



Checking Off USDOL's Regulatory Agenda

Insights

8.19.19

While stakeholders await *final* regulations on the white-collar exemptions (a/k/a Overtime Rule 2.0), regular rate, and joint employment, WHD has started sending the White House more proposals – first tackling tips and the tip credit and followed closely by fluctuating workweek. Based on our experience with prior changes and the time and resources that employers must invest beforehand, employers need to begin the process ASAP.

Three (Initial) Steps You Should Take Right Now

- **White-Collar Exemptions:** Though the exact figure and effective date still are under wraps, employers should be evaluating the 2020 pay structure for any exempt-classified employees under \$600/week (if not \$700 to minimize the chances of having to cast a wider net next month). There is unlikely to be much advance notice of the specifics given the, comparatively, insignificant increase and that even the proposed rule cured many of the defects in Overtime Rule 1.0.

Task: Review your budgets, consider what positions you might restructure, flag whom you might reclassify to non-exempt or give a salary increase, and think about when, practically speaking, you should implement changes.

Hint: Your target date might be sooner than you would think once you account for your payroll schedule and any state notice requirements.

- **Regular Rate:** WHD has presented new regular rate provisions for notice and comment. The agency is fairly constrained by statutory language when it comes to regular rate exclusions, but just the publication itself – whatever the final provisions – will further highlight that an employee's overtime rate can go far beyond the assigned base rate.

Task: Evaluate all your pay codes, make a list of those that you pay without overtime, and begin flagging potential problems.

Hint: Imagine what it would be like to not make the payments on that list – for example, a year-end bonus – if it would cause an uproar, flag that pay code now for further review.

- **Employment:** At a time when WHD is looking to revamp its “joint employment” interpretations as wholly different regulations, plus opining on independent contractors and volunteers, there is a definite possibility that alleged-employees pop up with claims.

Task: Determine if anyone not on your payroll is performing work for you, why the individual has been characterized as a non-employee, and flag potential issues.

Hint: Put at the top of your list for closer review those long-term relationships that you consider necessary (even if with other entities).

The Bottom Line

How far you should proceed beyond these initial steps will vary depending on what you find and, ultimately, the forthcoming regulations. But taking these initial steps sooner rather than later can go a long way towards triaging potential issues and creating a smooth(er) transition plan. Nonetheless, before diving in, consider retaining legal counsel to guide you through a privileged and confidential review.

If you have questions on how these developments may impact your business, please contact your Fisher Phillips attorney.

Service Focus

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