

New Reality for Exempt Employees

Pittsburgh Employment Law Conference

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TOPICS TO BE COVERED

- Current Department of Labor (“DOL”) regulations
- Proposed changes to the regulations
- Independent Contractor vs. Employee
- Executive, Administrative, and Professional Exemptions (“White Collar Employees”)
- Advice to Employers

FAIR LABOR STANDARDS ACT (FLSA)

- General Rule
 - Under federal law, employers must pay at least minimum wage and overtime at the rate of one and one-half (1½) times the “regular rate” of pay for each “hour worked” in excess of forty (40) hours in a seven-day workweek unless the employee is exempt from the minimum wage or overtime pay provisions or both

CURRENT DOL REGULATIONS

- DOL regulations exempt certain employees from eligibility for overtime pay
- **White collar exemptions** are those exemptions from the FLSA's minimum wage and overtime pay requirements for the so-called "white collar" occupations
 - Executives
 - Administrative employees
 - Professional employees
 - Highly compensated employees: Employees who earn at least \$100,000 per year are also exempt from overtime pay if they customarily and regularly perform any one or more of the exempt duties of an executive, administrative, or professional employee
 - Computer employees
 - Outside sales employees

CURRENT DOL REGULATIONS (CONTINUED)

- To qualify for exemption, white collar employees must meet the salary test and the duties test
 - The salary test requires that the employee be paid a minimum weekly amount
 - The duties test requires that the employee's job duties primarily involve executive, administrative, or professional duties as defined by the regulations
- Pursuant to current DOL regulations, to fall within the executive, administrative, or professional exemptions, employees must be paid a minimum salary of \$455 per week, which equates to \$23,660 annually
 - The minimum salary requirement does not apply to outside sales employees

CURRENT DOL REGULATIONS (CONTINUED)

- According to the DOL, the current minimum weekly salary has resulted in too many employees being exempt from overtime who should earn overtime pay
 - Ex. An assistant manager at a fast food restaurant who earns \$455 per week and meets the duties test for an administrative employee works 60 hours a week. Because the employee is exempt from overtime pay, the employee earns only \$23,660 annually, which is less than the poverty level for a family of four

PROPOSED DOL REGULATIONS

- On March 13, 2014, President Obama signed a Presidential Memorandum directing the DOL to revise the regulations defining which white collar workers are exempt from overtime and minimum wage standards
- The regulations proposed by the DOL increase the minimum weekly salary for white collar workers from \$455 to \$970 (or \$50,440 annually).
 - Exempt employees must earn an amount equal to or greater than the 40th percentile of earnings for full-time salaried workers, plus satisfy the duties test.
 - Amount will increase annually to remain at the 40th percentile.
- The proposed regulations also increase the minimum salary for highly compensated employees from \$100,000 to \$122,148 annually.

PROPOSED DOL REGULATIONS (CONTINUED)

- The proposed increased minimum salary is intended to address a salary level that has not been changed since 2004
- The DOL believes that the increased salary level will further the purpose of the white collar exemptions, which is to exempt only those highly compensated employees who also meet the duties test

INDEPENDENT CONTRACTOR VS. EMPLOYEE

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INDEPENDENT CONTRACTOR V. EMPLOYEE

- Employees are frequently improperly classified as independent contractors
- The benefits of independent contractor status are
 - Employment laws (including discrimination and wage hour laws) do not apply
 - No payroll taxes (Employer portion of FICA, Unemployment, etc.)
 - No income tax withholding
 - 1099 rather than W-2
- In recent years, all governmental agencies (federal and state) have been cracking down on improper classification of employees as independent contractors

INDEPENDENT CONTRACTOR V. EMPLOYEE (CONTINUED)

- On July 15, 2015, Wage Hour Administrator David Weil issued Administrator's Interpretation 2015-1 regarding how the DOL will distinguish between employee status and proper independent contractor status

INDEPENDENT CONTRACTOR V. EMPLOYEE (CONTINUED)

