

## EMPLOYMENT LAW ALERT

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Fall 2015 Issue

### PROPOSED NEW WAGE AND HOUR AMENDMENT INCREASES SALARY LEVEL FOR EMPLOYEES EXEMPT FROM OVERTIME

The US Department of Labor recently proposed amendments to the exemption from overtime pay allowed for certain "white collar" jobs under the Fair Labor Standards Act (FLSA). The new rules may expand the pool of workers eligible for overtime pay or otherwise force employers to double exempt employees' pay. These amendments will likely require employers to re-examine the pay scale, work schedules, and additional work activities performed by many administrative, technical, and managerial workers.

Under the FLSA, employees who work over 40 hours per week must be paid overtime (at least 1.5 times employees' hourly rate) unless exempted. Current regulations exempt employees in certain executive, administrative, and professional positions from overtime pay if those employees are paid a salary of at least \$455 per week (\$23,660 per year) and if the employees meet specific "duties" tests. This current salary level for the exemptions has been in place since 2004. Thus, employees such as managers with hiring and firing power, specially trained analysts or researchers, or creative arts designers might not be owed overtime if they are paid at least \$455 per week on a salary basis (i.e., predetermined amount with no reductions).

Under the newly proposed amendment, employers would have to pay employees in these executive, administrative, and professional positions at least \$970 per week (\$50,440 per year) to retain the overtime exemption. Otherwise, employers would become liable to these employees for hourly wages for all valid compensable time, plus overtime pay for time worked over 40 hours per week. For highly compensated employees to remain exempt, the total annual compensation would jump from \$100,000 per year to \$122,148 per year, the annual value of 90% of weekly full-time salaried workers' earnings. The proposed amendment also establishes a mechanism to update the salary requirements regularly and automatically in the future. The proposed rule amendment notice seeks comments on whether, and to what extent, non-discretionary bonuses and other incentive payments should be considered part of an exempt employee's salary to meet the exemption's salary test. The proposed rule notice does not propose specific changes to the "duties" tests for these exemptions, but does seek comments on the current duty requirements.

With the proposed amendment impacting employees in managerial and professional roles, there are many related issues employers need to consider if and when the rule becomes final:

- Whether bonuses and other incentive payments may be allowable to meet the exemption salary test;
- Whether and how activities done away from the workplace or outside usual business hours, such as work-related emails or phone calls handled on the employee's laptop or smartphone, should be recorded and compensated for employees no longer exempt;
- Whether employers restructure work hours of employees no longer exempt to minimize additional liability for overtime;
- Whether employers restructure work duties of present employees (both exempt and non-exempt) or consider hiring employees to minimize overall payroll liability; and
- Whether employers can continue to satisfy the exemption standards and avoid unintended payroll errors leading to costly wage and hour claims.

The period for public comment runs through September 4, 2015. Additional revisions may be made before the proposed rule becomes final and effective.

**Practice Pointer:** The proposed rule calls for a significant jump in the salary requirement for many potential employees in "white collar" jobs. Employers should be proactive in assuming the proposed rule will become effective, in analyzing the work actually done by their exempt employees, and in determining whether a shift in work hours and duties or an increase in salary would be most feasible and beneficial for their business in order to avoid any potential lawsuits by employees for misclassification and/or unpaid wages.

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#### AREAS OF PRACTICE

Litigation  
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 Defense  
 Tort and Insurance Defense  
 Employment and Civil Rights  
 Workers' Compensation  
 Defense  
 Healthcare  
 Mediation  
 Business and Finance  
 Estate Planning, Wills and  
 Trusts

## PENALTIES INCREASED FOR INCORRECT W-2 and 1099 FORMS

Provisions in a new federal Trade Preferences Extension Act enacted into law in June steeply raised the penalties for employers who file incorrect W-2, 1099, and 1098 forms. For such statements required to be filed after December 31, 2015, the penalty has more than doubled. The penalty for a single incorrect form jumped from \$100 to \$250; the annual aggregate cap on such penalties increased from \$1.5 Million to \$3 Million. A lower penalty rate, applicable if and when corrected forms are filed, is also increased. Because the IRS Code sections 6721 and 6722 have two filing requirements (one submission to the IRS and another to the individual employee), a single incorrect form could cost an employer \$500. Since employers bear the burden of complying with these federal filings, they are likely on the defensive in any claims filed by employees or any settlement of such claims.

**Practice Pointer:** Employers' liability for correctly filing W-2 and 1099 forms has increased significantly, both for single incidents and all episodes in a given year. Thus, employers must ensure that the necessary forms are completed and filed correctly to avoid this increased penalty exposure.

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## NEW REQUIREMENTS FOR WORKERS' COMP PPD SETTLEMENTS

The Tennessee legislature recently revised workers' compensation law on settlement payments for permanent disability benefits. Because the new law has a two-part system for determining initial PPD benefits and enhanced PPD benefits, questions had arisen as to procedures for paying and finalizing initial PPD benefits: should initial PPD benefits be paid automatically, should they be court-approved, etc. The new amendment, effective for injuries on or after April 20, 2015, requires that settlement on a claim for permanent disability benefits must be approved by a workers' comp judge. Any settlement agreement not so approved is void. Moreover, an employer who pays PPD benefits to settle a claim but does not have a settlement agreement approved by a workers' comp judge effectively extends the employee's statute of limitations on the claim. If PPD payments are made without an approved agreement, the limitations period is extended for 2 years from the date of the last PPD payment.

**Practice Pointer:** Voluntary payment of PPD benefits, especially for initial PPD benefits under Tennessee's new workers' comp act, requires the workers' compensation court's approval for finality. Employers should have any agreement to pay and accept initial or enhanced PPD benefits approved by the court to finalize such payments and to preserve any limitations deadline defenses. Employers who pay PPD benefits without court approval do so at their peril.

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## SAVE THE DATE: FALL EMPLOYMENT LAW SEMINAR

Mark your calendars for **November 3, 2015!** Partnering with the West Tennessee SHRM chapter, we will hold our annual Fall Employment Law seminar at Union University in Jackson, Tennessee. The full-day event gives legal updates on various state and federal employment laws and opportunities to discuss personnel management issues facing employers of all sizes and backgrounds. For further information, contact Elaine Amicone at [eamicone@raineykizer.com](mailto:eamicone@raineykizer.com) or 731-423-2414.

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