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# WHITE COLLAR EXEMPTIONS:

The Final Rule is (Finally) Here  
What Companies Need to Do About It

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# Why Are We Here?

- The DOL has more than doubled the minimum salary companies must pay employees to make them exempt from overtime
  - Final rule goes into effect December 1, 2016
- Over 4 million additional employees will now qualify for overtime IF companies do not react
- Some have called this threshold increase the single most significant workplace rule change in our lifetimes
- How do companies properly prepare for what's to come

# Understanding the White Collar Exemptions

- FLSA has over 30 different overtime exemptions
  - Most very industry specific
  - States typically mirror fed. classifications
- White Collar Exemptions
  - Administrative
  - Executive
  - Professional
  - Outside Sales (but not impacted by rule change)

# White Collar Exemption Test

- **Duties:** What does the employee do?
- **Salary Basis:** Employee gets the same pay each week regardless of quality or quantity of work performed
  - Quantity can be measured either in production or hours worked
- **Salary Level:** Salary level must be a certain minimum
  - Presently: \$455/week (\$23,660 annualized)
  - New: \$913/week (\$47,476 annualized)
  - Highly-Compensated Employees threshold increases to \$134,004/year

# What's New In the Rule

- Salary minimum is now indexed
  - Automatic adjustments once every 3 years
    - Increases begin as of January 2020
  - Tied to 40<sup>th</sup> percentile of wages in lowest Wage Census Region
- *Non-discretionary* bonuses and incentive payments (e.g., commissions) can account for up to 10% of the salary
  - Paid at least quarterly
- Employers can make “catch up” payments

# What's the Impact?

- 4.2 million employees will lose overtime exemption *unless* companies react in some way to save it
- Certain industries will get hit worse than others
  - Education
  - Health services
  - Wholesale/resale
  - Leisure and hospitality
  - Non-profits

# The Impact to Individual Businesses

- Potentially significant increased labor costs
- All newly non-exempt employees need to start tracking time
  - Potential need to expand time-keeping infrastructure and payroll manpower
  - Many states impose fines for record-keeping violations
- Emotional impact to employees/resistance

# Data, Data, Data

- The single most important step companies can take is to start tracking hours of potentially-affected employees
- Managers should not assume they know, unless employees are already tracking time
- Also a good time to revisit job descriptions to ensure compliance with duties test



# The Three Scenarios

- Employees earning close to \$47,476 (or close enough to get creative)
- Employees earning substantially less than \$47,476, but hours are stable and close to 40/week
- Employees earning substantially less than \$47,476 and routinely working more than 40 hours/week
  - Obviously, this is the group presenting the most difficulty

# Four Basic Solutions

- Hire more workers to spread out the hours
- Do nothing and just pay the overtime
- Control overtime hours, but don't change pay rate
- Reverse engineer present salary and hours to come up with a revenue-neutral result

# Example of a Reverse Engineer Solution

- Employee earns \$40,000/year (\$769.23/week) and regularly works 50 hours/week
- Divide weekly salary by 40 straight-time hours and 10 OT hours, *i.e.*, 55
  - $\$769.23/\text{week} / 55 \text{ hours/week} = \$13.99/\text{hour}$
- Presented to employee either as:
  - \$13.99/hour or
  - \$559.60/week salary plus OT at \$20.99/hour

# Special Issues for Non-Profits

- The Enterprise Test
  - \$500K in annual sales
  - Engaged in Interstate Commerce
- Non-profits only consider revenue from activities performed for a business purpose
  - Potential “fix” is to spin off business activity
- Potential “non-enforcement” for non-profits dealing with the disabled

# Special Issues for Higher Education

- Teachers have no minimum salary level requirement
- Coaches who actually coach are considered teachers
- Students who teach courses, RA's, etc. are not considered to be in an employment relationship, at least for FLSA purposes (for now)
- Academic admin. employees are exempt so long as they are paid at least as much as an entry-level teacher
- *Public* institutions can use “comp time” instead of paying overtime

# Is There a Chance This Won't Happen?

- Final Rule goes into effect December 1, 2016
- Congress can try to block it under Congressional Review Act
  - President can veto
- There will be the obligatory lawsuits
- The 2016 election

# Waiting Probably Isn't a Good Idea

- Companies need good data if they're going to come up with a plan to handle the change
  - A one or two week snapshot of hours likely isn't going to cut it
- Employee resistance to being “demoted” will mean time and effort to get them into the habit of tracking time
- Benefits and perks tied to hours worked will change
- Companies need to develop policies to deal with work outside of normal work hours

# Waiting Probably Isn't a Good Idea

- NYS Wage Theft Protection Act
- Bad time records now isn't a problem. Bad time records after December 1 can mean fines and penalties



# There is Some Opportunity in This

- One of the biggest problems in wage and hour law is misclassification of employees as exempt
  - Fixing the problem can be costly, so most companies kick the can down the road
  - This situation presents a golden opportunity to fix misclassification issues

# QUESTIONS

# THANK YOU!!!

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