with these changes on the horizon, now is an opportune moment

for employers not only to look at salary levels to comply with the Final Rule, but to conduct a broader analysis of employee classification strategies and consider modifications to different job descriptions and job families, which better meet organizational needs going forward.

Exempt versus Non-Exempt

In order to qualify as exempt under the executive, administrative or professional (EAP) exemptions to the FLSA's minimum wage and overtime requirements (absent certain limited exceptions), all three of the following requirements must be met:

- First, and the focus of the DOL's current regulatory efforts on the FLSA front, an EAP employee must be paid a certain minimum weekly salary.

- Second, an EAP employee must be paid "a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed."

- Third, an employee's position must meet the duties requirements of one of the EAP exemptions.

To qualify for the executive exemption, an employee's primary duty must



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involve managing or controlling general business operations, making employment decisions—such as hiring and firing—or recommending such decisions where the recommendations are given particular weight, as well as regularly supervising two or more employees.

In order to satisfy the duties requirements for the administrative exemption, an employee's primary duty must involve office or non-manual work directly related to the management or general business operations and the exercise of "independent discretion and judgment with respect to matters of significance."

The professional exemption requires an employee's primary duty to either be the performance of work requiring advanced knowledge in a field of science or learning that is customarily acquired by a prolonged course of specialized instruction (the learned professional) or the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (the creative professional).

As employers are considering the reclassification of employees to non-exempt status (or an increase in employees' salaries in order to remain exempt) as part of the implementation of the DOL's Final Rule, it makes sense also to look at the duties performed by each employee and consider changes to those duties (and, consequently, a potential change in status where such duties are modified). It also makes sense to look at each individual job classification in a broader context and consider changes not only on an employee-by-employee (or job title) basis, but in the larger context of the organization and the job family.

It of course remains an open question at this point whether the Final Rule will include changes to the duties tests. In its Notice of Proposed Rulemaking, the DOL asked several questions suggesting that it is considering making changes to the duties test, although it did not propose any specific regulatory language. Accordingly, employers may well contend with modifications to the duties test as well as changes to the minimum salary level.

Misclassification Litigation

Separate and apart from the DOL's current wage-and-hour regulatory

efforts, employees have challenged their exempt classifications in litigation brought against their employers. And the consequences of misclassification certainly can be financially significant.

In its annual "Trends in Wage and Hour Settlements: 2015 Update," National Economic Research Associates Economic Consulting reported that 17 percent of wage-and-hour cases settled from January 2007 through March 2015 included allegations of misclassification. Just last month, Home Depot reached a \$2.1 million settlement with a class of 120 sales managers, who claimed they were misclassified as "exempt." Likewise, in 2015, PetSmart Inc. reached a \$3.8 million settlement in an FLSA collective action involving over 300 operations managers alleged to have been misclassified as exempt by the pet supply retailer. And challenges to exempt classification certainly are not confined to the executive exemption. For example, several lawsuits have challenged the exempt classification of contract attorneys conducting document review, arguing that work performed does not require a law degree and therefore the contract attorneys should not be considered exempt learned professionals under the FLSA as well as state law.

Considerations for Employers

Given the expected changes to the salary level as well as the challenges to exempt classifications, employers should, as part of their process for evaluating employee status in response to the DOL's Final Rule, assess not only salary level but also employee duties. Although implementation of the DOL's Final Rule certainly

poses significant challenges to employers, consolidation of non-exempt duties with those being reclassified as non-exempt due to salary level (and a corresponding increase in the exempt job duties assigned to those with a salary above the required level) may well put employers in a stronger position to defend against misclassification litigation. Employers who use the DOL's Final Rule as the impetus for proactive workforce reorganization and planning could yet find a silver lining surrounding the regulatory changes and better protect themselves from potential storms in the distance. •

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