

## ARE YOU READY FOR THE NEW FLSA REGULATIONS?

Back in July 2015, we told you about the proposed new Department of Labor regulations which would dramatically affect employee eligibility for overtime under the Fair Labor Standards Act. After reviewing more than 250,000 comments on the proposed regulations, the DOL has now sent its changes to the Office of Management and Budget, which is expected to complete its review process fairly quickly. Experts in the area anticipate that the final regulations may be issued in early July – possibly even sooner. Once issued, the new regulations would take effect in 60 days.

Although a bill was recently introduced in Congress seeking to nullify the regulations, at this point, the bill does not seem likely to pass both houses (or to survive a presidential veto, even if it were to pass). And while there has been some speculation about how long the new regulations might survive following November's elections, employers cannot just ignore them in hopes of their eventual repeal. Nor can employers wait for the final regulations to be issued before starting to take action. Although it's not possible to complete the compliance process before the final regulations are issued – since some elements of the proposed regulations may be changed in the final version – employers who wait until the final regulations are issued to begin the process are likely to find themselves struggling to do all that needs to be done in just 60 days. Accordingly, while the regulatory process is wrapping up, employers who have not already done so should:

- Identify all positions in the organization which are currently classified as exempt *and* have an annual salary below \$970 a week (\$50,440 a year). Although that figure may be reduced somewhat in the final regulations, the expectation is that there will still be a dramatic increase from the current minimum salary level of \$455 a week (\$23,660 a year).
- Decide how the organization will treat those positions going forward: will you increase salaries to maintain exempt status? will you reclassify positions paying less than the minimum as non-exempt? some of each?
  - It may be helpful to identify compensation bands. For instance, an organization might decide that salaries within \$10,000 of the new salary threshold will be increased to remain exempt, while positions paying less than that will be reclassified as non-exempt.
  - Be careful about the process by which salary adjustment and/or reclassification decisions are made – if not handled (and documented) properly, these decisions could expose the organization to potential discrimination claims.
  - When making salary decisions intended to preserve exempt status, keep in mind that, at least under the proposed regulations, the salary threshold for exempt positions will be subject to adjustment annually.

- Decide how the organization will deal with what may be an increased number of non-exempt jobs: will you simply convert current annual salaries to an equivalent hourly rate or will you reduce base rates to offset potential overtime?
  - It may be useful to try to determine how many hours a week staff in positions likely to be reclassified are working now (*i.e.*, how much new potential overtime is lurking out there to be addressed).
  - Employers should look at their time keeping practices and policies and adjust as necessary to address any newly non-exempt employees. In some organizations, exempt employees may not be tracking their time at all now or may not be tracking it in a sufficiently detailed fashion. If those same employees suddenly become non-exempt, that will need to change.
- Remember to look at any “highly compensated employees” as well. Under the proposed regulations issued last summer, the minimum salary for a highly compensated employee was slated to increase from \$100,000 a year to \$122,148 per year. Employees who fall below the new salary threshold will not be eligible for the relaxed “highly compensated employee” exemption. Rather, employers will need to ensure that such employees satisfy one of the more stringent exemptions to retain their exempt status. (Pennsylvania employers should also remember that the Commonwealth does not recognize this exemption.)
- Do some spring cleaning. Even for positions not directly impacted by the regulatory changes, now is a good time to look at job descriptions and FLSA classifications. Any necessary adjustments can then be rolled out as part of a larger compliance effort.
- Develop a strategy to communicate any salary and reclassification decisions and any associated practice and policy changes. Employers should also be prepared to deal with resulting morale issues. Although eligibility for overtime might be viewed as a positive from an employee’s perspective, we have found that some employees view reclassification from exempt to non-exempt status negatively – the change can be perceived as reflecting a lack of respect for a particular position or class of positions. Reclassifications may be particularly sensitive if others in the organization are receiving salary increases in order to maintain their exempt status under the new regulations and/or if, as a result of reclassification, employees become subject to new administrative requirements (such as clocking in and out). It will be critical for employers to be prepared not only to explain changes but to address employee concerns.