Insights, News & Events

OVERTIME RULE STALLED: WHAT SCHOOLS SHOULD DO NOW

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This holiday season, many employers were thankful for the preliminary injunction that blocked the Fair Labor Standards Act (FLSA) exemption changes from going into effect on December 1 as scheduled. Those changes would have significantly impacted the way many educational institutions compensated their employees, requiring overtime pay for many who were previously considered exempt. As a result, we counseled you to conduct exemption status audits to ensure you were ready for the change.

However, just because the rule is currently stalled does not mean your work was in vain. Given the current legal landscape as we enter 2017, educational institutions should take this time to reflect on what they learned during their recent audits and the possible scenarios that still might require changes sooner rather than later.

WHAT WAS SCHEDULED TO HAPPEN ON DECEMBER 1

In May 2016, the U.S. Department of Labor (USDOL) revised the regulations that define the executive, administrative, professional, and derivative exemptions under Section 13(a)(1) of the FLSA. The highlights included:

- The salary threshold for exempt status was to increase for most employees from $455 to $913 per

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week, or $47,476 per year (more than double the current level);

- The total-annual-compensation threshold for the "highly compensated" exception was to increase to $134,004;
- Both thresholds were to be updated (most likely raised) every three years, beginning on January 1, 2020; and
- Employers were to be able to satisfy up to 10% of the salary threshold from "nondiscretionary bonuses and incentive payments," *including* commissions, paid on a quarterly or more frequent basis, for most employees.

These changes were slated to take effect on December 1. If there was any good news, it was that no duties-related requirements were to be changed.

While the USDOL issued its Guidance for Higher Education Institutions on Paying Overtime under the Fair Labor Standards Act (also of interest for PK-12 institutions), no exception was made for educational institutions. However, schools received some measure of relief knowing they could still rely on the FLSA exceptions already in place for the education community. For example, the USDOL's revisions did not impact the teacher pay requirements, and the FLSA provision excluding teaching professionals from the salary requirement remained intact.

Accordingly, educational institutions remain free under federal law to pay teachers on any basis (hourly, salary, etc.) with no minimum threshold, no minimum wage, no overtime, and no timekeeping requirement. Similarly, the special exception to the administrative exemption that permits a lower salary amount (at or above the establishment's entrance salary for teachers) for certain academic administrators remains in effect.

WHAT ACTUALLY HAPPENED

Before the regulations were scheduled to take effect, 21 states filed a lawsuit in opposition to the changes, and numerous business groups soon filed another. On November 22, the district court overseeing both cases ordered that the rule should be blocked from going into effect. The judge ruled that the USDOL could not implement or enforce the massive increase to the minimum salary threshold, the so-called 10% "credit," or the tri-annual salary "update." However, it appears that the increase for highly-compensated employees might not have been blocked, as it was not mentioned by the judge in his order. Time will tell regarding this issue.

The USDOL is appealing the decision to the 5th Circuit Court of Appeals, but that court will not rule on the matter until at least February 2017 – after the Trump administration is in the White House and in control of the USDOL. There is speculation that the landscape might change once Congress returns and the new administration is in place, especially given the incoming Labor Secretary's avowed displeasure with the overtime rule.

WHAT HAPPENS NOW?

A measured response is critical. If the employer-favorable decision is reversed, it is possible that some courts will rule that the original December 1 implementation date was indeed effective (as we've seen in connection with similar exemption-related changes). Moreover, even if not applied retroactively, you should not assume you will have any lead time before you must "flip the switch," so to speak.

Practically speaking, this could leave some employers worse off than if they had moved forward with the changes in advance of the original December 1 effective date. At least at that time, employers could determine how and when to implement changes in a smooth and efficient manner. For those that already made changes to comply with the scheduled increases, take comfort knowing you are now in the best position

should the appeals court resurrect the $913 per week rate. Whether there will be an opportunity to reassess these moves is a question that might only be answered down the road.

For those schools that have not made any changes, perhaps the one advantage to the current uncertainty is that you can use this as an opportunity to prepare. If the new salary threshold ends up somewhere short of $913, it seems likely to be set higher than $455, meaning you will need to increase some salaries or convert some employees to non-exempt status. Just as importantly, any issues existing today with respect to whether an employee qualifies as exempt based on the duties they perform will not be resolved. In fact, you may be at greater risk of exposure given the heightened awareness that employees currently have on the subject.

BOTTOM LINE: THE TIME TO REVIEW IS NOW

Many educational institutions reviewed the exempt status of their employees before December 1 to be ready to convert their status or increase their pay when the new salary threshold went into effect. Many educational institutions learned during their audits that there were a significant number of employees classified as exempt who did not meet the requirements for any exemption. This has long been our experience with schools.

We are hearing from many educational institutions that they now plan to “file away” the completed assessment and wait to see what the courts do with the overtime rule before making any changes. In many cases, it would be a mistake to do nothing where you know that employees are presently misclassified. If you correct their status now, you cut off continuing monetary damages and begin to eat away at the statute of limitations, potentially saving your institution thousands of dollars on future claims.

However, if your institution did not evaluate employee status to ensure proper classifications, now is the time to do so. At the very least, you should review their status before issuing new contracts for next year so that you can make a “non-noisy” conversation effective with the beginning of the next school year.

In the end, while employers remain hopeful that the $913 threshold will never go into effect, we cannot overemphasize the importance of using this window of opportunity to get your house in order. Given the current chaotic legal environment, it’s anyone’s guess as to when or how abruptly this window will close, so the time to act is now.

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