Insights, News & Events

"WHITE COLLAR" EXEMPTION EVALUATION

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It has been more than two years since President Obama directed the U.S. Labor Department to "propose revisions to modernize and streamline" the regulatory definitions of the federal Fair Labor Standards Act's Section 13(a)(1) executive, administrative, professional, outside-sales, and derivative exemptions. These provisions have traditionally been referred to as the "white collar" exemptions. Last September, we submitted extensive comments to USDOL in which we provided criticisms and recommendations with respect to the agency's proposals.

Current indications are that USDOL is likely to publish the revised regulatory definitions within the next week. The scope and specifics of the changes remain unknown at this time. Even so, employers can be virtually certain that, when the new regulations take effect:

- The minimum salary threshold for exempt status will increase dramatically; and
- Any changes the agency makes in these exemptions' duties-related requirements will be designed to make those tests harder to meet.

Our blog has highlighted various aspects of how employers should go about preparing for these changes by, for example:

- Analyzing whether one or more of these exemptions applies under the present regulations;
- Considering the possible application of alternative FLSA exemptions;
- Developing pay plans for employees who have been treated as exempt but who no longer will be.

If they have not already done so, employers should immediately consider reevaluating the status of (at a minimum) employees currently treated as qualifying for one of these exemptions:

- Whose weekly or weekly-equivalent salaries annualize to less than approximately $50,000; and/or
- Whose duties and responsibilities might call for an updated review under the current duties-related requirements.

The time required to assess these matters thoughtfully and to complete the necessary decision-making and planning that might follow is likely to be appreciably longer than the probable 60-day interval between the Final Rule's publication and its effective date.

Management should bear in mind that an adequate analysis of an employee's "white collar" exemption status should not be limited to any generalized checklist or other summary. For one thing, such materials are unlikely to take into account factors that are unique to a particular industry, employer, position, incumbent, and so on. Furthermore, no such document can cover all of the exemptions' many nuances, variations, subtleties, USDOL and court interpretations, and potential pitfalls that can be relevant in one set of circumstances or another.

Nevertheless, tools like these can provide a starting point. Fisher Phillips has therefore created a collection of materials designed to assist employers in these matters, both now and after the specific contents of the revised definitions become known. Contact your Fisher Phillips attorney for a complimentary action-item list and related guidance.

Employers should consider the possibility that adversaries might someday seek access to the information and conclusions generated by these evaluations. Whether, how, and to what extent management might be compelled to disclose the information is not amenable to a one-size-fits-all answer, but among the considerations will be whether the attorney/client privilege or some other protection is available.