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34th annual WORKFORCE MANAGEMENT BRIEFING

High Stakes and High Priorities

Wage and Hour Compliance: You Are Not Exempt

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Agenda

- What are the Stakes?
- White Collar Exemptions: Proposed Rule
- Independent Contractor Compliance
- Summer Professionals/Interns
- Tipping
- Bonuses
- East Coast v. West Coast

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What Are The Stakes?

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Wage & Hour Class Actions and Collective Actions

- Wage & Hour claims are the most frequently filed employment-related class action lawsuits
- Private Wage & Hour class actions and collective actions exceed all other types of employment class actions combined
- *Wage & Hour suits increased 237% in the last decade*
- 2014:
  - High of 8,160 new cases filed under FLSA
  - 8.8% increase from the previous 12 months
  - Eighth straight year of increases
- Largest spike:
  - Unpaid overtime (*e.g.*, misclassification claims)
  - Work off-the-clock (*e.g.*, employee security checks, donning and doffing safety equipment, smartphones, computer access after hours, booting up computers)

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White Collar Exemptions: Proposed Rule

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What Is Changing?

(1) White Collar Exemptions:

- The DOL's proposed rule would increase the minimum salary required to qualify as an exempt white collar employee under 29 U.S.C. § 213 (a)(1), from $455/week ($23,660/year) to approximately $970/week ($50,440/year)
- This change would affect the FLSA exemptions for:
  - Executive employees
  - Administrative employees
  - Professional employees (except certain doctors, lawyers and teachers)
  - Certain salaried Computer/Information Technology employees
- The DOL is also considering whether to allow non-discretionary bonuses, incentive payments and commissions to satisfy a portion of the salary level test

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What Is Changing?

(2) Highly Compensated Employee Exemption:

- The DOL's proposed rule would also increase the minimum salary required to qualify as a "highly compensated employee," from $100,000/year to approximately $122,148/year
- This change would affect employees who:
  - Earn an annual salary at or above the 90th percentile of all full-time salaried workers (estimated as $122,148/year);
  - Are paid at least the standard minimum salary requirement (estimated as $970/week or $50,440/year) on a salary or fee basis (the remainder of the highly compensated employee's total annual compensation may include commissions, non-discretionary bonuses, and other non-discretionary compensation); and
  - Customarily and regularly perform any one or more of the exempt duties of an executive, administrative, or professional employee.

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What May or May Not Change?

Duties Test

- The DOL did not propose any specific changes to the duties tests for the administrative, executive and professional exemptions
- The DOL solicited comments as to whether any such changes are warranted

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What May or May Not Change? (continued)

Specifically, the DOL sought comments on the following issues:

- What changes should be made to the duties tests?
- Should employees be required to spend a minimum amount of time performing exempt work to qualify for exemption?
- Does the single standard duties test appropriately distinguish between exempt/non-exempt employees, or should DOL consider returning to the long/short duties tests structure?
- Should the regulation allowing exempt executive employees to perform exempt and non-exempt duties concurrently be modified, or should there be a limit on the amount of non-exempt work permitted?

Expected Impact of Change

- The DOL estimates that the new rule will result in 4.6 million currently exempt workers either being reclassified as non-exempt or having their salaries raised to the new minimum salary level in the first year the rule goes into effect
- The DOL estimates at least $239.6 million in annual employer compliance costs, and average annualized transfers from employers to employees in excess of $1.178 billion in the form of higher wages
- The DOL predicts "a potential impact of the rule's proposed increase in the salary threshold is a reduction in litigation costs," based on increased certainty regarding exempt/non-exempt status

What Employers Should Do

- Identify potentially affected employees and job classifications
- Potential options to handle change in salary basis test include:
  - Increase affected employees' salary to the new minimum level for exempt status
  - Reclassify affected employees as non-exempt and pay overtime as needed
  - Reclassify affected employees as non-exempt and reduce regular rate of pay so total weekly earnings do not change after overtime is paid
  - Eliminate overtime hours
  - Some combination of the above
- Review HR policies and procedures, including job descriptions, to ensure FLSA compliance

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Independent Contractor Compliance

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The Economic Realities Test

- Under the FLSA, the legal distinction between an employee and independent contractor is determined based on the "economic realities" test
- Courts consider a non-exclusive list of factors, none of which is individually dispositive.
- The primary factors of the "economic realities" test include:
  - degree of control exercised by the employer over the workers
  - the workers' opportunity for profit or loss and investment in the business
  - degree of skill and independent initiative required to perform the work
  - permanence or duration of the working relationship
  - the extent to which the work is an integral part of the employer's business

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New DOL Guidance: A "Creative" Interpretation

- The DOL's July 15, 2015 guidance cautions against placing undue weight on the degree of control a business exercises over a worker, a factor courts often relied heavily on in their analysis
- Instead, the DOL guidance focuses on whether a worker is economically dependent on a single business for his/her livelihood
- The DOL's guidance reflects a far more aggressive interpretation of several "economic realities" factors than applied by courts, and concludes that most workers are employees under the FLSA

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New DOL Guidance: A "Creative" Interpretation (continued)

- Courts typically focus solely on whether a worker has the opportunity to experience profit or loss. The DOL's guidance, however, stated that the proper inquiry is "whether the worker has the ability to make decisions and use his or her managerial skill and initiative to affect opportunity for profit or loss" (*e.g.,* hiring employees or advertising, not merely "doing one's job well or working more hours").
- Contrary to the analysis used by courts, the DOL stated that a worker's investment in the business, "considered in isolation," is irrelevant; "it is the relative investments that matter." Thus, "the worker's investment must be significant in nature and magnitude relative to the employer's investment in its overall business to indicate that the worker is an independent business person." Note that this position, if adopted by courts, may make it virtually impossible for a large company to satisfy this component of the "economic realities" test.

