Christmas in July: Avoiding the Grinch

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Practically Dealing With

<u>The December 1st Overtime Regulations—Five Months Out</u>

After much angst, the Department of Labor's newest and most onerous overtime regulations become effective **December 1st**, right in time for the holidays. *Goody!*

As of that date, if employers are not ready, haven't revised pay procedures, and put in new accounting processes, well, "TB"—and some might add another letter in there. The "too bad" means that the DOL can, at 12:00 a.m. on 12/01/2016, descend on an employer for enforcement, if the regulations are not followed. *Christmas comes but once a year, but the DOL may taketh away.* And legions of overtime trolls (also known as plaintiffs' counsel) are already sharpening pencils for revised overtime lawsuits based on this new law.

Bottom line: Best to avoid these Grinches now.

What to prepare for?

The DOL regulations essentially do *two* things—both having to do with the salary component for overtime exemptions.

A little background: Generally speaking, to be exempt (not subject to overtime) two facts must exist: *one*, the employee must perform certain exempt work, such as supervising others or running a part of the core business (the executive and administrative exemptions); and, *two*, the employer must pay the person at a certain, guaranteed weekly salary level. An employee is *not* exempt without meeting <u>*both*</u> of these requirements (*e.g.*, almost certainly you can't have an "exempt" receptionist simply because he/she is paid a salary, and paying an otherwise-exempt supervisor by the hour almost always makes, for example, him/her non-exempt, that is, subject to overtime).

So, first of all, <u>the December 1st regulations deal with this salary level, jacking up the salary component from a formerly *fixed* $455 a week to now $913 a week</u> (or $47,476 annually). This $913 is based on 40th percentile of earnings for full-time salaried workers in the lowest-wage Census Region, which is currently the South. Also, 10% of this annual amount may be composed of certain non-discretionary bonuses and commissions, in addition to any base amount.

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Second, the DOL regulations also affect the salary level for "highly compensated employees" ("HCEs"). In general terms, the law presumes a person is exempt, if the employee is paid at a high rate. The threshold for this HCE consideration is currently $100,000, but, <u>with the new regulation, that salary level will increase to $134,004, starting on December 1, 2016</u>. This number is pegged on the 90th percentile of earnings of full-time salaried workers nationally.

As a side note, despite concerns otherwise, the DOL did not otherwise amend the exemptions—*i.e.*, the definitions of an "executive" or the "administrative" exemption were not touched . . . for now (see comment below). A short blog summarizing these changes is linked here, as well as comments about the then-proposed regulations, linked here.

In the abstract, that all sounds fine, like elegant algebra numbers. But the practicality is not just about theoretical numbers. It is about additional accounting requirements, a flattening of our workforce, and a deflating of employee expectations (and the likely uptick in wage and hour litigation). How employers deal with these issues is key to the future.

What should we do today?

With the salary requirements changed (nearly doubled), that means that businesses should do the following today:

1. **Assess employees now**—look at who is now treated as exempt and paid below $913 a week. The reality is simple—either these folks will have to be paid more to continue being treated as exempt (at or above $913 a week), or they will have to be re-classified and changed to non-exempt (and, thus, paid overtime, for any hour over 40 in a workweek).
2. **Gear up accounting practices now**—to deal with the increase in workers who will become non-exempt. This means significant record-keeping requirements and calculating hours and thus, overtime for everyone, every workweek, for those newly non-exempt, along with those previously non-exempt.

Attached is a page of questions that an employer might use to start these evaluations, linked here.

What's the actual fallout from these changes?

While this modification was much bally-hooed as a huge increase in pay for the common worker, it turns out that it probably won't be the case. It is estimated that workers that might benefit from these increases may see a whopping $19.97 in additional overtime pay (on average), and only 825,000 of the 4.2 million currently exempt workers below this pay level will likely see any additional overtime at all. See https://www.americanactionforum.org/research/final-overtime-rule-minimal-benefits-major-costs/?gclid=CMX-_Niz880CFZSEaQodBgcFFg.

But there is a negative effect on business—if not as to the wage issues, then from the costs of implementing and sustaining these charges; for example, record-keeping requirements will certainly increase and required overtime and hourly calculations will grow exponentially, too. In other words, the practical negative impact on the internal side of the business will probably be significant; some estimate (such as the American Forum, see cite above), that these macro costs could reach nearly $3 billion a year, with 2.5 million additional paperwork hours (no doubt there will be more overtime as a result, too!).

