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FLSA UPDATE

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FLSA Update

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Why should you care about the FLSA?

During the time frame of 2000 to 2015, the number of Fair Labor Standards Act (FLSA) lawsuits filed has increased by 354 percent.[1] In comparison, there has been a 42 percent *decrease* in civil rights-employment litigation (*e.g.*, Title VII claims, Title IX claims, Section 1983 claims).[2] In the same fifteen-year time frame, the Wage and Hour Division of the Department of Labor (DOL) has increased the number of hours it spends investigating FLSA violations and pursuing enforcement actions in Texas by 84 percent.[3] Further, the DOL collected $266,566,178 in back wages from Texas employers in 2016 — 63 percent more than the agency collected in 2000 ($163,735,341).[4] As these numbers demonstrate, it is more imperative than ever that employers, including educational institutions, ensure that their employment practices strictly comply with the FLSA's requirements.

New Overtime Regulations . . . Maybe

Quick background information

Congress enacted the FLSA in 1938 as part of President Franklin D. Roosevelt's New Deal legislation. The FLSA applies to all employers engaged in commerce (both public and private), regardless of the size of the employer's operation.[5] In a nutshell, the FLSA requires employers to:

(1) Pay qualifying nonexempt employees at an hourly rate of no less than the federal minimum wage (currently $7.25);
(2) Pay nonexempt employees overtime wages for all hours over forty that the employee works during a single workweek; and
(3) Keep accurate records of the hours worked and wages paid to their employees, as well as certain personal information.[6]

The FLSA exempts certain types of employees from its overtime and recordkeeping requirements, including bona fide executive, administrative and professional employees.[7]

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[1] "Judicial Facts and Figures", published by the United States Courts, reporting through Sept. 30, 2015, available at *http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-facts-and-figures.*
[2] *Id.*
[3] https://www.dol.gov/whd/statistics/2008FiscalYear.htm
[4] *Id.*
[5] 29 U.S.C. §§ 203, 206
[6] 29 U.S.C. §§ 206, 207(a), 211; *see also* 29 C.F.R. Part 516.
[7] 29 U.S.C. § 213(a)(1).

The exemption for executive, administrative, and professional employees is commonly referred to as the "white collar" or "EAP" exemption. Congress did not define "executive", "administrative", or "professional" in the statute, but delegated the power to define and delimit these terms to the Secretary of Labor. In turn, the Secretary of Labor authorized the DOL to issue regulations interpreting the white collar exemption.

The DOL's initial regulations defined "executive", "administrative" and "professional" based solely on the duties these employees performed. Since then, the DOL has amended its regulations several times to revise the tests for assessing whether an employee qualified for the white collar exemption. In 2004, the DOL implemented the three-part test currently in effect.[8] Under the current test, the employee must be paid on a salary basis; the salary must meet the minimum salary level established by the regulations (currently $455 per week, or $23,660 annually); and the employee must primarily perform executive, administrative, or professional duties.

Proposed changes to the White Collar Exemption

In March 2014, President Obama issued a memorandum directing the Secretary of Labor to modernize the overtime regulations addressing the white collar exemption. On July 6, 2015, the DOL published a Notice of Proposed Rulemaking and invited the public to submit written comments.[9] The DOL received approximately 293,000 comments before it published the final version of the rule (Final Rule) on May 23, 2016. The Final Rule increases the salary level for the white collar exemption to $921 per week ($47,892 annually) and provides for an automatic mechanism to adjust the salary level every three years. The Final Rule was scheduled to take effect December 1, 2016.

Twenty-one states, including Texas, banded together to file a lawsuit seeking to enjoin the DOL from implementing the Final Rule.[10] Additionally, over fifty chambers of commerce and other entities representing businesses across the state of Texas filed a parallel lawsuit challenging the Final Rule.[11] The two actions were consolidated in the U.S. District Court for the Eastern District of Texas, Sherman Division, before U.S. District Court Judge Amos L. Mazzant III.[12]

[8] 29 C.F.R. § 541.
[9] 80 Federal Register 38515.
[10] *State of Nevada, et al v. United States Dep't of Labor, et al*, C.A. No. 4:16-CV-00731 (E.D. Tex. Nov. 22, 2016) (The "State Plaintiffs" are: Nevada, Texas, Alabama, Arizona, Arkansas, Georgia, Indiana, Kansas, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, Utah, Wisconsin, Kentucky, Iowa, Maine, New Mexico, Mississippi, and Michigan).
[11] *Plano Chamber of Commerce, et al v. Perez, et al.*, C.A. No, 4:16-cv-732 (E.D. Tex. Sept. 20, 2016).
[12] Judge Mazzant was nominated for the federal bench by President Obama in 2014.

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