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U.S. Department of Labor Final Overtime Rule[1]

QUESTION 3:

We Don't Have Any Employees Who Earn Less Than the New Threshold Salary Amount. Is There Anything Else We Should Consider?

Yes! You should determine if you have any employees in positions classified as exempt from overtime under one of the white collar exemptions who do not meet the "duties tests" and correct the misclassification now. Inadvertent misclassification can occur when an employer pays a guaranteed salary to a worker and is unaware that specific job duties tests must be met, or when an employer agrees to pay an employee by way of a salary simply to satisfy a request from the employee.

Although it's a common misconception, job titles never determine the exempt status for a position; nor does the payment of a salary or a particular salary amount. To qualify for a white collar overtime exemption, in addition to receiving the guaranteed minimum salary amount, an employee must meet the duties tests for the exemption being claimed.

If, after a proper analysis, you determine that you have employees who meet the salary test but not the duties test, we recommend reclassifying the position to nonexempt between now and December 1. During this period of time, public attention will be on DOL-required changes for white collar salaried workers vs. employers' inadvertent misclassification of positions.

While there is no guarantee that making the change will not result in a claim for back wages, the six-month window of opportunity will likely minimize the potential for a claim given that *millions of white collar workers' pay rates and pay plans will be adjusted*.

To determine if a position meets the duties tests for one of the white collar overtime exemptions, you must have accurate information about the precise job duties and percentages of time the employee in the position performs each duty. You will also need a clear understanding of the DOL's tests for the given exemption. *Therein lies the challenge!* Over the years, the DOL has generated volumes of information about each of the White Collar exemptions in an effort to clarify enforcement practices and their interpretation of the tests. Nevertheless, much confusion still abounds, even among their ranks.

One thing is certain, though. As an enforcement practice, the DOL maintains that exemptions from minimum wage and overtime requirements under the Fair Labor Standards Act (FLSA) *"are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirt."* (Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 [1960])

To help minimize risk, we can assist in determining the proper classification for a position. Relying on our significant FLSA compliance experience, we will analyze the position duties and offer a recommendation based on current FLSA regulations, applicable state regulations, and enforcement practices of the agencies enforcing these regulations.

[1] This client advisory is excerpted from the Seawright & Associates May 31, 2016, e-bulletin, "U.S. Department of Labor Final Overtime Rule: Ten Things Every Employer *Must* Know Before Making Changes." To obtain the full content of the e-bulletin, contact Seawright & Associates

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