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THE JOB DESCRIPTION

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In This Issue:

DOL Proposes Revisions Doubling the Minimum Salary Requirement for Exempt Employees

More than a year after President Obama directed the Secretary of Labor to propose revisions to modernize and streamline the existing federal overtime regulations, the Department of Labor (DOL) on June 30, 2015 finally issued a notice detailing its proposed revisions. Those proposals include:

(1) Increasing the minimum salary requirement from $455 per week ($23,660 per year) to an expected $970 per week ($50,440 per year) in 2016; and

(2) Increasing the minimum annual compensation requirement to qualify as a "highly-compensated" exempt worker from $100,000 to $122,148 annually.

Currently, if an employee earns an annual salary less that $23,660, he or she is entitled to overtime pay (unless he or she qualifies for the outside salesperson exemption, which has no minimum salary requirement). Under this new proposed law, that relatively low $23,660 would rise to $50,440.

Continued on page 2

The Cavanaugh Law Firm, LLC is committed to your company's success. We are available to provide you knowledgeable advice on the full range of labor and employment law issues and to defend your company and its managers in lawsuits and agency proceedings. If you have any questions about the contents of this newsletter or about any issue affecting your company, please contact us.

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These are *proposed* revisions; they are not yet law. After a period of public comment and perhaps some revisions, the regulations will become law, probably in mid-2016. The final regulations will probably not differ significantly from the proposed regulations, and therefore employers now have a preview of the regulatory landscape they will face in 2016.

Therefore, employers should start evaluating their exempt employees and their employee classification policies to ensure compliance with, at the least, the expected increase in the minimum salary requirements. Given the large minimum salary increase, many employers will need to transition some employees, for whom meeting the new salary basis test is not feasible, from salary to hourly. In particular, employers should identify lower to mid-level managers who spend more than half of their time on non-exempt work.

Based on this analysis, employers should consider whether to reclassify the positions that do not meet the proposed salary threshold or to increase pay levels. Employers should also consider other options such as hiring more staff to spread out hours and limiting employees to working 40 hours or less.

The DOL estimates 4.7 million workers will benefit from the change, who will earn more than $1.2 billion a year in additional pay. While some employees may indeed earn more under the new rules, others will see their base pay reduced, or hours reduced, to make room in employers' budgets for overtime payments. The DOL, which proposes to more than double the threshold salary to $50,440, should know employers will find ways to keep their payrolls in line. In its rulemaking notice, the DOL acknowledges that some workers will lose some hours because employers will not be willing to pay them overtime.

EEOC Says Sexual Orientation Workplace Bias is Illegal

Discrimination on the basis of sexual orientation is not illegal in Missouri, except where local laws prohibit it, such as the City of St. Louis. Sexual orientation is not protected under federal or Missouri law – although it is under Illinois law if an employer has 15 or more employees. In a historic ruling this month, however, the federal Equal Employment Opportunity Commission (EEOC) found that employment discrimination on the basis of sexual orientation is illegal under Title VII, a federal law that prohibits employers with at least 15 employees from discriminating on the bases of gender, race, color, religion, and national origin.

The EEOC case of *Complainant v. Foxx* involved a supervisory air traffic control specialist at Miami International Airport who claimed he lost out on a permanent front-line manager position because of his sexual orientation. He also alleged that his supervisor, who was involved in the selection process, had made several negative comments about the employee's sexual orientation.

In a 3-2 vote, the EEOC commissioners concluded that the employer relied on sex-based considerations in denying the complainant a permanent position. The agency added that sexual orientation is inherently a "sex-based consideration" and that a discrimination claim based on sexual orientation is necessarily a sex discrimination allegation under Title VII.

Continued on page 3

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The EEOC also said that Title VII prohibits employers from treating an employee or job applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage, or because the employee has a personal association with someone of a particular sex.

In reaching its ruling, the EEOC relied on the Supreme Court's 1989 *Price Waterhouse v. Hopkins* decision, which held that discrimination against an employee for failing to conform to gender-based stereotypes violates Title VII.

The EEOC's pronouncement comes on the heels of the Supreme Court's decision that declared same-sex marriage a constitutional right. However, the Supreme Court's ruling did not address sexual orientation discrimination that may arise in hiring, firing or promotion decisions.

The EEOC's ruling governs complaints filed with any EEOC office. However, the EEOC's ruling does not bind the federal courts. Although about half the states explicitly ban workplace discrimination based on sexual orientation, Title VII does not specifically mention "sexual orientation" as a protected category.

NLRB Offers Guidance on Employee Handbook Policies

Employers have struggled for the past few years to reconcile their employee handbooks with decisions of the National Labor Relations Board (NLRB). The NLRB has invalidated many common handbook policies because they could be interpreted to prohibit employee's activities protected under Section 7 of the National Labor Relations Act (NLRA). In an further effort to clarify the NLRB's positions, the NLRB General Counsel recently issued a memorandum comparing lawful and unlawful employer policies and offering insight into the NLRB's rationale. Policies found to be vague or overbroad fall on the unlawful side of the line, such as the following:

- Do not make "insulting, embarrassing, hurtful or abusive comments about other company employees online," and "avoid the use of offensive, derogatory, or prejudicial comments."

According to the memorandum, this policy unlawfully limits employee discussions of unionization and other protected concerted activity because the contentious nature of such topics could lead to such comments.

Other policies, however, may be lawful depending on context. For example, the memorandum considers the following policy lawful:

- No "use of racial slurs, derogatory comments, or insults."

Continued on page 4

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Whether this latest memorandum helps employers is debatable, but employers should read it and compare its existing policies to those discussed in the memorandum. Employee handbooks are tailored to each organization and its specific goals and priorities. The examples of lawful policies may help employers shape their own policies, but each employer must decide whether its policies need to be revised and, if so, whether the examples contained in the memorandum are appropriate for it.

Unlawful Employer Policies

The memorandum lists a series of unlawful employer policies and the rationale in support of the conclusion that the policies are unlawful. The list includes policies that:

- Prohibit publishing or disclosing the employer's or another's confidential or other proprietary information;
- Require employees to be respectful to the company, other employees, customers, and partners;
- Require employees to show proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory speech, such as politics and religion; or prohibit sending unwanted, offensive, or inappropriate emails;
- Specify that all inquiries from the media must be referred to the Director of Operations in the corporate office, no exceptions;
- Prohibit the use of company logos without written consent;
- Banned use or possession of personal electronic equipment on employer property; or prohibiting employees from using recording devices, including but not limited to, audio, video, or digital for the purpose of recording any employee or operation;
- Prohibit walking off the job; and
- Prohibit employees from engaging in any action that is not in the best interest of the employer.

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