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Employer Wage and Hour Headaches Continue in 2015

The trend of wage and hour developments facing employers continues in 2015 with the U.S. Department of Labor (DOL) recently issuing a proposed rule that would update the regulations governing the white collar exemptions to the Fair Labor Standards Act (FLSA) and publishing new guidance on the classification of workers as independent contractors. In addition to the federal developments, employers also are facing minimum wage increases in cities and states across the country. These developments have created significant uncertainty for employers. To ensure compliance and minimize the risk of a potential violation, employers should proactively audit their wage and hour practices.

DOL Proposed Rule Updating the White Collar Exemptions

On July 6, 2015, the DOL issued a notice of proposed rulemaking that seeks to update the regulations governing the administrative, executive, and professional exemptions to the FLSA's minimum wage and overtime requirements. Under the current regulations, the salary threshold for exempt employees is \$455 per week (\$23,660 per year). The proposed rule seeks to set the minimum salary level for the exemptions at the 40th percentile of full-time salaried workers' weekly earnings. Under the proposed rule, the minimum salary threshold for full-time exempt employees would more than double from its current level to \$921 per week (\$47,892 per

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year). The DOL anticipates that these amounts will increase to \$970 per week (\$50,400 per year) in 2016. The proposed rule also would increase the total annual compensation requirement for the highly compensated employee exemption, from its current level of \$100,000 per year, to the 90th percentile of the weekly earnings of full-time salaried workers: \$122,148 per year. The proposed rule establishes a mechanism for automatically updating salary and compensation levels for the exemptions moving forward.

The DOL is accepting comments on the proposed rule through September 4, 2015.

If the proposed rule is adopted, nearly five million additional workers would be entitled to overtime given current salary levels. Employers will either need to increase employee compensation to meet the salary threshold or provide overtime to employees whose salaries no longer meet the threshold. Either scenario could impose significant financial hardship on employers. Employers should evaluate their exempt workforce now to determine the potential impact of the proposed rule.

DOL Independent Contractor Guidance

On July 15, 2015, less than two weeks after it issued the above-proposed rule, the DOL published an administrative interpretation clarifying the agency's position on whether a worker is an employee or independent contractor. The guidance does not change current law or regulations but does illustrate the DOL's aggressive position on worker misclassification. The guidance confirms the DOL's use of the "economic realities" test in assessing whether a worker is economically dependent on the employer, and thus an employee, or is in business for him or herself, and thus an independent contractor. The economic realities test factors include:



- The extent to which the work performance is an integral part of the employer's business;
- The worker's opportunity for profit or loss depending on his or her managerial skill;
- The extent of the relative investments of the employer and the worker;
- Whether the work performed requires special skills and initiative;
- The permanency of the relationship; and
- The degree of control exercised or retained by the employer.

The DOL notes that each of the factors should be weighed and that no single factor is controlling. However, the DOL emphasizes that the application of the economic realities factors is guided by the overarching principle that the FLSA should be construed liberally to provide broad coverage for workers. The guidance makes clear that the DOL believes that "most workers are employees under the FLSA."

In light of this guidance, employers should reevaluate their independent contractor relationships to ensure that workers are properly classified. Failure to properly classify workers could expose employers to unwanted litigation.

State and Local Minimum Wage Increases

In addition to the above federal developments, an increasing number of state and local governments recently have decided to increase their local minimum wage. In 2014, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Michigan, Minnesota, Rhode Island, Vermont and West Virginia passed laws to increase their respective minimum wage. Additionally, a number of local municipalities have passed ordinances increasing the minimum wage, including Chicago, Los Angeles, Oakland, San Francisco, Seattle and Washington, D.C.



Many of these minimum wage increases go into effect in 2015, with additional increases planned for subsequent years. Employers with employees in these jurisdictions should take note of the timing and amount of the forthcoming minimum wage increases.

Recommendations

In light of continued developments to the wage and hour landscape, employers need to be proactive to avoid potential violations. Employers should audit their wage and hour practices to identify potential problem areas, including whether (1) workers are properly classified as independent contractors, (2) employees are paid the proper minimum wage, and (3) employees will be entitled to overtime once the DOL's proposed rule goes into effect. Taking proactive measures now could save employers from claims and exposure down the line.