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FLSA Exemption Amendments: Preparing for the Inevitable

by Linda K. Horras

On June 30, 2015, the U.S. Department of Labor (DOL) issued a Notice of Proposed Rulemaking aimed at extending overtime compensation to a broader section of the American workforce. Rather than overhaul or even tweak the substantive elements of the white-collar exemptions, the DOL recommended a substantial increase to the salary basis on which all of these exemptions are based. We do not yet have an effective date for this change. Bureaucratic tarot cards suggest that this will become effective in late 2016, quite possibly before the presidential election.

With the proposed amendment, the current salary basis of $455/week will rise to $970/week. While there is no guarantee that this will be the final amount, we can safely conclude that the increase will be significant. Through this one change, the DOL estimates that over 4.6 million workers will be eligible for overtime compensation because their salaries will be too low for any white-collar exemption to apply regardless of their job duties.

This article will outline some practical tips for preparing for this inevitable change.

Update Your Policies. Review your policies and procedures and eliminate the existing salary basis amount. Recognize that the new salary basis will be adjusted annually by the DOL. Ensure that your policies recite basic wage and hour lingo, such as describing your workweek, payday dates, how overtime is calculated and the like. Cover other provisions that you follow in your business, such as requiring overtime to be authorized and making it a disciplinary issue for failure to obtain such authorization. Have a formal prohibition on working off the clock. Off-the-clock claims are notoriously hard to defend since, by their very nature, there are no records that prove (or disprove) that the individual was working.

With the rise of smart phones and remote access, closely monitor those with access to such tools. If possible, limit access to those who are truly exempt employees. Don't forget to review related policies, such as those involving benefits. Some employers tie PTO accrual to exempt status.

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Monitor and Enforce Policies. Employers must be vigilant in their enforcement of wage and hour policies. Don't let nonexempt employees work through meal periods. Don't allow employees to arrive early and start work off the clock. Ensure that overtime is required, requested and authorized. Be ready to use your discipline system for those who violate these policies. Beware of the nonexempt employee who is responding to emails during nonwork time or completing assignments over a weekend. The go-get-'em employee today may be the go-get-'em class representative tomorrow.

Use Written Acknowledgments. Distribute and post new policies so that all employees are aware of the changes and how those changes affect them. As with the distribution of an employee handbook, obtain a signed acknowledgment form from the employee. If appropriate, include a reference to the prohibition of off-the-clock work.

Implement a Time System for Formerly Exempt Staff. Let's face it — some people do not like to clock in and out. It is as if recording time is a slap in the face to their professionalism and honesty. There is no way around this. All nonexempt employees must record hours worked.

Job Classification Audits. Now is the time to take a hard look at job duties, salaries and work schedules of presently exempt workforce. The salary basis test comes first: do they make $970? If not, they become overtime-eligible barring workplace modifications, some we identify below. If the employees meet the salary basis, ensure that all elements of an exemption apply.

Job audits can take various forms. They can be done through interviews with supervisors and/or incumbents. They can be done through written questionnaires with more limited interviews of supervisors and/or incumbents. They can be a combination of questionnaires and interviews. The key to a proper audit is understanding what the person is actually doing and focusing on the particular exemption at hand. For instance, if the person is arguably an exempt-professional, make sure he is using his degree in the performance of his duties. Just holding a particular college degree does not mean that the job incumbent is necessarily exempt. For other exemptions, make sure the audit focuses on the level of an employee's independent judgment and discretion. Also, analyze the amount of time the employee engages in nonexempt work. This is another area that the DOL plans to address. Take action to limit the performance of nonexempt work now, if possible.

Once the job audits are complete, document it. The job audits themselves should be retained. Next, update all documents that describe the position, from job descriptions to employee review forms to job postings. Have the incumbent of the position review the draft job description, provide input and then sign off on it as a true and complete description of her job.

Navigating Murky Waters. Most employers have employees whose job responsibilities are on the bubble between exempt and nonexempt. You had them with the current salary basis and may continue to have them with a higher amount. Now is the perfect time to get out from under dubious exemptions. By rolling out changes to exempt status with new timekeeping policies, the employer should (hopefully) avoid raising the red flags that ordinarily arise when one group of employees becomes entitled to overtime that they did not previously receive.

Handling Potential Increased Labor Costs. This is a nonexhaustive list of options to consider as you implement the amendment:

- Beef up the job duties on those positions falling within the "murk" (above).
- Boost the salary of those who are truly exempt but whose pay falls below the new amount.

- Ensure that nonexempt employees are only working a 40-hour week.
- Conduct an organizational review with an eye toward position elimination, position consolidation, restructuring and the like. Part-time or seasonal employees may be an attractive alternative to reduce labor costs associated with increased overtime compensation. Consider adding a second shift or staggering work hours to keep overtime to a minimum.
- Consider alternative compensation systems, such as a flexible workweek.
- Consider cuts elsewhere, such as in the size of bonuses, reduced benefits or reduced commission rates (while taking care not to create an employee morale problem).

Communication and Training. Once everything is in place and the actual amendment has an effective date, roll out the new structure, systems and policies at employee meetings. Those who are truly exempt, like higher-level supervisors and managers, need to understand the impetus for the change, need for increased monitoring and need for action should newly made nonexempt employees fall back into old habits of working through lunch, taking work home with them, not clocking in/out, etc.

