

HOW TO CONDUCT AN EFFECTIVE WAGE CLASSIFICATION AUDIT – IS THE POSITION EXEMPT OR NON-EXEMPT?

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DOL NOTICE OF PROPOSED RULE MAKING

- On March 7, 2019, the Department of Labor announced a proposed rule that would make over 1 million more American workers eligible for overtime pay
- Under the currently enforced law, employees with a salary above \$455/week (\$23,660 annually) are not entitled to overtime pay
- UPDATE: the Department's recent proposal, however, would raise the salary level to \$679/week (\$35,308 annually) making employees between the \$23k-\$35k threshold non-exempt and eligible for overtime pay

NOTICE OF PROPOSED RULE MAKING

- The proposal would also increase the total annual compensation required for “highly compensated employees” from the currently-enforced level of \$100,000 to \$147,414 per year
- Employers would be allowed to use non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the new salary level
 - Bonuses/commissions must be paid annually or on a more frequent basis

NOTICE OF PROPOSED RULE MAKING

- No changes to the job duties test for executive, administrative, and professional employees
- No automatic adjustments to the salary threshold in the future
- The Department is still considering timely comments in developing a final rule
- NOTE: Changes will likely go into effect early 2020 when the final rule is established

WITH THESE CHANGES ON
THE HORIZON – NOW IS A
GOOD TIME TO CONDUCT A
WAGE CLASSIFICATION AUDIT

WHY IS AN AUDIT IMPORTANT?

- 2018 was a record year for wage and hour claims filed by the Department of Labor
 - Recovered a record \$304 million in wages
- Need to evaluate and manage risk of classifications. High risk areas:
 - Exempt v. non-exempt
 - Employee v. independent contractor
- Make sure pay differences are based on legitimate business justifications
- Collective actions get expensive quickly

OUTLINE FOR AN AUDIT

- Pre-audit work
- Select scope and positions
- Select interviewer
- Prepare questionnaire
- Select interview process and conduct interviews
- Document results and prepare report
- Implement changes

PRE-AUDIT WORK

- Check payroll policies to make sure they are updated and compliant
- Policy prohibits “working off the clock”
- Employee has a duty to report all hours worked
- Company has mechanism/form for non-exempt employees to report hours worked away from jobsite
- Train managers and supervisors to enforce policies

SELECT SCOPE AND POSITIONS

Three buckets of positions

- Bucket 1: Non-exempt employees
 - Make sure employees have knowledge of policies
 - Identify pay discrepancies and determine if additional information is needed on business justifications for pay discrepancies
 - Confirm non-discretionary bonuses rolled into regular rate for overtime
- Bucket 2: Exempt employees on the edge or positions classified differently
 - Employees making a salary less than \$40,000
 - Positions that human resources or managers have questions about
 - Also, could include questionable independent contractors in this group

SELECT SCOPE AND POSITIONS

Three buckets of positions (cont.)

- Bucket 3: Exempt employees that are in clearly categorized exempt positions
 - Confirm no improper deductions
 - Confirm safe harbor provision in payroll policies
 - Don't lose exemption on disallowed deductions

SELECT SCOPE AND POSITIONS

- From your 2nd bucket
 - Identify specific job positions to review
 - Collect job descriptions
 - Collect payroll information
 - Identify independent contractors to review

SELECT INTERVIEWER

Who conducts the interview?

- Human Resources
 - Knowledge of company
 - Cost effective
 - Limits protection of “good faith”
- Outside Counsel
 - Potentially better knowledge of exemptions
 - “Good faith” defense in litigation and privileges
 - Cost prohibitive
- Good Faith defense:
 - A defense to liquidated damages: (1) company actually believed its pay practices complied with the law; and (2) its actual belief was reasonable. Evaluate advise and recommendations of counsel in establishing defense.

PREPARE QUESTIONNAIRE (ASSUMING ACTUAL INTERVIEWS)

- Comprehensive questionnaire helps in interviews and lays out plan of questions
- Create outline of questions and issues for each exemption (All-white collar exemptions)
 - State specific as needed
- Provide space or form for interview notes
- Process may be time consuming but important to structure interviews and cover legal issues of each potential exemption
- Cover salary level and salary basis questions
 - Confirm no improper deductions

SELECT INTERVIEW PROCESS AND CONDUCT

Three types of interview process

1. Paper Review – Review job descriptions and payroll records only
 - Least effective approach
 - DOL says job descriptions do not matter – exemption based on actual job duties performed
2. Interview Managers/Supervisors
 - Better than paper review, but still not the best

SELECT INTERVIEW PROCESS AND CONDUCT

Three types of interview process (cont.)

3. Interview Employees Performing the Job Duties

- Best approach and collects actual information of job duties performed
- May generate questions and concerns from employees
- If large company, select sample size to collect a comprehensive evaluation
 - Maybe 15% to 20% sample size for positions
 - Make sure regions are covered in sample size

CONDUCT INTERVIEWS/DOCUMENT PROCESS

- Use same groups/people to conduct interviews for consistency
- Review job description before interviews
- For interviews, prepare and maintain notes for each interview
- Collect detailed information in notes
 - No summary responses
 - Obtain examples
- Prepare a summary finding following interview
 - One page report from interview completed close to completion of the interview
 - Makes a recommendation

DOCUMENT PROCESS/PREPARE THE REPORT

- Maintain all notes and summary findings
- Collect notes and maintain
- Collect summary findings and make a determination on classification of position
- From summary findings prepare report of findings
- Select categories for final report
 - Red, yellow and green
 - Based on risk tolerance Company can make decision on how to classify going forward

BASED ON FINAL REPORT MAKE A DECISION

- Green – Leave position as exempt
- Yellow – May leave as exempt, but understand the risk and will tolerate it
- If close call – Add job duties in job description and in performance of position to strengthen exemption qualification

BASED ON FINAL REPORT MAKE A DECISION

- Red – Convert position to non-exempt
- Calculate change based on current salary to minimize financial impact to company
 - Pay back wages?
- Be cautious of the same position classified differently
 - Have an explanation (regional or market approach)

FOLLOWING AN AUDIT

- Evaluate questionable positions on a regular or annual basis
- In audits, and on similar timely basis, monitor pay discrepancies in same positions and confirm legitimate business reasons for pay differences inside the same position (seniority, merit, quality/quantity of production, or reason not based on sex)

QUESTIONS?



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THANK YOU

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