

Compliance Tips for Final Wage and Hour Regulations

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Practice Area: Labor and Employment

Introduction

The Department of Labor (DOL) has established final revisions to regulations governing exempt and nonexempt employees under the Fair Labor Standards Act (FLSA). The FLSA governs minimum wage, overtime pay, child labor, equal pay, and record-keeping standards for employees covered under the law.

DOL requires that employers be in compliance with the revised regulations before the implementing date on Monday, August 23, 2004. Nearly every employer—both public sector and private sector alike—may be affected by the revisions of the regulations and should actively engage in complying with the revised requirements.

The FLSA establishes broad damages that can yield significant liability to employers who are not in compliance. Willful violations can escalate the scope of damages and trigger liability for liquidated damages. Furthermore, employees who sue as individuals may be entitled to attorneys' fees. Compliance can also have its rewards because the new regulations may allow employers to classify more employees as exempt, thereby reducing payment of overtime wages. The new regulations also provide a Safe Harbor provision. Safe Harbor allows employers to create a written policy that dictates the employer's commitment to compliance and provides a complaint mechanism to employees for filing wage and hour claims. A Safe Harbor provision will help minimize damages and protect employers that make improper deductions from losing exempt status for an entire group of employees if corrections are made in a timely manner.

Ten Suggestions for Compliance

Employers with employees in any of the revised exempt classifications should review how the new guidelines might affect the status of their employees. Employers should work with legal counsel to conduct self-audits and revise employee job duties, job descriptions, employee handbooks, and workplace policies. Employers should also establish a Safe Harbor Policy and train appropriate administrators, managers, and payroll department personnel.

1. *Start Now—Conduct a Self-Audit and Seek Assistance.* Employers that begin the reclassification process sooner rather than later will have more time to classify employees, update salary-basis and wage-deduction policies, and place themselves in a better position to avoid, deter, or protect themselves from costly litigation. Audit your payroll practices, and review salary levels, partial-day salary deductions, and any potential violations of the new standard salary-basis test. Correct any violations immediately by resolving these problems under the current regulations' window of correction provisions. Also, take the time to explain to your employees that new regulations require compliance with the law and that any payroll changes are the result of these new rules.

2. *Comply with the Revised Salary-Basis Test.* Determine whether your employees receive salaried compensation at or above the new standard test requiring payment of at least \$455.00 per week. If salaried employees do not earn \$455.00 per week, then do not classify the employee as exempt.

3. *Train your Payroll Department, Managers, and Administrators.* The Payroll Department is your front-line defense to wage and hour violations. A properly trained payroll department will ensure that managers do not improperly deduct wages from employees. Properly trained managers will also minimize the potential for improper deductions.

4. *Reclassify Highly Compensated Employees.* Any nonexempt employee performing nonmanual labor and earning over \$100,000.00 may become exempt under the new regulations.

5. *Revise Job Descriptions and Job Duties.* Ensure that each employee's job description reflects the employee's actual duties. When revising job descriptions and duties, be descriptive and detailed and demonstrate how the employee's duties require the application of "discretion and independent judgment."

6. *Properly Classify Each Employee.* The new guidelines modify or establish specific exemption categories including computer employees, learned professionals, financial services industry employees, technologists and technicians, teachers, and insurance claims adjusters. Also, remember that the FLSA excludes blue-collar workers, manual laborers, and numerous rescue and public safety workers from exempt status.

7. *Document All Exemption Determinations.* Create a paper record that explains reasons why employees are classified into exempt and nonexempt categories. Also, establish a primary duty for exempt employees and document why the primary duty makes the employee exempt. In the event that litigation arises, proper documentation will allow an employee to establish a good faith defense to certain damage provisions such as liquidated damages.

8. *Revise Employee Handbooks and Workplace Policies.* Establish clear policies for salary-basis issues and wage deductions, and consider separating sections of workplace policies that are applicable to exempt and nonexempt employees. Take into account the following considerations when revising the policies:

- Recording and tracking hours of exempt employees,
- Requiring exempt employees to work specific schedules,
- Providing some overtime pay to exempt employees,
- "Declaring" the work week,
- Establishing processes for deducting leave from employees' leave accounts, and
- Establishing a broader disciplinary deduction policy.

Also, use this opportunity to revise and institute new or updated timekeeping procedures for employees.

9. *Establish and Comply with the New Safe Harbor Rule.* A Safe Harbor insulates an employer from certain salary-basis errors and minimizes financial repercussions from improper deductions. An employer can rely on the Safe Harbor if the employer:

- Establishes a clearly communicated policy prohibiting improper deductions;
- Establishes an employee complaint mechanism;
- Reimburses employees for wrongful deductions; and
- Affirms their commitment to future FLSA compliance.

10. *Consult State and Local Laws and Collective Bargaining Agreements.* While the FLSA establishes minimum standards, state and municipal laws and collective bargaining agreements may establish broader protections in favor of employees. Make certain that any changes do not violate state and local laws and contractual agreements. Consult an attorney if you need assistance determining whether any broader protections apply to your employees.

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