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Rising Salary Levels Governing Fair Labor Standards Act's 'White Collar' Exemptions May Lift Union Votes

Since March 14, 2016, when the Department of Labor (DOL) transmitted its final rule to the Office of Management and Budget (OMB) increasing the salary required to qualify for the “white collar” overtime exemptions under the Fair Labor Standards Act (FLSA), employers have been encouraged to start planning to ensure compliance.¹ Whether these regulations will be published sooner than employers expect remains to be determined. Among the issues to be evaluated carefully is how the regulations will impact not only wage and hour and employment laws, but also traditional labor law.

The New Prevailing Executive Salary Increases May Create Prevailing Wins for Union Organizing and Bargaining

The DOL proposes an increase in the white collar salary requirement from \$455 a week (or \$23,660 per year) to about \$970 per week (or \$50,440 per year) and could include an automatic adjustment to the “salary” test to ensure that new salary levels are an effective measure for the exemptions from overtime under the FLSA. The salary test for the “highly compensated” exemption would also increase from \$100,000 per year to \$122,148 per year. In addition, the DOL has requested further input from stakeholders on the “duties” tests for the various exemptions.

These changes have the potential to significantly impact union organization campaigns as well as bargaining positions. The concept of more than doubling the white collar salary exemption minimum from \$23,660 to \$50,440 per year should be significant; and, if the past is prologue, salary minimum increases for supervisory exemptions may be utilized to suggest that the minimum wage should be doubled accordingly. The white collar exemptions are well-known, and the increases necessary to maintain them will be known to recipients and to all in the workplace. This can impact and increase union organizational activities and demands — even more so than it has in the past. Employees now making the minimum wage or above minimum wage may want similar increases and may be driven to support unions’ campaigns for

¹ Please see our previous *GT Alert*, [“Start Planning! The Department of Labor’s White Collar Overtime Rules are Coming...For Real.”](#)

raising the minimum wage, or unionization itself. Alternatively, if currently exempt supervisors are not receiving, or are not increased to the new levels, they will both lose their exempt status and become aware of the potential increases they did not receive. Even if such employees are able to retain their supervisory titles and earn the same amount by virtue of being paid overtime, such a change to nonexempt status could lead to real or perceived negative impacts. Supervisors converted to hourly plus overtime pay may be upset that they have lost the freedom to work the flexible hours they desire (and occasionally take breaks without being tracked “on the clock”). As a result, they may also be motivated to seek “concerted” and collective action, and consider union organizing campaigns.

Proposed Increases will be Publicized Even if not Granted

Although the proposed salary increases for white collar exemptions may not be granted to all currently-exempt employees, they will be publicized for all to see. Those not receiving such increases, as well as others, will be aware of the differences. This may lead not only to union organizing and benefit demands, but also may lead to increased employment tensions. Those currently-exempt supervisors who do not receive increases may be unhappy and be more aggressive in evaluating their employers’ policies. Some may be more hostile and inclined to take adverse actions under the multiplicity of labor and employment laws that exist. Others may be dissatisfied with their current positions and seek other employment opportunities, which may have negative impacts in the workplace.

Increases May Offer Promised Potential Benefits to Unions

The reality is that the administration was committed from the outset to its union constituents. The recent trend of action by regulatory agencies from the Equal Employment Opportunity Commission to the National Labor Relations Board, to the DOL and the IRS, has included “wake-up calls” promulgating policies, memoranda, programs, and rulings to promote and increase union organizing and protected “concerted” activities. The new salary increases proposed for the exemptions may provide benefits to unions and may become a mechanism for those seeking to obtain wage increases, those seeking to “develop the middle class,” and those seeking other objectives. It is premature to determine whether proposed increased salaries will be implemented and, if implemented, whether they will be blocked by the judiciary; and, if not blocked by the judiciary, whether they will be reversed by virtue of the pending presidential election. However, it is not premature to consult with your counsel in order to evaluate workplace solutions that include complaint systems, wage increases tied to productivity, and other beneficial results and programs that eliminate or minimize workplace tensions. A variety of mechanisms exists for minimizing such problems and should be considered as a result of the minimum salary increases anticipated and their potential workplace impacts.

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