- Key Quotes from Administrator's Interpretation
 - “Misclassification of employees as independent contractors is found in an increasing number of workplaces in the United States”
 - “Although independent contracting relationships can be advantageous for workers and businesses, some employees may be intentionally misclassified as a means to cut costs and avoid compliance with labor laws”
 - “[A]pplying the economic realities test in view of the expansive definition of ‘employ’ under the Act, most workers are employees under the FLSA”
 - “The ‘suffer or permit’ standard was specifically designed to ensure as broad of a scope of coverage as possible”

INDEPENDENT CONTRACTOR V. EMPLOYEE (CONTINUED)

- Economic realities test has multiple factors
- In laymen's terms, the worker needs to look like he/she is in business for him/herself, offer his/her services to the general public, have a risk of profit and loss, and actually perform work for and receive compensation from several different businesses
- If your business utilizes independent contractors, those relationships should be reviewed and analyzed to determine if they are properly classified as independent contractors
- Industry practice or custom and/or having the workers sign independent contractor agreements will not protect you from a claim of misclassification

INDEPENDENT CONTRACTOR V. EMPLOYEE (CONTINUED)

- Factors to consider
 - Is worker economically dependent on employer's business?
 - Is the work an integral part of the employer's business?
 - Does the worker's managerial skill affect his/her opportunity for profit/loss?
 - How does worker investment compare to employer's investment?
 - Does the work require special skill and initiative?
 - Is the relationship permanent or indefinite?
 - What is the degree of control?

CLASSIFYING EMPLOYEES

EXEMPT V. NON-EXEMPT

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WHAT DOES IT MEAN TO BE EXEMPT?

- Exempt – not entitled to overtime premium
- Non-exempt – entitled to overtime premium

EXECUTIVE EXEMPTION

(THE BOSSES)

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EXECUTIVE EXEMPTION

- Salary Basis
- **Supervisor** – customarily and regularly directs the work of two or more employees
- **Primary duty – managing** the enterprise (or a customarily recognized department or subdivision)
- **Authority to hire or fire** employees (or whose recommendations are given particular weight)

SUPERVISOR

- Two full-time employees, or
- Equivalent, *e.g.*,
 - One full-time and two half-time, or
 - Four half-time
- Usually not an assistant manager / lead

PRIMARY DUTY – “MANAGING”

- Interviewing, selecting and training
- Setting and adjusting pay rates
- Setting and adjusting schedules
- Directing work
- Maintaining production or sales records
- Appraising productivity and efficiency

MANAGEMENT DUTIES

- Handling complaints and grievances
- Disciplining
- Planning work
- Determining techniques
- Apportioning work
- Determining materials, supplies, machinery, equipment and tools to use

EXEMPT DUTIES

- Determining merchandise to be stocked
- Controlling the flow of materials, merchandise and supplies
- Providing for safety / security
- Planning / controlling budget
- Legal compliance

AUTHORITY TO HIRE OR FIRE

- Absolute power not required
- Factors for “particular weight”
 - Whether it is part of the employee’s job duties to make recommendations
 - How often recommendations are made
 - How often recommendations are relied upon
 - Whether recommendation is for an employee who the manager directs

CLASSIFYING EXECUTIVE EMPLOYEES

- These are supervisors with managerial authority
- Spend majority of their time managing other employees, not doing work

ADMINISTRATIVE EXEMPTION

(THE SUITS)

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ADMINISTRATIVE – GENERAL REQUIREMENTS

- Salary Basis
- Primary duty – office or non-manual work
- Primary duty – **directly related to the management** or general business operations of the employer
- Primary duty – includes the exercise of **discretion and independent judgment** with respect to **matters of significance**

OFFICE OR NON-MANUAL WORK

- NOT people who work with their hands
- So, not “leads” who have some administrative responsibility but mostly work beside their team

WORK DIRECTLY RELATED TO MANAGEMENT OR GENERAL BUSINESS OPERATIONS

- Must assist with running the business (vs. providing the service or products offered by the company)
- Examples
 - Tax
 - Finance
 - Accounting
 - Budgeting
 - Auditing
 - Insurance
 - Quality control

EXAMPLES (CONTINUED)

