

THE NEW FLSA REGULATIONS

As has been widely publicized, the U.S. Department of Labor ("DOL") has issued new "FairPay" regulations that substantially impact employee eligibility for overtime pay.

Assuming they are fully enacted, the new FairPay regulations will effect the most significant change to the Fair Labor Standards Act ("FLSA") in over 50 years. According to the DOL, 1.3 million currently exempt white collar workers will become eligible for overtime and 2.6 million workers at risk of being misclassified as exempt from overtime requirements will gain further protection. The DOL further estimates that 107,000 "highly compensated" workers will lose overtime protection.

This special edition of the Employment Law Advisor is in summary form and is intended to help employers recognize the most significant changes. More detailed information on the new regulations is available from the DOL at www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm. For additional guidance, we stand ready to offer in-house briefings and training, as well as assistance with specific classification issues.

THE KEY CHANGES

- In order to be classified as "exempt" from overtime requirements, the base salary level that must be paid to an employee has been increased from \$250 to \$455.
- As a result of the increase in base salary, all employees earning less than \$455 per week (\$23,660 annualized) are guaranteed overtime for all hours worked over 40 per week, other than outside salespersons, teachers, lawyers or physicians.
- A "highly compensated" exemption has

been created for employees guaranteed to make at least \$100,000 per year (with at least \$455 per week on a salary basis) and who regularly and customarily perform at least one exempt function.

- The "executive" exemption will require that the employee have hire/fire authority or at least the ability to make recommendations regarding hiring/firing and other personnel decisions that are given "particular weight."
- An individual who is a bona fide 20% owner of an enterprise and who is actively engaged in the management of the enterprise will be considered an exempt executive employee.
- The "administrative" exemption will require that the employee's primary duty includes the exercise of discretion and independent judgment with respect to "matters of significance."
- The outside sales exemption will eliminate the rule that the employee devote no more than 20% of his or her work hours to non-exempt work.
- The computer professional exemption has been streamlined and will not require discretion and independent judgment.
- The final rules also reaffirm that manual laborers and other "blue-collar" workers who perform work involving repetitive operations with their hands, physical skill and energy are entitled to overtime.
- Under certain circumstances, salaried employees may be subject to disciplinary suspensions without pay for at least one day without risk of losing exempt status.

THE IMPACT ON EMPLOYERS

While there is substantial disagreement regarding the ultimate effect of the FairPay regulations, it appears that a number of employee classifications that currently are considered "exempt" from overtime will lose their exempt status. Further, it is likely that there will be litigation over the meaning of some of these changes. In the short-term, it appears that there are several significant classifications that will be affected:

- *Working Supervisors.* Some supervisors currently classified as exempt executives will lose that exemption due to the new requirement that they have the ability to hire/fire or that their recommendations be given "particular weight." The effect of this addition to the current test likely will mean that a number of midlevel and lower level supervisors will lose the exemption because they do not have the authority to make or effectively influence significant personnel decisions.
- *Administrative Employees.* The FairPay regulations may decrease the number of administrative employees currently classified as exempt due to the added requirement that employees must have as a primary duty the exercise of discretion and independent judgment with respect to "matters of significance." This provision does not exist in the current regulations (although case law and interpretive guidance have included the "matters of significance" requirement). Given that the regulatory test will now explicitly include this requirement, we believe that employers should carefully examine their classification of administrative employees, as many employers may not have been

aware of the higher level of responsibility required to meet this exemption.

- *Highly Compensated Employees.* With the addition of a new classification, a number of well-paid employees that are guaranteed to make at least \$100,000 per year will no longer be considered exempt.

THE OPPORTUNITY PRESENTED BY THE NEW REGULATIONS

Making changes in the classifications of current employees is a problem many employers face, and one fraught with danger. In the absence of a significant change in job duties, such a midstream change from exempt to nonexempt arguably is an admission that the affected employee should have been paid overtime in the past. The new regulations, however, give employers an opportunity to review and correct current misclassification problems during a time of well-publicized changes in the law. We believe that, if properly executed, the potential for litigation over classifications can be reduced substantially if reclassification is conducted as part of an employer's efforts to comply with the new FairPay regulations.

The FairPay regulations have been an issue in election year politics and it remains to be seen whether they will be enacted in their current form. The Senate has voted to block their implementation, at least in part, but it is not clear what will happen as the political process moves to the House of Representatives. While the politics surrounding these new regulations must be closely monitored, if no further action is taken by Congress the regulations will become effective on August 23, 2004. Consequently, employers should be aware of the key changes and revise their pay practices accordingly.

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