MORE OF YOUR EMPLOYEES WILL BE ELIGIBLE FOR OVERTIME IN 2016
Proposed DOL Rule
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Introduction

The labor landscape has changed and it will continue to change. The average worker has become increasingly responsible for the more traditional aspects of the employment relationship including health insurance, pension, and job security. There also has been a substantial increase in the numbers of part time workers, workers/employees classified as exempt from overtime premium pay, and workers misclassified as independent contractors. Commentary and theory abounds as to the reason for the loss of full time jobs, much less middle class jobs, including out-sourcing, computers/software, Affordable Care Act, robots, automation, high taxes, globalization etc.

Suffice it to say, a legal backlash is building against this new terrain. Proposed restrictive legislation, administrative rule making and recent court cases show evidence of a concerted attempt to re-create or retrieve the job security and wages and benefits of days gone by.

Most recently, the United States Department of Labor ("DOL"), in a long awaited announcement on June 30, 2015, proposed a new rule that will decrease the ability of companies to classify their employees as exempt from premium overtime wages under the Fair Labor Standards Act ("FLSA").

Backdrop – Increase in Part Time Workers

This legal backlash is due, in part, to other recent and dramatic changes in the number of part-time workers:

- Since 2007, the number of "involuntary" part time workers has doubled.
- Employers are increasingly using software tools such as just-in- time scheduling software. Estimates are that 17% of work force is now employed by companies that use just in time scheduling software. This causes employees to work fluctuating work weeks with uncertain schedules.
- Another contributing factor is business practices, such as the use of "call in shifts" where the employer does not confirm need for services until two hours before start time.

In response, a host of bills are being introduced in many states and municipalities to legislate predictable scheduling.

Backdrop - Misclassification

Likewise, misclassification of workers has also increased. Companies are attempting to shift work from employees to independent contractors, especially in the construction, transportation and cab industries using a variety of strategies.

- The DOL recently pursued construction companies in Arizona and Utah for using phony limited liability companies and collected $700,000 in back wages, damages and penalties from companies.
- Similarly, in the transportation industry, companies as big as Federal Express, in California litigation, are paying settlements of $228 Million to their "independent contractor" drivers.

Alexander v. FedEx Ground Package Systems (Ninth Circuit, Court of Appeals, August 2014).

- Finally, through the use of an "app", Uber is upending the cab industry by classifying their "shared economy model" as providing technology services and not transportation services. States are reacting. Uber Technologies Inc. v. Berwyck (California Labor Commission, June 2015).

Exempt From Overtime Pay- Exempt Status under Current Rules

FLSA was part of the 1938 New Deal legislation that was passed in response to the Great Depression. Its purpose was two-fold: 1) to provide a minimum subsistence wage, and 2) to avoid oppressive working hours by creating an obligation to pay overtime premium pay of 1½ the employees' regular rate for hours worked over 40 hours in a regular work week.

A classification was created for white collar workers that were considered to not need the statutory protection of premium overtime pay or a minimum wage and whose skills, pay and position offered them sufficient bargaining power to protect themselves. Thus, these white collar workers were considered "exempt" from the statutory protections. In the agrarian- and manufacturing-oriented economy of the 1930s and 1940s, white collar workers had clearly-defined decision-making responsibilities, were closer to management, and were middle class in income, outlook, attitude, and life. That economy was very different from that of today.

The exemption currently applies to employees engaged in bona fide executive, administrative, or professional capacities that meet a prescribed "duties test" (including any employee employed in the capacity of academic administrative, personnel, or teacher in elementary of secondary schools or in the capacity of an outside sales employee).

An additional exemption is provided for computer systems analysts, computer programmers, software engineers and other similarly skilled computer engineers that meet a similar prescribed duty test. Terms are not defined in the FLSA, and the DOL is charged with the responsibility of delineating and defining these white collar exemptions from "time to time".

Misconceptions abound in this area. Job titles are insufficient to establish exempt status. Similarly, merely paying an employee on a salaried basis does not establish exempt status. Rather, in order for an employee to be defined as "Exempt" from premium overtime pay, the employee must meet a three-part Exempt Test:

(1) Salary Level test (currently $455 per week or $23,660 per year),
(2) Salary Basis test (employees must be paid a pre-determined salary that is not subject to reductions based upon quality/quantity of work), and
(3) Duties Test for each of the exempt capacities mentioned above.

Proposed Rule

The DOL Proposed Rule focused on three changes:

1. It changes only the Salary Level Test of the Exempt Test. It did not touch the Salary Basis test or the Duties Test. The Salary Level has been updated seven times since 1938, the most recent one being in 2004. The Proposed Rule would double the current Salary Level to $50,440, as projected for 2016.

2. It increases from $100,000 to $133,148 the pay requirement for the highly-compensated employee exemption to apply.
3. The Proposed Rules will also establish a mechanism which will cause the standard salary and compensation levels to be updated annually, either by maintaining the levels at a fixed percentile of earnings or by updating the amounts based on changes in the CPI-U.

The DOL has promised to carefully consider public comment in shaping the final version in the upcoming 60-day public comment period which will start when the Rules are published in the Federal Register. The White House predicts that the final rule will go into effect next year.

The DOL has also asked for comment on the Duties Test. Should exempt employees be required to work a certain percentage of their working time on their primary exempt duty? California has a 50 percent primary duty requirement. It also has inquired whether nondiscretionary monthly bonuses should be included in the Salary Level Test.

Action Steps

The Proposed Rule only gives companies 60 days from the final announcement of the rise in salary level for corrections. Companies should therefore do the following now:

1) Perform a classification analysis to determine if employees who are now being classified as Exempt (professional, administrative, executive, computer, outside salesperson) meet the three-part Exempt Test.
2) Give careful scrutiny to the Duty Test. Are your lower to mid-level managers spending more than fifty percent of their time in non-exempt work (i.e. working foremen). Any discrepancies should be addressed. It is very possible that the Final Rule will address this issue.
3) Apply the Proposed Rule Salary Level test to the class of workers that currently meet the three part Exempt test and determine who will no longer be considered Exempt because of the new Salary Level test ("Lost Classification").
4) With respect to employees falling in the Lost Classification, the employer has two options: (1) reclassify as hourly and pay overtime for hours worked over 40; or (2) raise the pay to the new Salary Level threshold. With the first option, Companies will have to determine which duties and responsibilities will have to be deleted so the identified employees do not exceed 40 hours per week through use of their laptops, tablets and cell phones after work.

Starting the Action Steps now will allow the Company to budget, plan and take the credit for the necessary changes that need to be made in 2016.