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THE JOB DESCRIPTION

How to Handle the DOL's Higher Salary Test for Overtime Exemptions

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The federal Fair Labor Standard Act ("FLSA") requires an employee make a certain minimum salary *and* perform certain duties before he or she can fall into an overtime exemption. Otherwise, he or she will remain non-exempt and entitled to overtime pay. For over ten years, the minimum salary has been only $455 per week, or $23,660 per year.

In our last newsletter, we reported the U.S. Department of Labor will more than double that minimum salary requirement. Solicitator of Labor M. Patricia Smith stated earlier this month she expects the minimum salary to rise to $971 per week, or $50,492 per year. She anticipates the final regulations will be issued sometime in 2016, after the DOL reviews the thousands of public comments it received on the proposed new regulations. Once the new regulations are finalized, Ms. Smith stated she anticipates legal challenges to the new regulations. Employers should not wait to see what the DOL's exact final minimum salary is or for legal challenges to be resolved. They should start preparing for this big change now. Here are some options for employers to handle currently-exempt employees who make

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less than the $50,492 or so future minimum salary:

1. Raise the employees' salaries to the $50,492 requirement. This will involve an immediate and sustained increase in labor costs. Depending on how many employees are affected and how much salaries need to increase, this option could be realistic or prohibitively expensive.

2. See if the employees fall into the outside salesperson exemption, which does not have the minimum salary requirement. That exemption is specific, and it is very difficult even for salespeople to meet that exemption because it requires the salesperson work primarily outside the office or his or her home base.

3. Switch the employees to hourly. This is probably the easiest option, mechanically, but employers must determine what that hourly rate should be based on how much the employees will be working, in order to control labor costs. This switch often hurts employee morale and makes employees feel less valuable.

4. Pay employees based on a "fluctuating workweek." Non-exempt employees do not need to be paid an hourly wage. They can be paid a salary, as long as that weekly salary divided by the weekly hours is at least minimum wage. The employer will need to calculate each employee's hourly rate equivalent each week, and pay each employee the premium overtime rate for all time worked over 40 hours that week. This option will be better for employee morale but will required more administrative time to calculate overtime pay for each employee.

5. Hire more employees to do the job. If an employee works 60 hours a week and will be switched to non-exempt, splitting that work between two employees, each working 30 hours a week, avoids having to pay overtime.

6. See if an employee would qualify for another exemption from overtime requirements, such as a "Belo contract" or the motor carrier exemption (which applies to employees of motor carriers who work as drivers, driver's helpers, loaders, or mechanics, whose duties affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce, or certain employees of auto dealerships).

There is no easy solution, and no one solution that will be best for every employer. An employer should weigh the options and choose the best solution that protects employee morale and keeps labor costs predictable and manageable.

No Right to Work for Missouri

The Republican push to bring Right to Work to Missouri has failed in the Missouri House. Calling the measure harmful to the middle class, Governor Nixon vetoed the measure on June 4, 2015, and the Missouri House recently failed to override that veto. The bill would have made it a misdemeanor for anyone to be required to become a union member or to pay dues to a labor organization as a condition of employment. The bill would have made Missouri the 26th right to work state.

OSHA Penalties on the Rise

President Obama signed the Bipartisan Budget Act of 2015 into law on November 2, 2015. That Act requires OSHA to increase its civil penalties for the first time since 1990. A one-time "Catch Up Adjustment" will occur in 2016 with penalties increasing up to 150%.

Supporters believe OSHA penalties must be increased to provide real disincentives for employers' accepting injuries and worker deaths as a cost of doing business. Astute employers, on the other hand, see this increase as punitive and a way to increase federal revenue. A first OSHA violation currently carries a penalty of up to $7,000, and a willful or repeated violation carries a penalty up to $70,000. The increased penalties should further encourage employees to dedicate funds, time, and attention to providing safe workplaces and preventing workplace accidents.

EEOC Cracking Down on Transgender Discrimination

Employers should examine their handbooks and policies to make sure their businesses are ready to handle potential transgender and sexual orientation issues because the U.S. Equal Employment Opportunity Commission is pushing its interpretation that "sex discrimination" under Title VII includes discrimination on the basis of sexual orientation and gender identity. The EEOC is even filing lawsuits alleging such discrimination violates Title VII.

Sexual orientation and gender identity are not listed as protected categories under Title VII of the Civil Rights Act of 1964. However, the EEOC interprets Title VII's sex discrimination provision as prohibiting discrimination against employees on the basis of sexual orientation and gender identity.

Employers should not ignore the EEOC's interpretation and enforcement efforts consistent with that interpretation. This is especially true in for employers who operate in locations where sexual orientation and gender identity are not already protected under state or local law. Illinois and the City of St. Louis, for instance, prohibit such discrimination for employers with at least 15 or 6 employees, respectively.

Therefore, the EEOC will accept and investigate charges from individuals who believe they have been discriminated against because of sexual orientation, transgender status, gender identity, or a gender transition. The EEOC began tracking charges alleging sexual orientation or gender identity discrimination in January 2013, and according to its most recent figures, is receiving over 100 such charges per month. The EEOC itself even filed two federal lawsuits on September 25, 2014 alleging transgender discrimination.

A Missouri court of appeals, on the other hand, made an explicit difference recently between "sex" and "sexual preference" and affirmed dismissal of a lawsuit in which the plaintiff alleged only that he was harassed and fired because of his "sexual preference." That court explicitly confirmed sexual preference and sexual orientation are not protected under the Missouri Human Rights Act.

What May You Ask an Employee who Calls in Sick?

The federal Americans with Disabilities Act ("ADA") applies to employers with 15 or more employees, but many states and cities apply disability protections to smaller employers. Missouri, for instance, includes disabilities protections to employees of employers with at least six employees. Illinois does not lower the 15-employee threshold.

When an employee calls in sick, it is reasonable for a manager to ask an employee "what's wrong?" Otherwise, it would be a "no questions asked" sick leave policy, and that would quickly be abused. So asking what is wrong requires the employee to give a brief and general explanation about why he or she is absent, e.g. the employee's child is sick, the employee has a general illness, or the employee has a major or minor injury. A condition that has a short duration does not implicate the ADA. Even long-term conditions are not necessarily "disabilities" under the ADA – it depends how they limit a person individually.

The ADA allows an employer to "require a medical inquiry of an employee that is job-related and consistent with business necessity." Therefore, managers can and should ask the employee who calls in sick to give a brief and general explanation, e.g. my child is vomiting, I sprained my ankle, I have a fever. If the employee gives those kinds of explanations, then the ADA is not implicated, and the manager can ask any other questions (if necessary) to determine whether the employer-provided sick leave is granted and when the employee expects to return to work. If however, the employee answers that he needs to go for dialysis treatment or needs to check into a mental health facility or has another serious and long-term condition, then the ADA may very well be implicated. In that case, the manager should avoid asking detailed follow up questions. The ADA allows an employer to "make inquiries into the ability of an employee to perform job-related functions." Therefore, the manager can and should still ask the employee with a probable ADA situation when he or she expects to return to work.

If the employee discloses that time off is because of a pregnancy or something that could be a "serious health condition" under the FMLA, the employer can and should send the employee FMLA paperwork. The manager should feel obligated to notify HR to start the FMLA process as soon as he or she learns the employee takes time off because of the pregnancy.

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