Legal Issues Related to Overtime and Leave Practices
Speakers

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FLSA General Background

- Passed in 1938 to both guarantee a minimum wage and to limit the number of hours an employee could work without additional compensation.
- Since its passage, the FLSA has included exemptions for “white collar” employees who are set apart from other workers due to salaries well above minimum wage and other employment privileges.
- Over the years, disputes regarding the proper calculation of overtime payments, and exempt/non-exempt employee classification have dominated this area of the law.
Primary Tests for Most Exemptions

Exemptions Require Three Elements:

1. The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the “salary basis test”);

2. The amount of salary paid must meet a minimum specified amount (the “salary level test”); and

3. The employee’s job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the “duties test”).
Salary Level Test For Most FLSA Exemptions

- The Salary Level test has been adjusted seven times since 1938.
- Most recently, it was adjusted in 2004.
- The DOL believes that the salary level test is the “single best test” of exempt status.
- DOL believes that its effectiveness diminishes as the real value of the salary threshold falls.
Salary Level Test For Most FLSA Exemptions

Current Test
- Eligible for most exemptions if employee is paid $455 per week ($23,660 annually).

New Test
- In 2016 Employees would be paid $970 per week ($50,440 annually)
- Number will change each year to remain in the 40th percentile of weekly earnings for full-time salaried employees.
- Highly Compensated Employee Salary Level also increases to $122,148 and would also be adjusted annually.
Proposed FLSA Changes – What is the potential impact?

- Could drastically increase the number of employees that are non-exempt.
- Will have a negative impact on your budget.
- Could increase the liability to your institution for misclassification of exempt/non-exempt status.
- Could increase liability for overtime payment calculation/payment errors.
- Will create additional pressure and responsibility for individual managers as they are forced to more closely monitor and manage employee hours.
- Could reduce productivity and efficiency of your work force.
Proposed FLSA Changes – What Should You Do Now To Prepare?

- Create a list of all exempt employees with annual salary information.
- Identify exempt employees not being paid at least $50,440 annually.
- Identify non-exempt employees who are currently making more than $50,440 when overtime is considered.
Proposed FLSA Changes – What Should You Do Now To Prepare?

- For these employees, obtain an understanding of how many hours they are generally working in an average week.
- Consider the necessity and/or the likelihood these hours would continue if employee was accountable for these hours.
- Consider whether the employee’s job could be reduced to less than a 12-month position?
- Review/create policies regarding hours worked, overtime calculation, work at home, email, record-keeping, etc.
Proposed FLSA Changes – What Should You Do Now To Prepare?

- Review and correct record-keeping functions as needed.
- Review travel policies relating to calculation of hours worked.
- Review primary duties of exempt employees to confirm exemption eligibility.
- Adjust duties where possible to comply with exemption requirements.
- Adjust job descriptions to accurately describe exempt positions.
- Train managers regarding overtime calculation and overtime management.
What should you be doing (or not be doing)?

- Now is the best time to correct classification errors
- Audit your employee classifications
  - Employee vs. Non-Employee
    - Employee/Independent Contractor
    - Are your volunteers really volunteers?
  - Exempt vs. Non-Exempt
    - Identify exempt/non-exempt positions that raise red flags and warrant closer scrutiny
Don’t assume that job descriptions are adequate or can be relied upon alone to establish exempt status
- Review them regularly
- Adjust to reflect actual job duties

Train administrators about FLSA compliance

Keep appropriate records

Consider state law
- Many align with FLSA but others are more strict

Approach re-classification cautiously
- Raises red flags
- Exempt to non-exempt may be viewed as a demotion and met with resistance
Increase Salary v. Convert to Non-Exempt?

- Determine the difference between old salary and new requirement.
- Calculate the Overtime Break Even Point. OBP = the number of overtime hours an employee would have to work before the difference between the old salary and the new requirement is eliminated.
- Estimate the anticipated yearly overtime hours of employee based on current work expectations.
- If the anticipated yearly overtime hours is greater than the OBP, then Institution should consider raising salary to maintain exemption.
Family Medical Leave Act – Keys to Successful Management

- Enforce Notice Requirements.
- Be Vigilant With Medical Certification Requirements.
- Closely Manage Intermittent Leave to Prevent Abuse.
- Carefully Analyze Performance Standards in Light of Leave.
Notice and Certification

- Employers are entitled to medical facts supporting leave requests.
- Can ask for explanation from doctor.
- Employer should require complete information.
Managing Intermittent Leave

- Develop clear and well communicated leave policies.
- Require medical documentation to support leave as often as allowable.
- Require employees to use paid leave while on FMLA.
Managing Performance Standards

- Employers may not use leave as negative factor in employment decisions.
- You are not required to adjust performance standards.
- Be careful that you do not inadvertently make employment decisions based upon an employee’s leave.
- Asses what is reasonable in terms of completing tasks and goals given leave status.
Questions?

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Thank You!