NEW WHITE COLLAR EXEMPTION REGULATIONS

What Does It Mean for Employers?

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WHY DO I CARE?

- The Fair Labor Standards Act ("FLSA" or "Act") enacted in 1938 as part of the federal government’s effort to lift the country out of the Great Depression

- Over 75 years later, the Act still serves as the centerpiece of wage and hour laws in this country

- The FLSA has three major provisions:
  1. Employers must pay a statutory minimum hourly wage
  2. Employers must pay non-exempt employees additional compensation for overtime work, calculated at 1-1/2 times the employee’s regular rate for all time actually worked over 40 in one week
  3. Employers must keep track of the hours worked by employees
**LAWSUIT RISK**

- The potential exposure for such a lawsuit is high:
  - Back wages (often for a class of employees) going back up to three years
  - An additional amount as liquidated damages
  - **AND** plaintiff’s attorneys’ fees (which may exceed the amount paid to the employee(s))
  - **PLUS** the company’s legal defense fees
RISK EXAMPLE

- Company A has 10 employees and pays each a salary of $500.00 per week
- About half the time, they are so busy the employees work 50 hours, but were not paid overtime
- Result: Company A could owe up to $292,500 (not including attorneys’ fees)
EXAMPLE CALCULATIONS

- Effective hourly rate: $12.50 ($500 ÷ 40 hours)
- Effective overtime rate: $18.75 ($12.50 x 1.5)
- Overtime hours per week: 100 (10 hours x 10 employees)
- Total weeks: 78 (3 years x 52 weeks ÷ 2)
- Total overtime due: $146,250 ($18.75 x 100 x 78)
- Liquidated Damages: $146,250
- TOTAL: $292,500
EXAMPLE CALCULATIONS

- PLUS $100,000 - $150,000 for plaintiff’s attorneys fees!
- PLUS an equal amount for your defense costs
- TOTAL: Devastating
- LIABILITY: corporation, can be personal
- Insurance? Mostly no
TODAY YOU WILL LEARN

- How the new rules fit into the existing FLSA structure
- Overview of the new salary rules
- How you can use nondiscretionary bonuses and other payments to meet salary requirements
- What the new “highly compensated employee” rules are
- How the escalator provision will work
- Steps you can take now to prepare for the December 1st, 2016 effective date
THE FLSA STRUCTURE
THE FLSA STRUCTURE

- FLSA requires employers to:
  - Track employee time
  - Pay for all working time (as defined)
  - Pay overtime if employee works more than 40 hours during a workweek

- Challenges:
  - Paying overtime is expensive
  - Employees work odd hours and can be hard to track
EXEMPTIONS GENERALLY

- There are numerous exceptions to the overtime rule ("exemptions")
- Those affected by Final Rule: White Collar Exemptions
WHITE COLLAR EXEMPTIONS

- Three also require that the employee be paid on a salary basis:
  - Administrative
  - Executive
  - Professional

- Exempt Computer professionals may be salaried
THREE REQUIREMENTS

- To be exempt from overtime, the employee must:
  - Satisfy the salary basis test
  - Satisfy the salary level test
  - Satisfy the duties test
THREE REQUIREMENTS

- Not all White Collar employees who are paid a salary are exempt:
  - They must meet the **duties** test for the particular exemption AND
  - Their full salary must be paid every week in which they perform services (with some exceptions)

- Today, we’re talking only about the salary level test
REASON FOR INCREASE

- March 2014: President Obama directed DOL to update and modernize overtime standards

- DOL researched salary levels and determined that the current rules were not keeping up with inflation

- Some exempt employees could be below the poverty line
SALARY IN THE PAST

- The Salary Test has been updated seven times since 1938
- Salary since 2004:
  - $455 per week
  - $23,660 annually
- Poverty level:
  - $23,850 for family of four
NEW SALARY RULES
PROPOSED NEW RULE

- Proposals published July 6th, 2015
  - $955 per week
  - $50,440 annually
- Over 250,000 comments
- FINAL RULE issued May 18th, 2016
- Effective December 1st, 2016
FINAL NEW RULE

$913 per week
$3,956 per month
$47,476 annually

- More than double the previous rate
- 40% of salaried workers currently earn below this amount
ADDITIONAL PAYMENTS

▪ OLD RULE:
  – Salary must be one, set amount received every week

▪ NEW RULE:
  – Other amounts may be used to reach weekly threshold:
    o Bonuses (only nondiscretionary)
    o Commissions
    o Incentive payments
ADDITIONAL PAYMENTS

- Must be paid at least quarterly

- Can count for only 10% of required amount
  
  - Weekly: 10% x $913 = $91.30 per week
  
  - Quarterly: 10% x $11,869 = $1,186.90

- So, if employee receives at least $1,186.90 quarterly in commissions or non-discretionary bonuses, his weekly pay for that quarter could be as low as $821.70
SUMMARY – STANDARD SALARY LEVEL TEST

- Weekly salary raised to $913

- Up to $91.30 per week may come from other types of guaranteed income (commissions, nondiscretionary bonuses, and other incentive plans)

- IF NOT: Must pay overtime
HIGHLY COMPENSATED INDIVIDUALS
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- Some employees paid so much, DOL does not worry that they are being taken advantage of
- For Executive, Administrative and Professional, duties and salary test are different
- DUTIES: Need to perform at least one exempt duty
SALARY – HIGHLY COMPENSATED INDIVIDUALS

- OLD RULE: $100,000 per year
  - $1,923 per week
  - $8,333 per month

- NEW RULE: $134,004
  - $2,577 per week
  - $16,080 per month
THE ESCALATOR PROVISION
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- OLD RULE: DOL needed to go through rule-making process to increase
- NEW RULE: These amounts will increase every three years
  - Next increase: January 1\textsuperscript{st}, 2020
  - Amount of increase:
    - Salary basis: 40th percentile of salaried employees
    - Highly Compensated individuals: 90th percentile of salaried employees
STEPS YOU CAN TAKE NOW
LEARN ABOUT THE FLSA

- Many exemptions, not just professional, administrative and executive
- Rules for identifying exempt employees are grounded in statutes, regulations and sometimes case law that are often obtuse and confusing
- Rules for paying non-exempt employees are detailed, specific and often anti-intuitive
ANALYZE

- DOL/Courts evaluate on case-by-case basis
- Identify employees who are obviously exempt
- Identify employees who are obviously *not* exempt
- For all employees in the gray zone in between, either:
  - Pay them as nonexempt OR
  - Contact a Clark Hill attorney for further legal analysis
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• Provide advice about exemptions

• Solve compensation issues
QUESTIONS?

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THANK YOU

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