

Big Wage & Hour Changes Coming for Employers But at Least KCMO Minimum Wage is on Hold

[fusion_text]Employers need to start planning now for some big up-coming changes in how they classify and pay their employees. **Fewer Employees Will be Exempt from Overtime** The biggest change relates to which employees are going to be exempt from overtime. On June 30, 2015, the U.S. Department of Labor (DOL) issued proposed regulations significantly increasing the minimum pay requirements in order for employees to be exempt from overtime. Because these regulations are only proposed regulations, we do not know if the final regulations (likely to be issued in late 2015 or early 2016) will differ. However, because the final regulations will likely take effect approximately 60 days after they are issued, prudent employers should start thinking now about how these changes will affect their business. *Here is what we do know:* The minimum weekly salary for exempt employees, presently \$455 per week or \$23,660 yearly, will increase – although we don't know for sure how much that increase will be. The new minimum weekly salary is proposed to increase to the 40th percentile of weekly earnings for full-time salaried workers in the U.S., which is estimated to be \$970 per week or \$50,440 per year in 2016. The minimum annual salary in order for highly compensated employees to be exempt from overtime will increase from the current amount of \$100,000 to a higher number – proposed to be \$122,148. This proposed amount might change as well as other requirements for this special overtime exemption. *Here is what we do not know:* Will the proposed amounts change? Will the duties test change for who is eligible for what exemption from overtime? *What to do now:* Start planning for these upcoming changes. Your options will include: Increase salaries to the proposed new minimum amount. Convert exempt employees to non-exempt employees and require the employees to keep track of their working time and overtime. Employers choosing this option need to further consider what the hourly rate should be to control payroll costs. By lowering the hourly rate (as long as it meets or exceeds the minimum wage) you may be able to pay overtime but keep total payroll costs the same. **DOL Moves to Restrict Who Can be an Independent Contractor** On July 15, 2015, in a little noticed 15-page Administrator's Interpretation, the DOL indicated that it will be taking a very broad view of which workers should be considered employees as opposed to independent contractors. Indeed, a former lawyer for the Department of Labor has stated that this new guidance "essentially declares war on the use of independent contractors" particularly in certain industries. Employers already struggle with determining who is an independent contractor given that tests under various federal and state statutes vary in their definitions of who is an independent contractor. This new DOL guidance takes a very expansive view of who is an employee and concludes that "most workers are employees under the Fair Labor Standards Act (FLSA)". This new guidance focuses on whether the worker is economically dependent on the employer (and thus an employee) or is really in business for himself or herself (and thus an independent contractor). In order to determine whether the worker is an employee or an independent contractor, the new guidance looks at the following 6 factors:

1. Is the Work an Integral Part of the Employer's Business?
2. Does the Worker's Managerial Skill Affect the Worker's Opportunity for Profit or Loss?
3. How Does the Worker's Relative Investment Compare to the Employer's Investment?
4. Does the Work Performed Require Special Skill and Initiative?
5. Is the Relationship between the Worker and the Employer Permanent or Indefinite?
6. What is the Nature and Degree of the Employer's Control?

DOL emphasizes that its so-called economic realities test requires an examination of all 6 factors and

that the “control” factor, which is the primary factor under the common law test for who is an independent contractor, should not play an oversized role in the analysis. Last year DOL working with the IRS and 22 states (including Missouri) to correct what it considers to be misclassification of employees as independent contractors resulted in employers having to pay \$79 million in back wages for more than 100,000 workers. With this expansive definition of who is an employee and DOL’s intent to aggressively investigate and reclassify workers as employees rather than independent contractors, this total is likely to increase in the future.

State and Local/City Minimum Wage Laws Not only do employers have to worry about increased overtime obligations, but states and cities around the country are passing their own minimum wage laws requiring minimum wages above the federal level. For example, on July 15, 2015, the Kansas City, Missouri Council passed an ordinance establishing an \$8.50 per hour minimum wage effective August 24, 2015, which would increase to \$13 per hour by 2020. This ordinance provides that employers who violate it are required to pay a fine of as much as \$1,000 for each employee for every week the employer is in violation of the law. Fortunately, this ordinance is currently on hold and may be submitted to a vote by Kansas City, Missouri voters. There is another competing ballot initiative to increase the minimum wage in Kansas City, Missouri to \$10.10 per hour in 2015 and eventually to \$15 per hour by 2020. However the ordinance putting the \$15 per hour minimum wage on the ballot contains a provision calling off the election on that proposal if the State of Missouri General Assembly overrides Governor Jay Nixon’s veto of a bill that would make it unlawful for any Missouri city to pass an ordinance increasing the minimum wage above the Missouri state minimum wage. We expect any ordinance increasing the minimum wage above Missouri’s minimum wage (currently \$7.65 per hour) to face legal challenges. We will be watching the outcome of this effort to raise the minimum wage in Kansas City, Missouri. Please feel free to check with us on the status of this issue.

Health Plan Benefits and the Affordable Care Act The reclassification of an employer’s workers from independent contractors to employees could have a significant impact on the employer’s offering of employee benefits. Beginning in 2015, the so-called “pay or play” rules under the Affordable Care Act generally require an employer with 100 or more full-time employees to offer those employees and their dependents health coverage or pay a penalty. A full-time employee is generally defined as an employee who works on average 30 or more hours per week. The pay or play rules apply to employers with 50 or more full-time employees beginning in 2016. Independent contractors are not counted when determining whether an employer is subject to these requirements. An independent contractor reclassification, therefore, would increase the number of employees to whom health coverage must be offered, and could trigger the pay or play rules for an employer not previously subject to the rules. Seigfreid Bingham is planning to present a seminar on these topics after DOL announces final regulations on changes to the overtime regulations. In the meantime, if you have any questions about any of the foregoing developments, feel free to contact your regular attorney at Seigfreid Bingham for advice on any of these matters. [/fusion_text]