New Year and New Update on the Department of Labor’s Proposed Increase to Salary Threshold under the Fair Labor Standards Act

Last year was a busy year for the U.S. Department of Labor, courts and lobbyists in light of the Department of Labor’s proposed changes to the overtime requirements of the Fair Labor Standards Act (FLSA). It looks like 2016 will be another year full of excitement if you find the proposed changes to the FLSA exciting – which many employers do not!

Most employers are aware by now that the Department of Labor has proposed doubling the salary threshold for the executive, administrative and professional exemptions from $455 per week (or $23,660 annually) to $970 per week (or $50,400 annually). These are the so-called “white collar exemptions,” and the proposed increase to the salary threshold will affect millions of exempt salaried employees, who will no longer be eligible for exempt status once the final rule is implemented in 2016.

In terms of timing, it was originally anticipated that the final rule would not be adopted until mid- to late-2016. The Department of Labor’s recent regulatory agenda supported this timing, as the agenda announced that the new FLSA overtime regulations would be finalized in July 2016. Recently, however, Thomas Perez, the current United States Secretary of Labor, indicated in a December interview that the change may be coming sooner rather than later. Perez announced that the Department of Labor is looking for a spring 2016 publication date for the final rule, and he is “confident” that the rule will be published by this date. Many speculate that an earlier publication date would leave the rule less vulnerable to a Republican legislative challenge, as any Congressional Review Act challenge would be resolved under President Obama if the rule is adopted sooner. Regardless of motivation, it is important for employers to be aware that changes to overtime regulations under the FLSA may be coming sooner rather than later.

There are many things employers can do now to prepare for the proposed changes to the FLSA. It is recommended that employers conduct an internal audit to identify those employees in the “zone of danger,” meaning those employees who will be affected by the proposed changes to the FLSA. These employees would include current exempt employees: (1) who are earning more than $23,600 but less than $50,440 per year, and (2) those classified as exempt under the “highly compensated employee” (HCE) exemption, since that salary threshold will also increase from $100,000 or more to $122,148 or more per year under the new rule. Once the employees in the “zone of danger” have been identified, employers can then determine if it is possible to increase the salaries of those employees to maintain exempt status, or whether it is necessary to devise a strategy to prepare for previously exempt employees becoming non-exempt. If the audit reveals that many of the employees in the “zone of danger” are frequently working more than 40 hours per week, it will be important to determine if their workload can be transferred or reassigned to keep hours at 40 per week. Another issue to consider will be the use of portable electronic devices outside of work hours by those employees who become non-exempt, as we discussed in the December article. How will this be managed to ensure that non-exempt employees are not spending compensable time on portable electronic devices outside of regular office hours when responding to emails? Also, employers should consider when to implement changes to employee classification, how time for now non-exempt employees will be tracked and how the message to employees will be delivered. There are many things employers can do now so they are not
caught by surprise when and if the proposed changes to the white collar exemptions under the FLSA are implemented.

The Governmental Affairs team at RWHRMA will be monitoring the proposed changes in the coming months and will keep RWHRMA members apprised of developments. In the meantime, if you have any questions on the proposed changes to the FLSA, please feel free to contact Holly Hammer, Governmental Affairs Director for RWHRMA, at hhammer@hutchlaw.com or at 919-829-4289.