UPDATE ON NEW FLSA OVERTIME EXEMPTION RULES

As we originally reported on July 10, 2015, significant changes are on the way for the federal Fair Labor Standards Act (“FLSA”), and they are bound to have an impact on employers. The current overtime rules, last updated in 2004, require employers to pay all employees covered by the FLSA one and a half times their regular rate of pay for any hours they work in excess of 40 hours in a single workweek. Executive, administrative, and professional employees are exempt from the FLSA’s overtime rules if they earn more than $23,660.00 per year or $455 per week, provided that their responsibilities also satisfy the “duties test”. The Department of Labor’s (“DOL”) new rule would more than double the minimum salary required for an employee to be classified as “exempt” from the FLSA overtime regulations, requiring employers to pay overtime to employees earning less than $50,440.00 per year in 2016. It is estimated that over five million (5,000,000) currently exempt, salaried employees will be affected by the prospective increase of the salary threshold.

For the first time ever, the proposed changes also seek to establish a mechanism for automatically updating the aforementioned salary requirements to ensure that the real value of the salary level does not degrade over time. Further, though the DOL did not propose specific changes to the “duties” tests for white collar classifications, it requested comments regarding the same, a sign that they may be inclined to revisit these tests in the near future.

The sixty (60) day comments period on the aforementioned proposed changes concluded on September 4, 2015, with the submission of over two hundred and seventy thousand (270,000) comments.

The DOL has indicated that the amendments to the current overtime exemption rules will be ready by July 2016. After that, employer would only have a brief sixty (60) day period to make preparations in response to the amendments and their specific content. The implications for employers are obvious. Increasing an exempt employee’s salary, whose is close to the current minimum of $455.00, to $970.00 all at once, in these times of economic uncertainty and hardship, is a feat that almost defies the imagination. This is even more problematic given that making adjustments to budgets and operational changes in only sixty (60) days can be very burdensome.

The logical conclusion is that employers must be prepared in advance, and have a plan ready in order to confront the coming changes. Salary increases, re-classification of employees to non-exempt status, modification of responsibilities in order to adjust them to any changes in the “duties test”, avoidance of overtime, implementation of punch systems for formerly exempt employees, and changes to incentive or bonus programs are only some of the challenges that employers will confront in the face of the coming changes.
The time is now to conduct internal wage and hour audits to identify employees whose status may be affected by the anticipated salary threshold revision. It is a common misconception that an employee who receives a salary is automatically exempt. However, the truth of the matter is that salary is but one of the requirements for exempt status. The employee must also carry out exempt duties. In carrying out the analysis as to whether an employee is exempt or not, employers should focus on the actual day-to-day responsibilities associated with the position rather than the job title. In the process, it is not uncommon to find that some employees fall into a gray area between exempt and non-exempt. Given that employers bear the substantial burden of proving that an employee falls squarely within the terms of an exemption, it is best to err on the side of non-exempt status in these situations. Our office can assist you in preparing a course of action in order to ensure that you are ready to act when the changes to the law go into effect.

It is interesting to note that House and Senate Republicans have introduced legislation to effectively invalidate the aforementioned amendments to the overtime exemption rule. While none of the proposed measures are expected to pass during this election year, they certainly provide insight as to the battles that lie ahead for the DOL’s final overtime rule, including the GOP’s contention that the Secretary of Labor underestimated the cost of compliance with the rule; that the DOL did not consider the potential impact of the proposal on workplace flexibility; the effect of the proposed rule on multistate employers, which operate in different states, with different costs of living and salary scales, which therefore face unique consequences in reclassifying employees; and the fact that changes to the “duties test” might be included in the final rule without the requisite notice and comment period and procedures. Even if any of these bills did pass, they will likely be vetoed by the President. Notwithstanding, they indicate that the final rule will face significant opposition once published in the Federal Register, which is estimated to occur around May of this year.

If you should have any questions or comments relative to the proposed changes to the FLSA overtime rule, or any other labor and/or employment matter, please contact any member of the Labor and Employment Division of AMG for further information: Edwin J. Seda Fernández, 787-281-1822, seda@amgprlaw.com; Mariel Y. Haack, 787-281-1951, mhaack@amgprlaw.com; Liana M. Gutiérrez, 787-281-1950, lgutierrez@amgprlaw.com; Katyana Farokhzadeh López, (787) 281-1811, kfl@amgprlaw.com; Verónica Torres Torres, (787) 281-1965, vtorres@amgprlaw.com; or Luis Pérez Giusti, (787) 281-1809, lpg@amgprlaw.com, for further information.

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