ALERTS

DOL Proposes Changes to Federal Overtime Laws

April 24, 2019

The Fair Labor Standards Act ("FLSA" or the "Act") is the federal wage and hour law that generally requires covered employers to pay overtime (at time-and-one-half of employees' regular hourly wage rates) to employees who work more than 40 hours in a workweek. The FLSA, however, contains certain exemptions. If an employee is "exempt," the employer is not required to pay the employee overtime pay.

The U.S. Department of Labor ("DOL") has recently proposed several important updates to the regulations governing overtime under the FLSA. The proposed regulations are now in a public comment period.

Update of Salary Level for Exemptions

On March 7, 2019, the DOL announced a proposed rule to increase the salary threshold used to determine whether an employee qualifies as exempt from the FLSA's overtime laws under the "salary level test." Under current law, employees with an annual salary level below $23,660 must be paid overtime if they work more than 40 hours per week, regardless of their job duties. Employees with annual salaries of more than $23,660 may be exempt from overtime if they also meet the "job duties test." The proposed rule boosts the threshold annual salary level to $35,308. Note, however, that various states also have wage and hour laws, which may require higher salary thresholds to qualify for exemption. For example, New York's current salary threshold to qualify for the executive or administrative exemption is between $43,264 and $58,500 (depending on the location and size of the employer). Accordingly, an employee may

be considered exempt under federal law but be required to receive overtime pay pursuant to state law.

The DOL also proposed an increase in the salary threshold to qualify for the "highly compensated employee" exemption from $100,000 to $147,414. To qualify for the exemption, an employee must be guaranteed $147,414 in total annual compensation, including non-discretionary bonuses, and perform just one — rather than all — of the standard duties that are required for the other "white collar exemptions" to apply.

Regular Rate Clarification

On March 28, 2019, the DOL announced a proposed rule to clarify and update the "regular rate" requirements of the FLSA. The FLSA requires overtime pay of at least one and one-half times the regular rate of pay for hours worked in excess of 40 hours per workweek. The regular rate is not necessarily the hourly rate of pay — it means an employee's total remuneration for employment (minus statutory exclusions) in any workweek divided by the total number of hours actually worked by that employee in that workweek for which compensation was paid. The DOL issued the proposed rule asserting that current rules discourage employers from offering more perks to employees because employers have been unsure whether to include the value of those perks when calculating an employee's regular rate of pay. The proposed rule seeks to clarify the regulations to confirm that employers may exclude the following from an employee's regular rate of pay:

1. The cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes and employee discounts on retail goods and services;

2. Payments for unused paid leave, including paid sick leave;

3. Reimbursed expenses, even if not incurred "solely" for the employer's benefit;

4. Reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the federal regulations;

5. Discretionary bonuses;

6. Benefit plans, including accident, unemployment and legal services; and

7. Tuition programs, such as reimbursement programs or repayment of educational debt.

In addition, the proposed rule includes clarifications about other forms of compensation, including payment for meal periods and "call-back" pay.

Joint Employer Status

The FLSA has been interpreted to hold joint employers jointly and severally liable for an employee's wages due under the Act. Under the DOL's existing regulations, multiple employers can be joint employers of an employee if they are "not completely disassociated." On April 1, 2019, the DOL proposed a four-factor test to replace the "not completely disassociated" standard. The four-factor test considers whether the other employer's actions in relation to the employee merit joint and several liability under the FLSA. The four-factor test would consider whether the potential joint employer actually exercises the power to:

1. Hire or fire the employee;

2. Supervise and control the employee's work schedules or conditions of employment;

3. Determine the employee's rate and method of payment; and

4. Maintain the employee's employment records.

If the potential joint employer exercises power with respect to the factors above, the potential employer would be considered a joint employer. The proposed regulation provides that only actions taken with respect to the employee's terms and conditions of employment, rather than the theoretical ability to do so under a contract, are relevant to joint employer status under the Act. In conducting the analysis, no one factor is dispositive, but the focus on the four factors above should provide more certainty for employers. The DOL also explained in the proposed regulation that additional factors may be relevant to the joint employer analysis but only if they are indicative of whether the potential joint employer is exercising significant control over the terms and conditions of the employee's work, or otherwise acting directly or indirectly in the interest of the employer in relation to the employee.

Although the proposed regulations may change when issued in final form, employers should be proactive and review their classifications of

employees as exempt or non-exempt. Employers also should review vendor contracts to determine if they may be held jointly liable for potential overtime and other wage claims. Class action lawsuits for overtime violations have become increasingly common and are likely to continue. These lawsuits can be extremely costly as they can result in back pay of up to six years (under New York law), double damages and attorneys' fees.

Authored by Mark E. Brossman, Ronald E. Richman, Holly H. Weiss and Scott A. Gold.

If you have any questions concerning the proposed regulations or your current overtime pay practices, please contact one of the authors.

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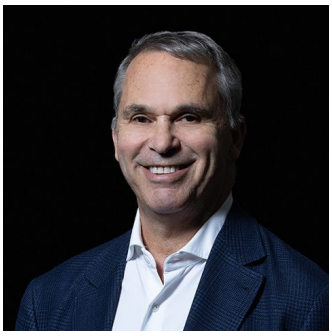

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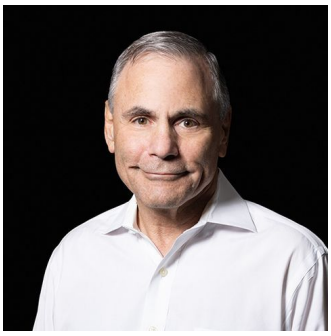

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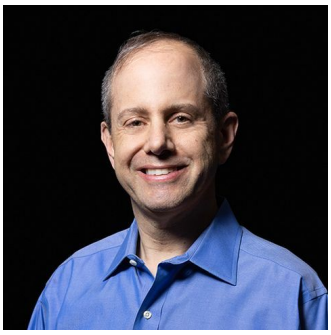

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