Young Lawyers Division

Compliance without cost

Understanding and avoiding the potential economic impact of changes to federal overtime regulations

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The U.S. Department of Labor (DOL) recently updated its federal overtime regulations, in an effort to extend overtime wages to workers not currently covered under the Fair Labor Standards Act (FLSA). The U.S. District Court for the Eastern District of Texas recently enjoined the Department of Labor from implementing the regulations on Dec. 1, 2016, as planned. As the litigation continues, it is uncertain whether the court will ultimately permit the DOL to implement its updated regulations. While the parties continue to litigate the matter, attorneys representing employers should take this opportunity to advise their clients on strategies to avoid the updated regulations' anticipated economic burden, should the courts ultimately rule that the DOL may implement them.

The updated regulations, if implemented, would benefit some employees, while significantly burdening employers. The DOL's updated regulations would raise the mandatory minimum salary for exempt workers from $455 per week (or approximately $23,600 per year) to $913 per week (or $47,476 per year). If the DOL ultimately implements its updated regulations, employers who pay their salaried employees less than $47,476 per year would either have to increase these employees' salaries, or re-classify the employees as non-exempt. Under the Fair Labor Standards Act, employers must pay all non-exempt employees overtime, at a rate of one and a half times their regular hourly rate, for each hour they work over forty (40) in a single week. The DOL's updated regulations, if implemented, would require employers to incur significant expense to either increase employees' salaries to maintain their exempt status, or to pay overtime to employees rendered non-exempt.

Indeed, the DOL specifically updated its regulations in an effort to provide more workers with additional income, whether through increased salaries or new overtime benefits. The regulations, once implemented, have the potential of benefiting many employees, as the DOL estimates that the changed regulations will impact 4.2 million workers nationwide, with 84,000 of these workers in Massachusetts alone.

At the same time, however, the updated regulations, if implemented, would significantly burden employers. The DOL has estimated that the updated overtime regulations would require employers nationwide to pay their employees an additional, estimated $1.2 billion in wages per year. The economic impact of the updated regulations, if implemented, would go far beyond employers' new obligations to pay employees additional wages, however. The DOL has estimated that, nationwide, employers would incur an additional approximately $295 million in non-wage related costs (including adjustment costs, management costs, and regulatory familiarization costs) each year for the first 10 years if the regulations were to go into effect.

If the updated regulations are ultimately implemented, Massachusetts employers who fail to comply will likely face significant penalties including both mandatory treble damages and mandatory reasonable attorneys' fees awards under the Massachusetts Wage Act. Further, to the extent that Massachusetts and federal governments' recent heightened focus on enforcing wage laws to deter wage theft continues, employers who fail to comply with the updated regulations, once implemented, will likely also continue to face additional, significant economic fines and penalties issued by the government.

Massachusetts employers may take several steps to ensure compliance with the updated regulations, while protecting their bottom line. Although we anticipate that the updated regulations, if ultimately implemented, would greatly impact Massachusetts businesses, there are several changes employers may implement, to ensure compliance with the DOL's updated overtime regulations (if and when they are effective), while limiting the regulations' overall economic impact. Thus, while the regulations' future remains uncertain, attorneys advising employers should take this opportunity to advise their clients as to the anticipated economic impact of the updated regulations, and ways to minimize this impact, if and when the regulations go into effect.

First employers may comply with the regulations, once they are effective, by simply raising the salary of those exempt employees who currently earn between $23,600 per year to $47,476 per year. In doing so, employers would not only comply with the updated overtime regulations, they would also ensure that their exempt employees can continue to perform unlimited overtime hours, without any additional cost. Employees whose employees already earn close to the new $47,476 per year threshold may ultimately choose this option to avoid the potentially significant additional costs associated with formerly-exempt employees becoming eligible once the DOL can implement its updated regulations. Further, employers with significant overtime needs may ultimately choose to comply with the updated regulations in this manner, as increased costs associated with raising exempt employees' salaries to comply with the new regulations, once implemented, may ultimately cost less than paying those same employees (if rendered non-exempt) at time and a half for significant overtime hours.

Second, employers may comply with the updated regulations, once they are implemented, by simply re-classifying previously exempt employees earning less than $47,476 per year as non-exempt, and then paying these newly non-exempt employees time and a half for all overtime hours worked over 40 per week. If and when the new overtime regulations are implemented, businesses which rarely require their employees to work over forty (40) hours in a single week will likely choose to comply in this manner, as will businesses which can afford to pay their employees for overtime work without excessive cost (e.g., employers whose non-exempt workers earn a relatively low wage).

Third, many employers may ultimately choose to limit the hours their employees work to 40 hours per week, with requirements for employees to seek approval prior to working any overtime hours. If and when the DOL is able to implement its updated overtime regulations, businesses which can easily limit their employees' hours to 40 per week may choose to comply by doing so. As always, however, businesses who limit non-exempt employees to working only 40 hours per week must not only implement a system to approve overtime hours as required, they must be prepared to pay all overtime worked, with or without approval, as prior approval for overtime is not a prerequisite for its payment under the FLSA.

Fourth, once the regulations are implemented, employers may off-set their anticipated economic impact by reducing newly non-exempt employees' hourly wages, thereby off-setting the cost of any overtime compensation to which these workers would be entitled, under the changed regulations.

Fifth, employers may avoid any additional costs by raising a few exempt employees' salaries to $47,476, and then offsetting the increased economic burden by eliminating redundant employees.

Lastly, employers faced with the potential economic impact of the updated regulations may choose to extend a single (formerly exempt) employee's job duties over multiple non-exempt employees, to avoid a single employee ever earning overtime. For example, if an employer uses two employees to perform what was once a single role, that employer may use 80 hours of employee time per week (40 per employee), without having to pay a single hour of overtime.

Conclusion

While the courts continue to determine whether to ultimately permit the DOL to implement its updated overtime regulations, attorneys representing employers should take this opportunity to advise their clients on ways to diminish the economic burden the updated regulations will cause, once implemented. For example, although the DOL has estimated that its updated overtime regulations will significantly impact employers, businesses may reduce such an impact by implementing one or more of the recommendations set forth above. Attorneys advising employers should work closely with their clients to not only ensure compliance with the DOL regulations once implemented, they should use this time of uncertainty to determine how employers may best comply with the regulations, if and when they are implemented, while still protecting their bottom line. ■

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Code could save interested parties a lot of time and money by avoiding litigation.

Parties may also pursue decanting as an option to effectuate a change in the provisions of an irrevocable trust. Decanting is a method used to distribute trust property from one irrevocable trust to another with different terms. If the original trust provides that a trustee can make distributions "*to or for the benefit of*" the beneficiary, the SJC has held that distributions to a new trust for the same beneficiary are permissible. *Morse v. Kraft*, 466 Mass. 92 (2013). This must be carefully done to ensure that the decanting itself will not create adverse tax consequences, but in the appropriate context, it is an option worth considering.

Regardless of how a family may have arrived at a crossroads with a trust instrument — whether through a drafting error, a change in the law, or a change in circumstance, families should be aware that there are many trust reformation options available that not only will effectuate the settlor's intent but also may avoid costly litigation. ■

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