- Purchasing
- Procurement
- Advertising
- Marketing
- Research
- Safety and health
- Personnel management
- Human resources
- Employee benefits
- Labor relations
- Public relations
- Government relations
- Computer network
- Internet / database administration
- Legal and regulatory compliance

DISCRETION AND INDEPENDENT JUDGMENT WITH RESPECT TO MATTERS OF SIGNIFICANCE

- Involves
 - Comparison and evaluation of options
 - Considering the possibilities
 - Deciding on a course of conduct
- Authority to make an independent choice, free from immediate direction or supervision
- Even if decisions or recommendations are reviewed at a higher level

DISCRETION AND INDEPENDENT JUDGMENT WITH RESPECT TO MATTERS OF SIGNIFICANCE (CONT)

- Create management policies / operating practices
- Major assignments in conducting the operations of the business
- Work that affects business operations to a substantial degree
- Commit the employer in matters that have significant financial impact

CLASSIFYING EMPLOYEES AS ADMINISTRATIVE

- People behind the scenes in the office who keep the business running successfully
- Factors to consider
 - Does the employee have authority to formulate, affect, interpret or implement management policies or operating practices?
 - Does the employee carry out major assignments in conducting the operation of the business?
 - Does the employee's work affect business operations to a substantial degree?
 - Does the employee have authority to commit the employer in matters that have a significant financial impact?

PROFESSIONAL EXEMPTION

(THE DOCTORS)

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PROFESSIONAL EXEMPTION – GENERALLY

- Salary Basis
- **Primary duty** is the performance of work requiring **knowledge of an advanced type**
- Knowledge is in a field of **science or learning**, customarily acquired by a **prolonged course of specialized intellectual instruction**

KNOWLEDGE OF AN ADVANCED TYPE

- A specific four-year degree, or an advanced degree
 - NOT high school
 - NOT a general degree

FIELD OF SCIENCE OR LEARNING CUSTOMARILY ACQUIRED BY PROLONGED COURSE OF SPECIALIZED INSTRUCTION

- Fields having a recognized professional status as opposed to the mechanical arts or skilled trades
- Examples include
 - law
 - medicine
 - theology
 - accounting
 - actuarial computation
 - engineering
 - architecture
 - teaching
 - physical/chemical/biological sciences
 - pharmacy

DUTIES

- Predominantly intellectual
- Requires consistent exercise of discretion and judgment
- Uses advanced knowledge to analyze, interpret and make deductions from varying facts or circumstances

DEGREE BUT NO LICENSE

- §541.705 – professional exemption does not apply to employees training for employment in a professional capacity
 - UNLESS they are actually performing the duties of a professional employee
- Case-by-case

IS A LICENSE REQUIRED?

- Statute is silent
- DOL Field Operations Handbook – relevant only to provide evidence that a prolonged course of specialized intellectual instruction has become a standard prerequisite for entrance into the profession
- §541.705 – professional exemption does not apply to a trainee who is not actually performing the duties of a professional
- §541.304 – physicians who obtain their degree are exempt professionals during the time they are doing their residency – even if not licensed to practice medicine (limited to the health care field)
- §541.301(e)(5) – accountants not licensed as CPAs may be exempt

IS A LICENSE REQUIRED?

- *Dolar v. Day & Zimmerman* – Yes, where employee
 - prepared detail plans from original plans
 - prepared sections, plans and elevations
 - for reinforced concrete, designed the arrangement of the components
 - prepared schedules of materials used in placing supplier orders
- SO, license not mandatory, BUT an unlicensed person must perform exempt duties

ADVICE TO EMPLOYERS

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ADVICE TO EMPLOYERS

- In light of the increased minimum salary requirement for white collar employees, previously exempt employees may be eligible for overtime pay
- Reevaluate all positions to determine if formerly exempt employees must now receive overtime pay
 - Does each position clearly meet all tests for one of the exemptions?
 - If not,

Track hours and pay overtime

OR

Get legal advice

- Err on the side of designating employees as non-exempt
- Make sure that all non-exempt employees understand the importance of accurately recording the hours they work
- Ensure that formerly exempt employees who are not accustomed to having to track the hours they work know how to use the employer's timekeeping system

QUESTIONS?

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THANK YOU



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