New DOL Guidance: A "Creative" Interpretation (continued)

- It is important to note that guidance is merely the DOL's interpretation of the law
  - Under the DOL's interpretation it will be very difficult to establish an independent contractor relationship
  - The DOL's guidance ignores the body of case law that applies a more employer-friendly interpretation of the "economic realities" test
  - The amount of deference that courts will give to this guidance remains to be seen

COLLATERAL ISSUE: Joint Employer Liability

The National Labor Relations Board's recent decision in *Browning-Ferris* dramatically expanded the definition of "joint employer" as it applies to who should sit at bargaining table

Under this revised standard, an entity may be considered a "joint employer" if it possesses the authority, direct or indirect, to control the essential terms and conditions of workers' employment, even if it does not exercise that authority, or does so through an intermediary

The extent to which courts and/or the DOL will defer to this interpretation, and potentially apply it in other contexts, remains to be seen

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Summer Professionals/Interns

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Summer Professionals/Interns

Two questions:

1. Are summer professionals considered employees subject to the FLSA?
2. Are they professional employees exempt from the FLSA?

Are Summer Professionals/Interns Employees? The DOL's Test

- DOL Fact Sheet #71 sets forth a six-factor balancing test to determine whether interns are employees, with no single factor being determinative:
  - is the internship similar to training given in an educational environment?
  - is the internship for the benefit of the intern?
  - does the intern displace regular employees?
  - does the employer derive immediate advantage from the intern's services?
  - is the intern automatically entitled to a job at the conclusion of the internship?
  - do the employer and intern both understand that the intern is not entitled to wages?
- If all six factors are met, the intern is *not* an employee under the FLSA

Are Summer Professionals/Interns Employees? The Second Circuit's Test

- Second Circuit: "the proper question is whether the intern or the employer is the primary beneficiary of the relationship." *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376 (2d Cir. 2015)
- Factors to consider in determining whether an unpaid intern is an employee include:
  - the intern/employer clearly understand there is no expectation of compensation
  - the internship provides training similar to that given in an educational environment
  - the internship is tied to the intern's formal education program by coursework or receipt of academic credit
  - the internship accommodates academic commitments/corresponds to the academic calendar
  - the internship's duration is limited to a time period within which it provides the intern with beneficial learning
  - the intern's work complements, rather than displaces, the work of paid employees.
  - there is no entitlement to a paid job at the conclusion of the internship

Are Summer Professionals/Interns Employees? The Second Circuit's Test (continued)

- These and all other relevant factors should be weighed and balanced, with no single factor being dispositive
- The Eleventh Circuit recently joined the Second Circuit in rejecting the DOL's more rigid six-part test, citing to *Glatt's* holding that multiple non-exclusive factors should be considered in determining whether the intern or the putative employer was the primary beneficiary of the services being rendered. *Schumann, et al. v. Collier Anesthesia, P.A., et al.*, No. 14-13169, 2015 U.S. App. LEXIS 16194 (11th Cir. Sept. 11, 2015)

Do Any White Collar Exemptions Apply?

- Most white collar exemptions have a compensation component that unpaid interns will not satisfy
  - Unpaid law and medical students may still qualify as exempt
- Paid interns may satisfy the salary basis test
  - Weekly salary of $455 per week or greater (*for now…*)
- What are an intern's job duties?
  - Do they exercise independent discretion and judgment? (administrative exemption)
  - Do they have authority to hire or fire other employees or are their suggestions and recommendations regarding change of status given particular weight? (executive exemption)
  - Does their work require advanced knowledge customarily acquired by a prolonged course of specialized intellectual instruction? (professional exemption)

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What Employers Should Do

Track intern hours as you would nonexempt employees in order to:

- Cap damages
- Comply with recordkeeping requirements

Limit overtime worked by interns

Limit interns' remote access to work computers/email

Monitor and control any programs or training offered for the interns' benefit

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Tipping

Tip Credits

- Notice to tipped employees
  - Oral notice permitted under federal law
  - Some states (*e.g.*, New York) require written notice
  - Best practice is to provide written notice
- The 20% Rule: Employers generally may claim a tip credit for all of an employees time if that employee spends 20% of less of their time performing non-tipped functions
- Compulsory service charges are *not* tips

Tip Pooling

Tip pools may only include employees who customarily and regularly receive tips.

29 C.F.R. § 531.54

An employee must regularly receive more than $30 a month in tips to be considered a tipped employee. 29 C.F.R. § 531.56

All money from a tip pool must go to tipped employees participating in the pool; none of the money may be retained by the employer for any purpose.

Calculating A Tipped Employee's Overtime Rate

- A tipped employee's overtime rate = 1.5x(regular rate)-tip credit. 29 CFR § 531.60
- Under the FLSA, a tipped worker making minimum wage should be paid: 1.5x($7.25)-$5.12= $5.76 per hour (in addition to tips)
- Always remember to check state and local minimum wage laws

Bonuses

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Structuring Bonus Compensation

- Should it be in writing? Must it be in writing?
- Are bonus plans set in stone? When and how can they be altered?
  - Discretionary bonuses
  - Clawbacks
  - Employee loans
- Deferred compensation traps
  - Adverse tax consequences due to constructive receipt
  - Treatment as an employee benefits plan under ERISA
- Properly calculate overtime compensation to account for non-discretionary bonuses

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East Coast v. West Coast

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Local Issues

- Wage theft prevention and wage deduction laws
  - Recordkeeping, wage statements, and mandatory disclosures
- Independent contractor misclassification
- Meal and rest breaks
- White collar exemptions