September 25, 2019

FLSA Final Rules

What Are the Implications? What Are Employers to Do?

The U.S. Department of Labor announced the final rule, revising the regulations issued under the Fair Labor Standards Act (FLSA) regarding the earnings thresholds necessary to exempt executive, administrative, or professional employees from the FLSA's minimum wage and overtime pay requirements. The Department simultaneously announced its formal rescission of the 2016 final rule.

The final rule updates the salary and compensation levels needed for workers to be exempt:

- The standard salary level increased from $455 to $684 per week ($35,568 per year). The DOL is updating the standard salary level set in 2004 by applying to current data the same method used to set that level in 2004.
- The annual compensation level required for highly compensated employees increased from $100,000 to $107,432 per year.

Employers are permitted to use nondiscretionary bonuses and incentive payments and commissions that are paid at least annually to satisfy up to 10% of the standard salary level. If an employee does not earn enough in nondiscretionary incentives in a year (52-week period) to retain exempt status, the DOL permits the employer to make a catch-up payment within one pay period of the end of the 52-week period.

The effective date for the changes is January 1, 2020. The DOL ultimately decided to not automatically update the salary levels. Instead, the DOL indicated that it would more regularly update the levels in the future.

The final rule maintained the following current provisions regarding:

- Primary duty tests
- The tests for the duties required of executive, administrative, or professional employees
- Salary basis test
- Compensation standards for doctors, lawyers, teachers, or outside sales employees; and
- The computer employee exemption

Implications

The rules result in increases in workers' earnings, thus, employers will have to manage or offset the anticipated cost of paying overtime or its equivalent. Some possible outcomes and unintended consequences include:

- Adjusting benefits
- Changing 401(k) or pension

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(continued from previous page)

- Altering the formula and/or definition of compensation for life insurance or disability
- Changing eligibility
- Impact on paid time off (PTO)
- Effects on salary bands/compression/trickle up effect
- Internal and external pay equity

What Employers Should Do?

Organizations should create an action plan to determine the influence of overtime pay modifications:

- Review employees currently classified as exempt who will fail the new salary tests, as well as highly compensated employees (HCE), and employees who will also fall below the $107,432 level.
- Review all job descriptions to determine whether they are still accurate: reflect the jobs performed and the skills necessary to perform the job.
- Conduct market study of wage rates to determine overall competitiveness of pay, as the data will be useful in establishing solutions.
- Determine if overtime pay for current non-exempt employees is properly calculated.
- Create a list of employees who are currently listed as exempt and earn a base pay slightly above the current threshold and
    - Estimate or determine overtime.
    - Review incentives or other bonuses paid.
    - Determine expected pay amounts to maintain the exemption to be used as part of alternate strategy.
    - Identify employees that will be reclassified as non-exempt and develop appropriate strategies.

There continue to be calls for various workers' advocates and similar groups to pursue litigation to enjoin the final rule from going into effect. We will continue to monitor these issues.

Companies cannot simply view this in isolation and should work toward development of a total compensation approach that will permit them to offer a package that is designed to remain an employer of choice. This should be comprised of designing creative and compliant programs aimed at meeting the diverse requirements of the entire workforce.

Elliot N. Dinkin, President/CEO
elliotd@cowdenassociates.com | 412.394.9997
cowdenassociates.com