

## **E-Verify Work Authorization Program To Become Mandatory in Tennessee**

Beginning January 1, 2017, the E-Verify program to investigate work authorization status becomes mandatory for private employers in Tennessee with 50 or more employees. Until now, the E-Verify program has been voluntary so long as employer maintained appropriate documents confirming employees were authorized to work. With this change in the law, applicable employers will have to use the E-Verify program, but only for employees hired on or after January 1, 2017.

Failure to comply with the new E-Verify requirements, as well as failure to maintain appropriate documents showing work authorization, may subject employers to civil penalties. The Tennessee Department of Labor will have authority to investigate and issue notices and orders, which generally give employers 45 days (reduced from 60 days) following receipt to remedy the violations and document compliance. Failure to correct a violation may result in penalties ranging from \$500 to \$2,500 for each violation and additional penalties of \$500 per day if an employer knowingly continues to violate the law.

## **New Salary Rules Impacting Overtime Exemptions for “White Collar” Employees**

The US DOL has announced its long-expected final rules on overtime exemptions for certain “white collar” employees. These new rules clarifies when employees performing primarily executive, administrative, or professional duties must be paid premium overtime pay for time worked over 40 hours in a workweek.

Key provisions of the final rules focus on increasing salary levels:

- The standard annual salary level for an exempt worker becomes \$47,476 (\$913 on a weekly basis). This figure is equal to the 40<sup>th</sup> percentile of full-time salaried workers’ earnings in the lowest-wage census region—the South.
- The total annual compensation required for highly compensated employees (HCEs), subject to a minimal duties test, becomes \$134,004. This amount is equal to the 90<sup>th</sup> percentile of full-time salaried workers throughout the nation.
- These salary and compensation levels automatically update every three years, to maintain these percentiles, with the first update set for January 1, 2020.
- Employers will be able to use nondiscretionary bonuses and incentive payments including commissions to satisfy up to 10% of the new standard salary level, but HCEs must receive at least the full standard salary amount without regard to such bonuses and incentive payments.

While the new rules raise the salary test on the overtime exemption, they do not change the standard duties test necessary to meet any exemptions.

These rules will likely be a jarring change for employers since the “white collar” overtime rules have not been updated since 2004. The standard salary level for these exemptions has essentially been doubled—from \$455 to \$913 per week. However,

employers may still have several options to cope with these heightened salary requirements and remain compliant:

- Increase the salary for an employee meeting the duties test to at least the new salary level;
- Pay an overtime premium (1.5 times the employee's regular pay rate) for any time worked over 40 hours in a workweek;
- Reduce or eliminate overtime hours;
- Reduce the amount of pay allocated to base salary (ensuring that the employee still earns at least the applicable hourly minimum wage) and add pay to account for overtime hours, to hold total weekly pay steady; or
- Utilize a combination of these options.

Notably, the new rule does not require employers to change employee's pay from salaried to hourly so long as employees satisfy the overtime exemption or employers ensure employees are paid at least the appropriate minimum wage and overtime rates.

Since these new rules become effective December 1, 2016, employers should begin planning now to ensure compliance by that date. Employers should also be mindful to determine employees are properly classified (exempt versus non-exempt, employee versus independent contractor) and to keep complete and accurate records, should any overtime disputes arise.

### **New Affordable Care Act Rule Prohibits Discrimination on Sex, Gender Identity**

The US Health and Human Services Department (HHS) has issued a final rule addressing sex discrimination under the Affordable Care Act (ACA). Under the new rule, individuals are protected from discrimination in health care based on pregnancy, gender identity, and sex stereotyping. The new rule covers any health program or activity which receives funding from HHS, any health program that HHS itself administers, and Health Insurance Marketplaces and issuers that participate in those Marketplaces. While all employers may not be covered, they will likely be impacted in health insurance plans and benefits they must provide under the ACA.

The new rule protects against sex discrimination in health care in such ways as:

- Women must be treated equally as men in the health care they receive and the insurance they obtain.
- Individuals cannot be denied health care or health coverage based on the individual's sex—including gender identity and sex stereotyping.
- Categorical coverage exclusions or limitations for all health care services related to gender transition are discriminatory.
- Individuals must be treated consistent with their gender identity, including access to facilities. Providers cannot deny or limit treatment for any health services ordinarily or exclusively available to one particular gender based on a person seeking such services identifying as another gender.
- Sex-specific health programs or activities may be permissible if the covered entity can demonstrate an exceedingly persuasive justification.

While the final rule does not completely resolve whether discrimination based on sexual orientation alone is sex discrimination under the ACA, it does clarify that HHS's civil rights office will evaluate complaints alleging sex discrimination related to an individual's sexual orientation. HHS will determine if the complaints involve sex stereotyping that can be addressed under the ACA.

The final rule becomes effective on July 18, 2016, though parts of the rule requiring changes to health insurance or group benefit designs apply on the first day of the first plan/policy year beginning on or after January 1, 2017. HHS has made clear that it supports prohibiting sexual orientation discrimination as a matter of policy. The final rule allows for various enforcement mechanisms by HHS and the Department of Justice as well as civil actions by individuals. We can expect HHS to closely monitor compliance with this rule as public debate grows over gender identity and sexual orientation issues. Employers, insurers, and health care providers will need to be aware of the new rule requirements in interpreting health insurance plans and providing treatment and facilities for health care.