New DOL Salary Requirements for Exempt Employees

June 14, 2016
Agenda

• Introductions
• Background – Current Law until 11/30/16
• Final Rule – What’s new as of 12/1/16
• Next steps and options
• Legal claims
• Q&A
Background

• The law
  – Fair Labor Standards Act (federal)
  – State law
  – Conflict? Best for employee.
Background

• Covered employer:
  – Annual revenue of at least $500,000
  – Hospitals, medical or nursing care for residents, schools and preschools, and government agencies

OR

• Covered employee:
  – Work involves “interstate commerce”
Background

• Non-exempt
  – Record hours worked
  – Must pay at least minimum wage for all hours worked
  – Must pay overtime at 1.5x regular rate of pay for all hours worked over 40 in workweek
  – Can pay hourly, salary or other, but most are paid hourly
Background

• Exempt
  – Need not record hours worked
  – Not entitled to overtime pay
  – Must qualify for exempt status under at least one FLSA exemption
Background

• Primary FLSA Exemptions
  – Executive Exemption
  – Administrative Exemption
  – Professional Exemption
  – Computer Exemption
  – Highly Compensated Exemption
Background

• Executive Exemption
  – Annualized salary of at least $23,660 ($455/week); AND
  – Required job duties
Background

• Administrative Exemption
  – Annualized salary (or fee basis) of at least $23,660 ($455/week); AND
  – Required job duties
Background

• Professional Exemption
  – Annualized salary (or fee basis) of at least $23,660 ($455/week); AND
  – Required job duties
Background

• Computer Exemption
  – Annualized salary (or fee basis) of at least $23,660 ($455/week) OR hourly rate of at least $27.63; AND
  – Required job duties
Background

• Highly Compensated Exemption
  – Annualized salary (or fee basis) of at least $23,660 ($455/week);
  – Total annual compensation of at least $100,000; AND
  – Required exempt job duty
  – But only use in Minnesota if meet Minnesota job duties tests
What’s New as of 12/1/16

• Exempt Employees:
  – No change in the required job duties
  – Big change in the required salary
New Required Salary

• As of 12/1/16:
  – Annual Salary: $47,476
  – Weekly Salary: $913
  – Bi-weekly Salary: $1,826
  – Semi-monthly Salary: $1,978
  – Monthly Salary: $3,956
New Required Salary

• Special rules for
  – American Samoa
    • $767 per week as of 12/1/16
  – Motion picture producing industry
    • $1,397 per week as of 12/1/16
  – Computer employees:
    • $27.63 per hour
New Required Salary

• Special rules for
  – Administrative EEs of Educational Establishments:
    • Salary or fee equivalent of $913/week, OR
    • Salary at least equal to the entrance salary for teachers in the educational establishment by which employed
  
• Teachers (29 CFR 541.303), physicians and attorneys (29 CFR 541.304) are not covered by the salary requirements
New Required Salary

- Up to 10% can be
  - Nondiscretionary bonuses
  - Incentives
  - Commissions

- Which must be paid
  - No less than quarterly
  - No later than first pay period after end of a quarter
New Required Salary

• Must receive the minimum weekly salary amount ($913)
• Exempt EE also may receive additional pay:
  – Commission on sales
  – Percentage of sales or profits
  – Extra pay for extra hours worked
    • Hourly pay, flat sum, bonus, time and a half
New Required Salary

• The new salary amount:
  – Based on the “40th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region, exclusive of board, lodging or other facilities.”
New Required Salary

• Beginning 1/1/20 and every 3 years thereafter:
  – The Secretary of Labor will update
  – Must be published in the Federal Register by 150 days before the January 1\textsuperscript{st} effective date (August 3\textsuperscript{rd} of the prior calendar year)
New Required Salary

• “Fee” is acceptable alternative for
  – Administrative, professional, computer

• How to determine:
  – Fee paid ÷ weekly hours worked = Minimum required weekly salary if EE worked 40 hours ($913/week)
New Required Salary

• Salary basis rules still apply:
  – No deduction for quality or quantity
  – Full weekly salary regardless of hours worked
  – No salary for week if perform no work
  – No deduction for ER-caused absences
New Required Salary

• Be sure you include in the employee handbook/personnel manual:
  – Safe harbor language regarding inadvertent deductions to the salary of exempt EEs
New Required Salary

