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Changes to Wage and Hour Laws that are Likely to Affect Your Business

Times, they are a changing ...

So many of you have heard that changes were coming to wage and hour laws. We are now one step closer to those changes. The Department of Labor ("DOL") has issued the new "Proposed rule and request for comments," and the proposed changes are about what we expected.

The DOL's marching orders ...

In March of 2014, President Obama sent a memo to the DOL asking them to "modernize and simplify" the current regulations, with specific attention to limiting the number of people who are "exempt" from overtime pay. When your human resource professional talks about "exempt" and "non-exempt" employees, he/she is really referencing whether or not that employee is exempt from the overtime pay system; or not exempt, and therefore must be paid at one and a half times the hourly rate for all hours over 40 in a pay week.

What is "exempt" anyhow?

As you may recall, in the world of employment, two things are necessary to exempt someone from overtime pay. The first is that they be paid a salary basis, meaning that their pay is fixed and not subject to reductions based upon the quality of work performed, and that the salary basis be at least \$455 per pay week or \$23,660 per year. The second is that their duties at work fall within a defined scope of duties that are considered "exempt" from overtime pay. Importantly, defining those duties has been a bone of contention between business and the DOL since the inception of this test, and arguing over a particular employee and their role in an organization has occupied countless hours with DOL investigators. In the end, both parts of this equation are necessary – the salary basis and the right kind of duties.

For sake of reference, you should know that the last change to the salary basis came in 2002. Prior to that, the last change had been 1975. In point of truth, the Fair Labor Standards Act ("FLSA"), the legislation which introduced this concept to employment in the United States, was issued in 1938. Since that time, the salary basis has been updated only seven times.

What are the changes?

The current Administration wanted to address both aspects of this analysis and update both the salary level and simplify the identification of non-exempt employees. In terms of the salary basis, the new regulations are really attempting to do two things: first, to update the current salary basis; and second, to install a system so that the salary basis is updated on an ongoing basis to keep up with inflation. To do this, the DOL crunched numbers and determined that the salary basis should be equal to the 40th percentile of earnings for full-time salaried workers or \$47,892 for 2013. This law is slated to go into effect in 2016; therefore, the projected number for 2016 is \$50,440. More or less, anyone making LESS than \$50,440 in 2016 will NOT be able to be classified as exempt under the FLSA because they will not meet the salary basis requirement.

How many people are going to be affected by this? The DOL estimates that in the first year of implementation (2016) this will change the status of about 10% of the current workforce.

How about the duties test?

Interestingly, the DOL punted on the clarification to the duties analysis. The proposed rule indicates that they would like the public to provide comment on what, if any, changes should be made to the duties analysis.

So, is this a done deal?

No. This is a proposed rule and request for comments. There still will be a period of time for people to comment, for the DOL to assess those comments, and time for Congress to comment as well. However, despite the political challenges many of this Administration's changes has faced, this particular change is not likely to face huge opposition.

What should I do?

Begin to assess the effect this will have on your payroll budget and determine what impact, if any, this will have on your company. If you believe it will have a significant impact, begin looking at alternatives, such as increasing pay to employees to overcome the new salary basis or limit overtime work. You may want to consider hiring additional employees or you may want to shift some duties to other employees who either have capacity or who clearly satisfy the salary basis requirement.

Following this change there will be a time of heightened scrutiny. You may want to consider using this time to make sure that your current exempt/non-exempt categorizations are accurate and that you understand your options moving forward. The Employment and Labor Group at Dickie, McCamey & Chilcote, P.C. can help you with your analysis. Feel free to reach out to us to arrange for an audit of your current positions analysis.

By the way ...

Stay tuned. On the horizon, the DOL is to provide clarification to the definition of independent contractor.