New Overtime Rules – What You Need To Know!

Many of our clients mistakenly believe it is up to them to decide whether to pay their employees on an hourly (non-exempt) or salaried (exempt) basis. Often, they classify employees, such as CSRs and inside sales professionals, as exempt and salaried when, in fact, the law requires that they be paid hourly and eligible for overtime.

The Fair Labor Standards Act (FLSA), administered by the U.S. Department of Labor, establishes a duties *and* a salary test that employers must consider when classifying an employee as "non-exempt" or "exempt".

Non-exempt employees must be paid at least minimum wage for all hours worked and overtime for more than 40 hours worked in a work week. Employers must track and keep record of the exact time worked to ensure all employees are paid correctly.

Employees whose white-collar job responsibilities satisfy the various DOL "duties test" and who earn at least the minimum salary threshold established by the DOL can be classified as "exempt" from the minimum wage, overtime, and exact-time-record requirements. To review the various white collar exemptions, search online for DOL Factsheet #17.

On September 24, 2019, the DOL released the highly-anticipated final rule increasing the minimum salary level for "white-collar" and highly-compensated exempt employees for the first time since 2004. These changes will go into effect January 1, 2020. No changes were made to the "duties test".

White-Collar Exempt Employees:
Typical DOL exemptions, commonly referred to as "white-collar" exemptions, are usually classified under the executive, administrative, and professional categories. (Again, refer to the DOL Factsheet #17 for more on these exemptions.) What has changed is the minimum salary requirement for these **white-collar exemptions -- it will increase to $684 per week ($35,568 per year)** from the current $455 per week ($23,660 per year).

Up to 10% of this new minimum salary level for white-collar classifications can be satisfied with nondiscretionary bonuses, incentive pay, or commissions. And outside sales professionals continue to have no minimum salary threshold so this change doesn't affect them.

As a result of increasing this minimum salary, the DOL estimates:

- 1.2 million workers will become eligible for overtime pay if employers make no adjustments to their pay; and
- 2.2 million non-exempt workers will have their non-exempt status strengthened because, even though their duties were close to making them eligible for an exemption, their salary level will now be below the required level.

Highly-Compensated Employees:
Highly-compensated employees (HCEs) are those who, even if they do not meet the duties test of other exemptions, are paid a high enough salary to qualify for an exemption. The DOL is **increasing the salary requirement for HCE's to $107,432 per year** from the current $100,000 per year. This must include a

weekly salary of at least $684 that does not include nondiscretionary bonuses, incentive pay and/or commissions.

The DOL estimates that 101,800 current HCE will be impacted unless their salary is increased.

Next Steps
With this change going into effect January 1, 2020, we recommend that employers take the following steps:

- **Step 1 - Identify** which white-collar and HCE exempt employees will fall below the new salary levels.
- **Step 2 - Review job duties** to ensure exempt employees clearly meet the applicable duties requirement; if they do not, then, regardless of their salary, they should be reclassified as non-exempt.
- **Step 3 - Calculate the costs and consider the options** for employees that meet the job duties tests but whose salary falls below the new $684/week $35,568 annual salary minimum. Your options include:
    - **Re-classifying** these employees as non-exempt, tracking and recording their time, paying overtime and minimum wage, and including time as compensable such as travel time, waiting time, etc.; or
    - **Increasing** these exempt employees' salaries to meet the new exempt salary minimum; or
    - **Structuring Pay** for non-exempt employees so that they still receive a salary but have their time tracked and receive overtime for all time worked in excess of 40 hours a week (or your state's overtime requirements).
- **Step 4 - Communicate** your plan with the employees impacted so they know what to expect and why the change has occurred.
- **Document** everything.

Important notes for consideration:

1. If there is uncertainty when classifying an employee, you must classify the employee as "non-exempt" as it benefits the employee by being eligible for overtime and earning at least minimum wage.
2. An employee cannot waive his or her right to protection under wage-and-hour law. So even if the employee wants to be classified as exempt and salaried because they don't want to track their time or they want to help you out, you are still liable for any misclassifications and underpayment that results from the misclassification. An employee who is okay with the practice now may not be in 2 years, and they would be within their right to bring a claim against you.
3. Wage-and-hour mistakes can be time-consuming and expensive as the DOL investigation may go back 2 years and include back wages, back overtime, and penalties. And if the violations seem egregious, they can go back 3 years. Also, if one employee is deemed to be misclassified, they will check all the employees in that job group, meaning you would be responsible to pay back wages and punitive damages for multiple employees even if they did not complain.
4. After the previous changes in 2004, there was a dramatic increase in wage-and-hour claims from employees thinking they were misclassified and should have been receiving overtime. Chances

are, another bump will happen again in 2020 as the administration and media promote the fact that more than a million workers will now be eligible for overtime.

Remember – you're only as safe as your last bad hire. Best to make sure you've got your employees classified correctly before they do! For more details about this rule change, read the DOL Factsheet #17G or review the full rule on the Federal Registry.

As always, feel free to call the HR consultants at Affinity HR Group to help you with these changes and considering all the impacts to your business.

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