ROETZEL

222 South Main Street
Akron, OH 44308
DIRECT DIAL: 330.849.6773
PHONE 330.376.2700 FAX 330.376.4577
kadinolfi@ralaw.com

WWW.RALAW.COM

THE NEW WAGE AND HOUR REGULATIONS – GETTING COMPANIES AND CLIENTS READY

AKRON BAR ASSOCIATION
SEPTEMBER 22, 2016

KAREN D. ADINOLFI, ESQ.
ROETZEL & ANDRESS

I. THE ROAD TO THE CURRENT RULE

A. Fair Labor Standards Act ("FLSA") and its overtime and minimum wage provisions are a way of life in the workplace.

1. The FLSA applies to the overwhelming number of employers and/or their employees, whether public or private, large or small, for-profit or non-profit.

2. FLSA does not cover fringe benefits, vacation or personal time, sick time, or other employee benefits.

B. Interaction with Ohio Law, Revised Code Chapter 4111

1. Largely mirrors the FLSA, but provides its own minimum wage

2. If state law provides for more generous coverage than FLSA, then state law controls.

3. Ohio law has not changed, but employers must still comply with the FLSA.

C. Numerous changes to the FLSA since its enactment in 1938.

1. Most recent update was in 2004, when the minimum salary level was increased for exempt employees to $455 per week, the first increase since 1975.

2. In 2004, also implemented a single standard duties test, replacing the previous "long" and "short" tests.

D. Background of December 1, 2016 Changes

1. In March 2014, President Obama directed the Department of Labor to "modernize and simplify" the FLSA's overtime and minimum wage requirements.

2. DOL engaged in public outreach.

3. On July 6, 2015 the DOL issued a proposed rule which proposed:

a. Increase in salary level requirements for exempt executive, administrative, and professional employees to $970 per week.

b. Increase in salary level requirements for highly-compensated employees to $122,148 annually.

c. Enactment of a method to annually update the salary and compensation level requirements.

d. Allowance of non-discretionary bonuses and incentive payments to count toward the salary level requirement.

e. Significant number of comments received -- over 270,000

4. Final rule published in Federal Register on May 23, 2016

a. Changes effective December 1, 2016

b. Changes affect the salary level test, while the duties test remained unchanged.

II. SUMMARY OF PROVISIONS OF THE FLSA RELEVANT TO THE NEW RULE

A. FLSA allows certain "white collar" employees to be "exempt" from the minimum wage and overtime provisions.

B. Three tests must be met for the exemption to apply.

1. Employee must be paid on a salary basis.

2. Employee must earn a certain threshold weekly amount. Until November 30, 2016, that weekly amount is $455.

3. Employee must perform primarily executive, administrative, or professional duties as defined by the regulations.

C. If a “highly-compensated” employee (earning over than $100,000 per year), who performs office or non-manual work, and customarily and regularly performs one identifiable executive, administrative or professional duty, that employee may be considered exempt.

D. If an employee does not meet all three tests, the employee must be paid at least minimum wage for all hours worked, and time and a half for all hours worked over 40 in a workweek.

III. WHAT DOES THE NEW RULE PROVIDE FOR?

A. Salary Level Requirements

1. Raises current salary level requirement to $913 per week ($47,476 per year).

    a. Represents the 40th percentile of weekly earnings of full-time salaried workers in United States’ lowest-wage census region.

    b. If an employee does not earn at least this amount, may not be exempt, no matter the duties.

2. Raises salary level requirement for highly-compensated employees to $134,004 per year.

    a. Represents the 90th percentile of weekly earnings of full-time salaried workers nationally.

3. Inclusion of bonuses and commissions

    a. The DOL will permit nondiscretionary bonuses and incentive payments (including commissions) to count toward the salary level requirement.

    b. Examples include retention bonuses and commission payments derived from a fixed formula.

    c. Such payments, however, may only constitute 10% of the standard weekly salary.

    d. Such payments must be made at least quarterly, with a quarterly “catch-up” payment allowed within one pay period at the end of a quarter.

    e. Discretionary bonuses may not be counted toward the 10% level.

4. Automatic Updates

   a. Salary and compensation thresholds will automatically update every three years.

      (1) 40th percentile for executive, administrative, and professional employees

      (2) 90th percentile for highly compensated employees

   b. DOL will publish the updated rates at least 150 days in advance of the increase

   c. First automatic update will take place on January 1, 2020

      (1) Current estimate is that the salary level will rise to $984 per week ($51,168 per year) for executive, administrative, and professional employees.

      (2) Annual salary will rise to $147,524 per year for highly-compensated employees.

   d. What Will Not Change?

      (1) Standard duties test

      (2) Limitation on the performance of non-exempt work by exempt employees

      (3) Permissible vs. impermissible deductions

IV. CULTURE SHOCK

A. With the doubling of the weekly threshold amount, significant numbers of employees will now be classified as non-exempt

   1. Does not matter what their job duties are

   2. Very much a black-and-white determination

   3. Categories of employees with same or similar duties that will have differences in exemption status because of weekly salary amount

B. Issue of “status”

C. Unfamiliar requirements for newly non-exempt employees

1. Tracking all hours

2. Not having freedom to come and go

3. Perception of less flexibility

4. New restrictions on working time, i.e., working through lunch, taking work home

5. Technology issues

V. THINGS ALL EMPLOYERS NEED TO DO BEFORE DECEMBER 1, 2016

A. Evaluate who is going to be affected by the increased threshold.

1. Do not look at duties

2. Look at current pay

3. Identify all exempt employees who are paid below $913 per week

B. Evaluate your options for those employees who would otherwise be non-exempt as of December 1, 2016.

1. Raise the salary to the required threshold, keeping in mind that come January 1, 2020, it will need to be raised again.

   a. Now is a good time to audit your job descriptions and job duties to ensure that current employees are also properly classified as exempt pursuant to the duties test.

2. Leave the employee’s pay as is and reclassify employee as non-exempt.

   a. Calculate hourly rate

   b. Determine realistically how much overtime an employee will work, assessing workloads, ability to re-distribute, and possible hiring of additional employees.

   c. Controlling overtime

      (1) Permission from supervisor

      (2) Policy against unauthorized overtime

      (3) Disciplinary issues

d. Trying to keep employees at same level of compensation

e. Effect on fringe benefits, if any

3. Evaluate bonus structure

a. Adjustment of discretionary bonuses to non-discretionary

b. Put procedure in place to analyze such non-discretionary bonuses on a quarterly basis

4. Communicate any changes to your employees.

a. Emphasize it is a change required by law

b. Morale issues

(1) Not a demotion

(2) Work still valued

c. Watch for unintended consequences

(1) Pay differentials between employees and their supervisors

d. Train newly reclassified employees on timekeeping methods and procedures

e. Handbooks and policies

(1) May need to be updated and rewritten

(2) Provisions that may be affected

(a) Overtime

(b) Off-the-clock work

(c) Meal and rest breaks

(d) Travel time

(e) Use of mobile devices

(f) Preliminary and postliminary activities

(g) On-call policies

5. Explore some alternative ways to handle

    a. Salaried non-exempt

    b. Fluctuating workweek