



"10% Credit" Approach Might Necessitate Timekeeping

Insights

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Management need not keep hours-worked records for employees who qualify for one of the federal Fair Labor Standards Act's Section 13(a)(1) executive, administrative, professional, outside-sales, and derivative exemptions. 29 C.F.R. § 516.3. Of course, employers may nevertheless maintain those records for such employees if they wish, and some do.

However, one aspect of the U.S. Labor Department's revised compensation requirements for these "white collar" exemptions could mean that some employers will have to keep records of at least some of these exempt employees' hours worked. So why might *that* be the case?

"10% Credit" Ramifications

When USDOL's revisions take effect, employers will be permitted to (i) pay as little as 90% of the new \$913 salary threshold for up to a 13-week period, and (ii) rely upon nondiscretionary bonuses and other incentive payments to provide the other 10% (except for "highly compensated" employees). 29 C.F.R. § 541.602(a)(3)(effective December 1, 2016). If in the end those additional amounts fail to close the 10% gap, then one option is for the employer to make-up the difference by paying a lump-sum that is sufficient to do so.

But what if a situation arises in which the employer does not want to pay the catch-up amount for some reason? For example, maybe paying the shortfall for all affected employees will be a budget-buster, or perhaps management will be facing a cash-crunch.

Well, the alternative is to treat these employees as having been non-exempt during the relevant period. *See, e.g.*, 81 Fed. Reg. 32427 n. 67 (May 23, 2016). And this will include paying them the required FLSA overtime compensation for all overtime hours worked during that interval.

But here's the kicker: Management can be sure that it has correctly calculated the overtime pay due *only* if it has an *accurate* record of the employees' hours worked during that time. For that matter, conceivably the normal USDOL timekeeping requirements for non-exempt employees might someday be said to apply to such an employee at that point, at least retroactively.

In any event, reconstructing these employees' actual hours worked for the pertinent timeframe is likely to be a daunting and inexact exercise in the absence of time records. It might also be a difficult task to complete by the "catch-up" payday.

The Bottom Line

Employers who decide to rely upon USDOL's 90%/10% salary arrangement should consider whether they are truly committed to making a catch-up payment in every instance in which nondiscretionary bonuses or other incentive payments turn out not to bridge the gap, no matter what the surrounding circumstances are.

If management believes instead that there might be scenarios in which it would *not* be willing or able to make these catch-up payments, then it should consider maintaining *contemporaneous, accurate* hours-worked records for the employees paid under the arrangement. And for reasons we have discussed previously, there is room to question whether "exceptions reporting" timekeeping is up to the job.