In the last few weeks, the Department of Labor (DOL) has made two announcements that will likely reshape the U.S. workforce for many years to come. The developments will no doubt create new avenues of litigation for the plaintiffs’ employment bar, which continues to find creative ways to capitalize on wage and hour laws. Conversely, to avoid or mitigate liability, employers will scramble to adopt or bolster existing wage and hour risk management solutions that will range from conducting regular wage and hour audits, reclassification of employees and independent contractors, regular and proper training of manager to purchasing wage and hour insurance.

YOUR “EXEMPT” EMPLOYEES MAY BE ENTITLED TO OVERTIME

The DOL on June 30 announced its long-awaited proposed amendments to the Fair Labor Standards Act (FLSA). To summarize, the DOL proposed to increase the annual salary before which an employee will be considered exempt from overtime or minimum wage under the FLSA’s “white-collar” exemptions from $23,660 to $50,440. The DOL also proposed to increase the “highly-compensated” employees’ salary threshold from $100,000 to $125,148. Because of the “automatic” annual adjustments also proposed by the DOL, employers may also have to adjust these salaries annually, which may create confusion and room for error.

While employees must still meet the “duties” test, the proposed amendments all but guarantee that an additional 21.4 million or more employees currently considered exempt will now be non-exempt and eligible for overtime. The amendments, which once finalized will take effect in 2016, are of significant import to low-wage industries, such as retail, hospitality, certain health care sectors (e.g., home health aides), and non-profit organizations (the agency’s efforts in 2014 yielded $79 million in recovery on behalf of employees, mostly in these industries). The DOL has asked employers for comments to the proposed regulations no later than September 21, 2015. Whether or not those comments, many of which are likely to oppose the amendments, will be taken into account remains to be seen. However, employers should assume and proceed as though the proposed salary levels will be THE NEW NORMAL.
EVERYONE IS ‘DE FACTO’ AN EMPLOYEE

The DOL set its sights on misclassification of workers in 2011 with implementation of the Misclassification Initiative http://www.dol.gov/whd/workers/misclassification/. The Initiative is rooted in the assumption that most employers intentionally misclassify workers as independent contractors to avoid providing benefits (such as unemployment insurance, medical benefits), overtime pay and paid time off and/or paying payroll taxes to the IRS for those workers. On July 15, the agency made good on its promise to shift this paradigm when it announced new guidance that will likely cause employers to reclassify a number of their workforce as employees rather than independent contractors.

Specifically, the DOL issued an Administrator’s Interpretation (AI) or “opinion letter” http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm that downplays any control an independent contractor has over the tasks he/she performs in determining whether such worker is an employee or an independent contractor. Reasoning that “suffer or permit” as used in the FLSA is paramount, the DOL adopted the “economic realities” test over the common law “control” test detailed in the AI. According to the DOL, “each factor (of the “economic realities’ test) should be considered in light of the ultimate determination of whether the worker is really in business for him or herself (and thus is an independent contractor) or is economically dependent on the employer (and thus is its employee).”

Although the AI is not law, the guidance has the potential to further fuel the DOL’s investigations and enforcement activity, court decisions, as well as private litigation in this already turbulent area.

PROACTIVELY MITIGATING THE RISK: WHAT EMPLOYERS CAN DO NOW

It might be gratuitous at this stage to write about the accelerating rate of wage and hour claims, particularly in California, New York, Massachusetts, Illinois, New Jersey and Florida, but it’s worth repeating for this reason: the DOL’s amendments shouldn’t come as a surprise to any employer. Aside from the fact that wage and hour claims have outpaced all other employment-related claims in the last five years, the DOL provided sufficient notice that the amendments and guidance were eminent. Some companies heeded the warning and are already making necessary adjustments to their exempt/non-exempt classifications as well as independent contractors’ classifications to ensure compliance with the FLSA and thus mitigate potential liability. Still, these developments will likely be the source of consternation for a greater number of companies. For those companies, we recommend the following risk management strategy:

- Consult qualified employment counsel with hands-on experience in wage and hour laws.
- Develop a plan of action that includes documentation of the process used to determine reclassification of employees as exempt/non-exempt, as well as independent contractor v. employee.
- Train employees and managers, particularly as respects accurate recordkeeping and other time-keeping and pay practices.
- Ensure that classifications take into consideration the “economic realities” test preferred by the DOL.
- Be sensitive in the communication of any reclassifications to affected employees.
- Consider wage and hour insurance. While most of the W&H insurance currently available consist of sub-limited defense costs only coverage (for small companies) and a minimum $1M retention for defense and indemnity coverage (mainly for large companies through Bermuda insurers), the market for this insurance is rapidly evolving; more markets may be willing to provide broader coverage with detailed underwriting information.
CONTACTS

For information on these developments, please contact your Willis Client Advocate®.

For past issues of our publications on other topics of interest, please visit the Executive Risks website.

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1 These developments have implications under workers’ compensation and other benefit laws. However, this blog focuses only on the wage and hour implications. For discussion related to workers’ compensation and benefits implications, please contact your Willis Client Advocate® or a member of the Willis Casualty Practice.

2 The FLSA governs the payment of minimum wage and overtime pay (one time-and-a-half) for any hours worked in excess of 40 per week. Some employees, however, are exempt from the overtime requirements. Those exempted fall into six categories: (1) executive, (2) administrative, (3) professional, (4) outside sales, (5) computer, and (6) highly-compensated employees – all commonly referred to as the “white collar” exemptions. To qualify for these exemptions, the employee must satisfy certain job duties tests and receive a minimum weekly salary/annual salary – the focus of the DOL’s proposed amendments.

3 Although it was expected that the DOL may also amend the “duties” test, the DOL instead requested comments from employers on whether the current duties tests are “working as intended.”

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