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Preparing for the 2020 DOL Changes under the Fair Labor Standards Act

Employment and Labor

The Department of Labor (DOL) made critical changes Jan. 1, 2020 to the earning threshold qualifications of an exempt employee under the Fair Labor Standards Act (FLSA). In general, for an employer to claim an exemption of a particular employee, three tests must be satisfied: (1) the salary level test, (2) salary basis test, and (3) duties test.

The most notable and significant changes were to the minimum salary threshold that must be satisfied under the salary level test (at least US$684 per week/US$35,568 per year; in 2004, the minimum salary was US$455 per week/US$23,660 per year).

Unlike the previous rule, employers are permitted to use 10 percent of nondiscretionary bonuses or incentive payments to satisfy the minimum salary (with the exception of highly compensated employees (HCE)). For example, an employee who has a salary of US$616 per week, can satisfy the minimum threshold if the employee receives US$68 per week (10 percent) as a nondiscretionary bonus.

The new rule increases the minimum annual salary threshold of highly compensated employees to US$107,432 per year. However, 100 percent of the standard salary level (US$684 per week) must be paid on a salary or fee basis, and the remainder of the total annual compensation requirement may be paid in nondiscretionary bonuses or incentive pay (including commission).

Please remember that an employee must not only satisfy the minimum salary requirements, but the employee's duties must primarily involve those associated with the following exemptions: executive, administrative, professional, outside sales, computer, or highly compensated.

How does an employer prepare for the new changes and avoid violation?

During the regular course of business (i.e., annually, biennially), an employer should conduct a compensation analysis to ensure salaries are awarded in an equitable, nondiscriminatory manner.

It is important to conduct this analysis under the instruction and in conjunction with legal counsel to maintain the attorney-client privilege and avoid disclosure. Even if your company or client does not regularly review its compensation structures, it’s an excellent way to prepare for the new DOL exemptions and should be implemented as a best practice. Below are a few steps to follow when conducting an analysis:

- Identify the areas of the company that will be evaluated (i.e., departments, divisions, positions/titles, markets, etc.).

- Determine the type of compensation that will be evaluated (i.e., salaried, hourly, commission, overtime, etc.).

- Collect and gather information on employee salaries, performance evaluations, standard pay practices, internal versus external market data, and the company’s historical compensation data. In any collection, you should give great consideration to the FLSA, the Equal Pay Act, and other applicable federal and state statutes and laws.

- Determine the best way to represent the collected data through a statistical model.

Once the analysis is complete, it’s important to determine if adjustments need to be made to ensure compliance with the new DOL changes.

Example

The compensation analysis conducted by XYZ Company reveals that Employee A receives an annual salary of US$34,000 and holds the position of marketing specialist in the company’s Boston office. However, Employee B holds the same position, at the same location, but is paid US$12 per hour. Employee B averages approximately 8.5 overtime hours per week.

Suggested resolution

XYZ Company must determine whether marketing specialists within the same region or market will be paid on a salary or hourly basis to avoid inconsistencies. In consideration for the new minimum salary threshold (at least US$684 per week/US$35,568 per year), the company must consider additional costs it will incur to become compliant, budgetary restraints, and evaluate the needs of the business. It may be more cost-effective and advantageous for the company to increase the salary of Employee A (US$34,000 to US$35,568) and reclassify Employee B as salaried and pay both employees equally. This will alleviate the overtime compensation requirements under FLSA as both employees are exempt.

Also, an analysis may reveal the need for modification in policy, rectification of disparities, and allow for the examination of business factors that may be at play when compensation structures are designed.

Noncompliance can lead to hefty penalties

The new changes will be enforced by the DOL's Wage and Hour Division. The DOL has jurisdiction to investigate and pursue legal action against any violator. Such violations could be costly for an employer, and result in civil monetary penalties. If a violation is determined to be willful, violators could face criminal prosecution. In addition to monetary damages, the DOL will recommend changes to compensation policies and practices to avoid future penalties.

Key takeaway

When advising business partners and key stakeholders, it is our job to help them avoid the pitfalls of noncompliance. A DOL investigation can lead to exorbitant legal fees, drain internal resources, and hinder business goals. However, many companies can escape investigation by conducting a compensation analysis to ensure compliance with the new changes. While a compensation analysis may be time-consuming, it certainly beats being faced with crippling monetary penalties and damages.

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