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THE FAIR LABOR STANDARDS ACT -- SIGNIFICANT CHANGES ON THE HORIZON

In 2016, employers can expect significant changes to federal wage and hour laws as the U.S. Department of Labor ("DOL") finalizes new regulations related to the payment of overtime under the Fair Labor Standards Act ("FLSA"). The basic premise of the FLSA is that covered, non-exempt employees must be paid overtime for hours worked in excess of 40 hours in a work week at the rate of one and one-half times the employee's regular rate of pay.

Limited exceptions to the FLSA's overtime obligations exist for certain types of employees and for employees in particular industries and occupations that would otherwise be entitled to FLSA protections. The most common exemptions are for white collar employees, i.e., executive, administrative, and professional employees. An employee can be considered exempt only if the employee's primary duties are of an exempt nature, the employee is paid on a salary basis, and the employee's salary meets a minimum salary level (these are known as the "duties test," the "salary basis test," and the "minimum salary test" respectively). There are no general exemptions for non-profit organizations under the FLSA, though certain individuals employed by non-profit organizations may qualify for an exemption if the nature of their employment satisfies the tests described above.

The DOL has announced proposed revisions to the FLSA's overtime rules that include two key changes to FLSA regulations:

- Currently, exempt employees must receive a salary of not less than $455.00 a week or $23,660.00 per year. The rule proposes to double this minimum salary level to approximately $970.00 per week, or $50,440.00 annually. Anyone making less than $50,440.00 annually would be classified as a nonexempt employee and entitled to overtime pay if they work more than 40 hours in a work week. Notably, this proposed level is only a projection and may increase or decrease with the final regulations.

- The proposed rule contemplates the establishment of a mechanism for annually updating the minimum salary test for these exemptions going forward. For example, minimum salary amounts could be adjusted annually based on changes in inflation as measured by the Consumer Price Index. The minimum salary level was last updated in 2004. The idea behind this change is to avoid large gaps in this adjustment and to add a measure of predictability to the minimum salary level.

During the rulemaking process, the DOL also sought comments on whether it should revise the duties tests for the various white-collar exemptions based on the belief that the current duties test does not effectively screen for true exempt-status employees. For example, the DOL asked for comments on whether it should implement a hard 50 percent limitation on work deemed nonexempt or overtime eligible. Such a change could eliminate the exemption for an employee who manages while contemporaneously performing other nonexempt-type duties.

Since the DOL announced the proposed revisions, it has received more than 300,000 formal complaints on the anticipated impact of the proposed rule. On March 17, 2016, bills were introduced in the United States Senate (S.2707) and House of Representatives (H.R. 4773) that are intended to block the proposed changes to the FLSA. At the time of this bulletin, S.2707 and H.R. 4773 were under consideration in committee.

In its most recent regulatory update, the DOL announced its plans to publish final regulations on these wage and hour updates in July 2016. If the final regulations are not blocked by legislative action in Congress, employers should expect that the time period between the announcement of the final regulations and their effective date may be short. Therefore, planning may be critical. While employers should not make any actual changes until the regulations become final, they are well-advised to consider auditing their current employee classifications to determine what changes may need to be made to the classification of positions if or when the proposed rule becomes final. Those changes may include raising salaries for certain employees to meet the new minimum salary level or reclassifying employees from exempt to overtime-eligible status. Reclassifying exempt employees to overtime-eligible status in turn requires the consideration of a broad range of issues, including communication strategies, training, timekeeping policies, and morale concerns.

For employees who may be reclassified from exempt to overtime-eligible, it is important for private-sector employers to remember that overtime obligations cannot be satisfied with the use of "comp time." Compensatory time, or "comp time," is paid time off that is earned by an employee in lieu of cash payments for working overtime hours. However, the FLSA limits the use of comp time to nonexempt employees in the public sector. Comp time cannot be used in place of overtime payments owed to nonexempt employees in private-sector employment.

For some employees who may no longer qualify as exempt after these proposed changes take effect, employers might consider implementing either a fluctuating workweek or a Belo contract to comply with the overtime pay requirements and reduce overtime costs. These options provide employees a consistent weekly salary, but are only available for employees whose duties necessitate irregular or variable hours of work (both more than 40 hours per week and less than 40 hours per week on a regular basis). If a Belo contract is used, an employer's overtime obligations may not kick in until the employee works more than 60 hours in a workweek. A fluctuating workweek entitles employees to a set weekly salary, regardless of the number of hours worked that week. If an employee works more than 40 hours, he or she must be paid additional half-time based on his or her regular rate for that week. For example, Jane is paid a weekly salary of $500 as straight-time pay in a fluctuating workweek arrangement. In a week that Jane works 60 hours, her overtime premium would be an additional $83.34 [20 hours x (($500/60) x ½)]. A Belo contract or fluctuating workweek arrangement can be implemented for discrete periods of time, such as the busy period leading up to an event. However, these workweek arrangements are not valid in every state and are subject to strict requirements under the FLSA that must be carefully analyzed on a case-by-case basis before implementation.

These 2016 changes to the FLSA will bring sweeping changes to federal wage and hour laws. They will be particularly burdensome on rural states and will significantly impact non-profit organizations, among others. Employers should consider preparing for these changes now by collecting and analyzing data regarding the organization's exempt employees, particularly those who are currently paid salaries between $23,660, the current minimum, and $50,440, the proposed 2016 minimum. In the event that the duties test is also revised, employers also will need to consider a more in-depth review of their exempt status employees to ensure compliance. In sum, employers are encouraged to engage in a planning process now so that they are prepared to respond to these regulatory changes once they become effective.

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