• Applies to both FT and PT
  – Example:
    • Professional exempt physical therapist works two days per week for 16 hours
    • Currently paid weekly salary of $800
    • Under the new salary rules, must be paid $913/week or converted to “salaried, non-exempt” and track hours and receive OT after 40 hours
      – (Remember that benefit plans may use different methods for tracking work hours than FLSA)
Highly Compensated EEs (Under FLSA; not 401K)

• Other than Minnesota:
  – $134,004 total annual compensation (with weekly salary of $913), AND
  – At least one exempt duty

• Consider carefully whether may be used in Minnesota
  – Same required compensation,
  – But, EE must meet Minnesota-required duties test
New Required Salary

• DOL will not enforce new required salary until March 17, 2019 for
  – Providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds
New Required Salary

• But DOL will enforce
  – Job duties tests
  – $455 per week, and
  – All other FLSA provisions for these ERs
Non-Profits and the New Required Salary

• Enterprise coverage under FLSA
  – Not covered if only provide charitable services (i.e., no sales made/business done)
  • Temporary shelter, clothing and food to homeless, counseling services to sexual assault and domestic violence victims, disaster relief, etc.
Non-Profits and the New Required Salary

• Enterprise coverage under FLSA:
  – All hospitals, institutions that care for older adults and people with disabilities who reside on premises, schools for children with disabilities, etc.
  – Others covered if have sales made or business done annually of $500,000+
    • Gift shop, sale of donated clothing, operate restaurant, etc.
Non-Profits and the New Required Salary

• Individual coverage under FLSA:
  – Even if the organization is not covered, each individual who engages in interstate commerce or in the production of goods for interstate commerce is covered
    • Making out-of-state phone calls
    • Receiving/sending interstate mail/email
    • Ordering/receiving goods from out-of-state
    • Handling credit card transactions or doing the accounting/bookkeeping for such activities
    • Etc.
Next Steps and Options

• Where do the new regulations leave us?
• Reality check:
  – Internal/external complaints
  – Federal DOL audit risk
  – State DOL audit risk
Next Steps and Options

• What are the recommended next steps?
• Assess and audit current practices
• Consider options and determine action items
• Communicate to affected employees
Next Steps and Options

• Audit of:
  – Exempt/nonexempt classifications
  – Current compensation
  – Assess economic impact
  – Timekeeping processes
  – Bonuses and commission payments
  – Review of policies
Action Items and Options

• Update/correct practices based on audit results
  – Timekeeping, breaks, off-site work, misclassification based on duties, etc.
  – Dec. 1 Opportunity to correct with potentially fewer red flags
Action Items and Options

• Reclassification as nonexempt
  – Reclassification may be required
  – Can continue to pay salary, change to hourly (or other method), but must pay overtime
    • Can adjust rate of pay
    • Can manage hours worked
  – Must track hours worked
Action Items and Options

• Continue exempt status
  – Increase salary
  – Consider nondiscretionary bonuses and commissions
  – Process for future salary adjustments
  – State law considerations
Factors To Consider

- Financial impact
- Travel time
- Comp time
- Off-hours work
- Administrative burden
- Perception by employees
Communication

• Review and revise policies
  – Communicate and enforce policies prohibiting off-the-clock work, unauthorized overtime by nonexempt employees

• Reclassified employees

• Other employees
Litigation Risks

• Costs of getting it wrong:
  – Back wages – up to 3 years
  – Liquidated (double) damages
  – Attorneys’ fees and costs
    • Court costs
    • Litigation costs – Discovery, court reporters, deposition transcripts, experts
    • Mediation costs
Litigation Risks

- Types of actions:
  - Single-plaintiff action
  - Collective action
    - Opt in
    - All “similarly-situated” individuals
    - Conditional certification and judicial notice
  - Class action
    - Automatically included, unless “opt-out”
Litigation Risks

• **Strict-liability standard**
  – Not a defense:
    • Ignorance
    • Confusion/misunderstanding
    • Good intentions
    • Agreements/employee requests
Litigation Risks

• **Strict-liability standard**
  – Defense to damages only:
    • Good faith/not willful
      – What did you do to try to get it right?
        » Advice of counsel?
        » Audits?
    • Effect:
      – 2-year statute of limitation instead of 3
      – No liquidated damages
Questions?