Another considerable negative, not addressed by DOL do-gooders, is the flattening this change will have on the American workforce.

Most employers will be able to raise the salaries/pay of only a few employees to reach the required $913 weekly amount. Businesses may choose to do so as a way to avoid recordkeeping and accounting headaches. But that will not make sense for most employers who are paying workers below the $913 level.

Instead, employers will more likely have to adjust their treatment of these "managers," who will effectively or optically be "demoted" to non-exempt hourly workers. At the same time, there will likely have to be a re-assessment downward of hourly base pay (or base salary), given the consideration of additional overtime pay. In other words, for those who had often worked some hours of overtime as formerly exempt employees, their hourly pay will likely be reduced to account for the expected overtime pay they will get in the future. Alternatively, businesses may wish to curb overtime hours or hire others to fill in during those peak time periods. For affected employees, all of this may be a double whammy, particularly psychologically depressing—like waking up on Christmas day and finding out you are no longer a manager and your pay and/or hours are reduced. *Merry Christmas!*

Some will say these strategies will be an attempt to "skirt" the law, but, in truth, it is only business survival tactics and entirely expected.

Are these intended or unintended consequences of these new regs? Hard to say. But they will be like a holiday gift not quite up to the recipient's expectations.

Santa Alert: These salary levels will be adjusted every three years.

Let me mention here that the salary levels will also change every three years. That will mean that business has to reassess these matters in three-year cycles. In the world before *this* Grinch, the change was semi-permanent till

Congress amended the laws (something business could count on year in and year out), the last change being in 2004, when the salary was fixed at $455 a week. Now the salary levels will float with periodic adjustments based on inflation, but still will be pegged to the 40th and 90th percentile numbers, as noted above.

Will Santa Claus be coming this year?

Last year about this time, when the regulations were being considered and argued about vehemently in the abstract, there was a lot said about possible congressional fixes. Many pundits predicted that the regulations would never take effect or would be barred by acts of Congress (the usual rhetoric, promises, and fists in the air). Based on historical patterns, I would say waiting on Congress to act would not be a useful investment of time and resources.

While Republicans (lead by Senator Scott of South Carolina and Representative Walberg of Michigan) have proposed the "Protecting Workplace Advancement and Opportunity Act," which would put the entire matter on hold and is supported by various business groups, currently that law is listed as having the most dismal chance of passing, 8% (I guess they could not bear to say zero). *See* https://www.govtrack.us/congress/bills/114/hr4773.

Let's face it, even if the law were miraculously passed in both houses in this contentious election year, it is a 100% certainty that it would be vetoed by the current White House.

We will have to see what the election brings, and even then (even assuming a change in the administration from Democrat to Republican), I would not bet money that this overtime train would be slowed down—at least immediately. Certainly, from the November election to the effective date is less than a month's time (a *Miracle on 34thStreet* would be more plausible). Perhaps, some changes will come later. Maybe a court one day will invalidate the regulations as being beyond the authority of the DOL—*it could happen?*

Who knows? What I do know is that we have to prepare now for December 1.

Final note from the Grinch.

Worries from your defense lawyer.

I am also a little worried about how the change may be used in this future to judge past compensation conduct. To be clear: The regulation is not retroactive and should apply to conduct only on or after December 1, 2016, but I know that there are plaintiffs' law firms out there already suggesting the opposite to would-be clients ("you may have an overtime claim against your employer for the work you did in the past" was stated on one website when talking about the retroactivity issue). Another fight for another day, I suppose.

I am also concerned about future DOL changes. Perhaps, the definitions about executives and administrative exemptions (or other exemptions) will be tightened (as could have happened this time but did not), further eliminating employees from the ranks of "exempts." I suspect the DOL did not go in that direction this time, so as to keep the hue and cry of the Chamber of Commerce to a dull roar. After the Affordable Care Act, how much more could be borne by employers, particularly at the tail end of this administration?

I would not be surprised, however, if these issues were looked at again, if Secretary Perez (or his successor, should he be tapped as a vice-presidential running mate) remains in control of the DOL. Like "after-Christmas sales," when something did not sell well before the holiday, it may be better received after.

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