Just as importantly is the communication to those directly affected by this amendment. Some folks are not going to mind — overtime compensation for hours over 40! Great news! As noted above, others are going to bristle at the notion that they are now required to record their time, take their lunch breaks, lose their remote access and the like.

Communication and training are key to getting everyone on board with the new normal. Be proactive and start dealing with the inevitable now so that you are ready once the DOL makes the change effective.

The EEOC's Battlecry: Cracking Down Hard on Religious Discrimination

by Nicole Jagielski

Last month, in line with the EEOC's "hottest litigation trend," a Northern District of Illinois jury awarded two Muslim truck drivers $240,000, finding Star Transport fired them for refusing to transport alcohol despite their religious beliefs. The case, *EEOC v. Star Transport Co.*, is just one of a multitude of religious discrimination cases the EEOC brought this year. Others include the *National Tire and Battery* case (Arab and Muslim mechanics accused of making bombs), the *Consol Energy/Consolidation Coal* case (employee who saw "Mark of the Beast" in biometric scanner forced to retire), the *National Federation of the Blind* case (Hebrew Pentecostal employee refused to work on Saturdays), the *Dunkin' Donuts* case (employer revoked job offer because applicant couldn't work on Saturdays), the *UPS* case (employees who wore beards as part of their religious observance were not promoted until they shaved), and the *Rotten Ralph's Restaurant* case (Muslim employee refused to remove headscarf). And those are just the cases dating back to July.

Ultimately, employers should be extremely vigilant about taking potentially discriminatory actions against employees, especially if they involve an employee's religious beliefs. The EEOC has certainly made its intentions to take a harsh stance against religious discrimination known, and the cases they choose to litigate are increasingly high profile.

Amex Employment Arbitration Policy Held Unlawful by NLRB

by Mellissa Schafer

In *Amex Card Services Company*, three former American Express employees filed a charge with the NLRB alleging that the company's Arbitration Policy and corresponding acknowledgment form violated section 8(a)(1) of the National Labor Relations Act by requiring employees to submit to final and binding arbitration on all wage and hour claims on an individual basis. The NLRB panel agreed, finding that Amex engaged in unfair labor practices by maintaining and enforcing a policy that would lead employees to believe that they were barred or restricted from filing charges with the NLRB or otherwise accessing the NLRB's processes. Its analysis relied on a key distinction between the policy and acknowledgment form: while the policy clearly stated, "any claim under the National Labor Relations Act was not covered," the form did not. As a result, the NLRB deemed the policy and form ambiguous when read together. Construing the ambiguity against Amex, the panel found the policy unlawful.

The case highlights the importance of ensuring policies and acknowledgment forms are consistent. It also highlights the importance of updating employment policies to reflect changes in the law. Employers should review policies with their attorneys yearly.

EEOC Issues Proposed Rule Clarifying When Employers May Offer Incentives to Employee's Spouses in Exchange for Genetic Information

by Evan J. Bonnett

The EEOC has issued proposed rules clarifying when employers may maintain incentivized wellness programs that include the collection of genetic information regarding employees' spouses. The law at issue is the Genetic Information Nondiscrimination Act of 2008 (GINA), which generally prohibits employers from requesting, requiring, or purchasing genetic information about an employee or his or her spouse, children, and family members. GINA maintains an exception, however, permitting employers to request genetic information as part of voluntary wellness programs, as long as certain requirements are met. Until the recent proposed rules, it was unclear how or whether the incentive rules applied to the spouses of employees.

The proposed rules would create a narrow exception permitting employers to offer limited incentives for spouses that provide genetic information through a medical questionnaire, a medical examination, or both. The process must be voluntary and accompanied by a written authorization. The incentives may consist of either a reward, such as a discount or rebate of a premium or contribution, or avoiding a penalty, such as the absence of a premium surcharge. In either case, the total incentive may not exceed 30 percent of the total cost of the plan in which the employee and any dependents are enrolled. It is important to note that the exception carved out in the proposed rules does not apply to the genetic information of children.

Federal Judge Finds That Employer May Have Used Experience Requirement to "Weed Out" Older Workers

by Nicole Jagielski

In *Kleber v. CareFusion Corp.*, the Northern District of Illinois rejected an employer's motion to dismiss an age discrimination complaint, finding that an employer's cap on the experience that it would accept for a position may have been a workaround to avoid older workers, and "could constitute age discrimination." Dale Kleber, a 59-year-old attorney and former General Counsel of a Fortune 500 company applied for a position titled "Senior Counsel, Procedural Solutions." The job posting stated a preference that candidates should have "3 to 7 years (no more than 7 years) of relevant legal experience." Mr. Kleber was not invited to interview for the position. Those who were interviewed had seven or fewer years of legal experience. Mr. Kleber filed suit, claiming that the requirement that applicants have seven years or less of legal experience was intended to "weed out older applicants such as himself." The employer filed a motion to dismiss, which the federal judge denied. Even while acknowledging that an employer "does not commit age discrimination when it declines to hire an overqualified applicant," the judge found it possible that something else was going on in this case: the employer may have unlawfully used experience as a proxy for age if it purportedly made its hiring decisions based on "experience" but in truth was trying to "weed out" older applicants.

This decision reinforces the notion that age discrimination can take many forms — even the experience requirements in a job posting. Make sure that the level of experience you want to bring to your company doesn't intentionally exclude older, and typically highly compensated, workers. Experience requirements — especially those involving an experience cap — should be reasonable, fact-based, and supported by evidence and documentation.