PBN.com PROVIDENCE BUSINESS NEWS
June 3-9, 2016

GUEST COLUMN | WILLIAM E. O'GARA

'White-collar' pay boost

On May 18, 2016, the United States Department of Labor issued long-awaited regulations regarding the "white collar" overtime exemptions. The Fair Labor Standards Act ("FLSA") introduced the 40-hour work week in 1938 and requires overtime pay for most private sector employees. The FLSA carves out exemptions for executive, administrators and professionals, outside sales and computer employees – the "white collar" exemptions. The new regulations substantially increase the minimum salary a white-collar exempt employee must be paid from $23,660 to $47,476. The new regulations leave the existing law largely unchanged except for a new higher salary requirement. Barring a successful legal challenge by the employer groups, the new requirements will take effect December 1, 2016.

For employers, compliance with the above salary test is fairly simple. What many employers do not understand is that meeting the salary requirement is only part of what must be considered when treating employees as exempt from overtime pay. The more complicated issue is the analysis of the employee's job duties to determine if the employee actually meets the applicable "duties test." The "duties test" entails a careful consideration of the principal responsibilities and duties of the particular employee. What for many years had been a fairly simple task – deciding to treat an employee as salaried – has become something employers now need to carefully consider because of the risk of litigation and the financial exposure. A mistake in classifying an employee can surface years later when an employee is found to be non-exempt and is owed back overtime pay and legal fees.

In the past decade, there has been a sharp rise in overtime pay litigation, which is an outgrowth of greater awareness by employees, higher scrutiny by the Obama administration and the fact that employers are frequently at a disadvantage when dealing with these claims. First, it is the employer's

obligation under FLSA to justify exempt status. Basically, the law assumes that employees are entitled to overtime after 40 hours of work. The obligation is on the employer to properly classify employees and it must be able to justify its actions. If the employer decides to classify an employee as exempt, it has the burden to prove to the Department of Labor or a court that the employee meets all of the requirements of the exemption.

The failure to meet any of the requirements of exempt status means that the employee is owed overtime pay if he or she worked more than 40 hours in any week. Further complicating the process is the fact that the regulations that detail each exemption date back decades. The regulations are also not a model of clarity. For example, an administrative employee can be treated as exempt if his or her job involves "matters of significance" and the exercise of "discretion and independent judgment." What constitutes "matters of significance" or "discretion and independent judgment" can be a gray area. In short, those questions keep many a lawyer at the Department of Labor employed.

The fact that the tests were vague combined with the burden resting on the employer has fueled overtime litigation. The reality is that the claims are tailor-made for a plaintiff's lawyer looking to earn a fee. The employee bringing the claim has favorable law to work with, namely a vague standard that can easily put the employer on the hook. As importantly, an employee's lawyer is entitled to recover his or her fees from the employer, if successful on an overtime pay claim. (On the other hand, a successful employer cannot collect its fees from the employee). That fee award is also not connected to the actual recovery the employee received. It is common that successful plaintiff's lawyers in these cases recover significantly more in fees than the employee gets in back overtime pay. The combination of these factors will continue to drive litigation.

Perhaps employers should be thankful that the Obama administration only raised the salary test and did not completely re-write all of the regulations. Such a wholesale re-write would, in the current environment, probably be worse than the existing regulations. For employers, the new regulations are a wake-up call to carefully review how each employee is classified. ■

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