Labor and Employment Alert: Will the DOL's New Salary Threshold Sound the Death Knell for Some Non-Profits?

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Effective December 1, 2016, the salary threshold for an employee to be considered exempt from overtime under the Fair Labor Standards Act (FLSA) increases to $913 per week – $47,476 per year (or to $134,004 for highly compensated employees). This is more than double the existing $455 weekly ($23,660 annually) threshold.

Provision

Current Regulations Effective Until 11/30/2016

Final Rule Effective 12/1/2016

Salary Level

$455 weekly

$913 weekly

Salary Level for Highly Compensated Employees

$100,000

$134,004

Automatic Adjusting

None

Every 3 years

Bonuses

No provision to count nondiscretionary bonuses and commissions toward standard salary level.

Up to 10% of standard salary level can come from nondiscretionary bonuses, incentive payments, and commissions if paid on at least a quarterly basis.

This may be a staggering increase for non-profits, which they may struggle to absorb without fundamentally altering their service model.

To assist non-profits in addressing this salary increase, the U.S. Department of Labor (DOL) has issued "Guidance for Non-Profit Organizations on Paying Overtime under the Fair Labor Standards Act." The DOL said it "is issuing this guidance because during the development of the Final Rule, numerous organizations asked for clarification regarding how the FLSA generally, and the white collar exemptions specifically, apply to the non-profit sector." To fall within the FLSA's overtime requirements, employees must be covered by the FLSA either because: (1) their organization is a covered enterprise; or (2) the particular employee is individually covered. There is no minimum number of employees for an employer to be covered by the FLSA. Additionally, some organizations are expressly covered by the FLSA, including hospitals; residential care facilities for the sick, aged, mentally ill, or developmentally disabled; preschools, elementary and secondary schools, and colleges; and public agencies.

To meet the enterprise coverage test (which means that all employees would be covered by the FLSA unless otherwise exempt), an entity must have annual sales made or business done of at least $500,000. Generally, non-profit organizations are not covered enterprises under the FLSA unless they engage in ordinary commercial activities (like operating a gift shop) that meet the $500,000 threshold. Activities that are charitable in nature – such as those that likely form the core of the non-profit's mission – are not considered ordinary commercial activities and do not establish enterprise coverage.

As the DOL points out, however, "Organizations that are not covered on an enterprise basis likely still have some employees who are covered individually and are therefore entitled to the FLSA's protections." Thus, an employee would be covered by the FLSA – even if his employer is not – if the employee is engaged in "interstate commerce." This broadly defined term includes work related to the movement of persons or things across state lines such as making out-of-state phone calls, receiving/sending interstate mail or electronic communications, ordering or receiving goods from an out-of-state supplier, and, handling credit card transactions or performing the accounting or bookkeeping for such activities. The DOL notes that "while many non-profit organizations may not be covered enterprises under the FLSA, most non-profits are likely to have some employees who are covered individually and are therefore entitled to the minimum wage and overtime protections guaranteed by the FLSA." In fact, it will be the rare employee who does not engage in interstate commerce.

In its guidance, the DOL claims that it will not assert that an employee who "on isolated occasions" spends an "insubstantial amount of time" engaging in interstate commerce is individually covered by the FLSA. Additionally, even if the employee regularly engages in interstate commerce and is individually covered, the DOL states that it "focuses its enforcement efforts on circumstances where it can have significant impact on compliance, generally where there is enterprise coverage." Of course, while the DOL may not pursue an employer, nothing prevents employees from filing their own lawsuit to collect unpaid overtime.

As with for-profit employers, non-profits will need to decide how best to adapt to the salary increase while managing their employees' work and morale. For example, the non-profit will have to determine whether to increase the salaries of certain currently exempt employees to meet the new threshold; pay overtime to employees who will no longer be exempt; and/or restructure jobs and realign workloads and responsibilities to minimize overtime and off-the-clock work by newly non-exempt employees. In fact, one of the biggest issues may be monitoring the working time and changing the work habits of formerly

exempt employees who are accustomed to flexible work schedules and responding to work-related matters (such as taking calls and reading emails) after-hours.

Ultimately, the DOL provides some guidance for non-profits, but little solace. Contact your Vorys lawyer if you have questions about how the new overtime regulations will affect your organization's operations and for assistance in managing the change.