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The Time-and-a-Halves They Are A Changin

Earlier this month, President Obama directed the U.S. Department of Labor to update the federal overtime pay regulations by revising the salary component of the executive, administrative, and professional exemptions. To qualify for these overtime pay exemptions (a.k.a. the white collar exemptions), employees must receive a minimum, guaranteed weekly salary of at least \$455 and satisfy a duties test that requires them to primarily perform exempt-level tasks. The Presidents directive was aimed only at the salary component of the white collar exemptions. The currently minimum of \$455 a week equates to about \$24,000 a year, which is below the poverty line for an employee supporting a family of four. The Presidents directive would raise this minimum salary threshold, making fewer employees eligible for the white-collar exemptions and triggering the need for employers to either raise salaries to keep employees exempt, pay overtime pay to more employees, or limit overtime hours to avoid incurring extra overtime pay costs.

Since the Presidents directive, reporters and bloggers have been working overtime discussing what the upcoming regulatory change will mean for the modern workplace. Little of this chatter has, however, focused on the white collar exemption duties tests even though this is a more complicated web for employers to untangle. Whatever the dollar amount of the new salary test, it will be objective and straightforward. In other words, an employee will either make the required salary to be exempt or not. The tests for determining exempt duties are far more complicated and nuanced, and employers still need to carefully analyze the job duties of potentially exempt employees to ensure they can be properly classified as exempt.

For example, federal law provides that an exempt administrative employee must perform non-manual or office work directly related to the management or business operations of the company and must exercise discretion and independent judgment on significant matters. Executive employees must generally manage one or more departments, direct the work of at least two other full-time employees, and have the power to hire and fire employees. In turn, professional employees must meet the requirements of either a creative professional, learned professional, or teaching professional. To determine if these various tests are met, an employer must consult detailed federal wage and hour regulations that elaborate on test components, such as what it means to manage or direct employees, to work on a company's management or business operations, or to have discretion and independence on significant matters.

At the end of the day, the jobs duties test is like a swirling tie-dye shirt when compared to the black and white salary test. And, if an employer gets it wrong, the stakes are high. Employers who violate federal wage and hour laws can be held liable for two to three years of back pay, double damages, potential fines, and criminal prosecution. In addition, when an employee makes a wage and hour mistake, the mistake often involves more than one employee in the job category. Multiple violations affecting multiple employees can pack a heavy punch.

So, even though the proposed changes to the salary test may take a year or more to finalize, employers should start preparing now and should remember that whatever salary test is eventually adopted a careful audit of employees job duties is still required.