

Stuckey Insurance's 2017 Design Professional Risk Management Seminar

EMPLOYMENT LAW UPDATE

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Goals for Today's Discussion

- FLSA Exempt / Non-Exempt Review
- Arizona's New Paid Sick Leave

FLSA Review ...

- White Collar Exemptions
- Proposed Changes to Salary Requirement
- Salary Basis Test
- Preparations to Consider

White Collar Exemptions

- 2 Part test for employee to qualify for exemption from overtime
 - (1) Duties test
 - (2) Salary Level test*

Executive Employee

- Primary duty consists of management of the enterprise or a department or subdivision thereof. Primary duty defined as:
 - The principal, main, major, or most important duty the employee performs
- Customarily and regularly directs two full-time employees
- Has authority to hire or fire, or suggestions regarding hiring, firing, advancement, and promotion receive particular weight

Administrative Employee

- Primary duty consists of performing office or non-manual work directly related to management or general business operations. Directly and closely related defined as:
 - Tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work
 - Work that is directly and closely related to the performance of exempt work is also considered exempt work
- Exercises discretion and independent judgment regarding matters of significance

Professional Employees

Learned

- Performs work requiring advanced knowledge in a field of science or learning, customarily acquired through schooling
- Advanced knowledge may also be acquired through a combination of schooling and work experience

Professional Employees

Creative

- Primary duty consists of performing work requiring invention, imagination, originality, or talent in a recognized field of artistic endeavor

Highly Compensated Employees

- Customarily and regularly performs at least one of the exempt duties of an executive, administrative, or professional employee. Customarily and regularly defined as:
 - Greater than occasional but less than constant
 - Tasks performed customarily and regularly include work normally and recurrently performed every workweek
- Does not apply to “manual laborers” or “first responders”

Salary Level History

- 1975: 62% of full-time workers fell below the salary threshold
- 2015: 8% of full-time workers fell below the salary threshold
- DOL considers that only workers in the top 40% are paid well enough to be exempt from overtime



Salary Level For White Collar Exemptions

- Currently \$23,660 per year or \$455 per week
 - Poverty level is \$24,008 per year (family of four)
- **New Proposed Requirement**
 - \$47,476 per year (\$913 per week)
 - Tied to 40th percentile of weekly earnings of full-time salaried workers
- Automatic updates

Highly Compensated Employees

- Proposed rule increases the Highly Compensated Employee annual compensation to \$134,004
- Tied to 90th percentile of weekly earnings of full-time salaried workers

Some Good News

- DOL now allows non-discretionary bonuses incentive-based payments, and commissions to count towards required salary amount.
 - Limited to 10% of Salary Requirement
 - Must be calculated no less than quarterly
 - If bonus/incentive is not sufficient to get employee to \$913/week for all weeks worked, employer must pay difference in a catch-up payment in the first pay period after the end of the quarter
 - Does *not* apply to highly compensated employees

Unintended Consequences

- The DOL recognizes that employers are likely to reduce the working hours of currently exempt employees reclassified as a result of these regulations, and that the reduction in hours will probably lead to lower overall pay for these employees.

Salary Basis

- The employee is paid a predetermined amount each pay period that is not subject to reduction due to the quality or quantity of work
- The employee receives a full salary for any week in which the employee works regardless of the number of days or hours worked

No Docking Rule

Deductions can only be made for:

- An absence of one or more full-days for personal reasons
- An absence of one or more full-days due to sickness or disability
 - The deduction must be made in accordance with a policy or practice providing compensation for loss of salary occasioned by sickness or disability
- A penalty for an infraction of a safety rule of major significance

Improper Pay Deductions

- Employers who make improper pay deductions will lose the exemption if the facts show the employer did not intend to pay employees on a salary basis

Criticisms

- Should have smaller increases to minimum salary periodically (every 3-4 years)
- Ignores cost of living differences
- Doesn't include value of benefits and other "soft compensation"
- Set up a scenario in which minimum salary would automatically increase in time of recession

Timing

- New rules are effective ...
Who knows when?!?!?!?

Preparations to Consider

- Budget for increased wages
- Consider treating some employees as non-exempt
 - Review current pay and number of hours worked
 - On average, how many hours are employees working?
 - Spread work among more employees
- Accurate time records
 - Clock-In / Clock-Out
 - No Automatic Lunch Deductions
 - Signed Time-Sheets
 - Management Review

Proposition 206: Fair Wages and Healthy Families Act

- Passed by a wide margin (60%)
- Alters the landscape of pay and benefits available to Arizona employees.
 - Hundreds of thousands of Arizona employees received a raise on January 1, 2017, and will receive further raises later.
 - Private sector employees in Arizona, now have a right to paid sick leave beginning July 1, 2017.

Minimum Wage

Under the Act, Arizona's minimum wage of \$8.05 per hour will increase annually as follows:

- \$10.00 per hour on January 1, 2017.
- \$10.50 per hour on January 1, 2018.
- \$11.00 per hour on January 1, 2019.
- \$12.00 per hour on January 1, 2020.
- Starting January 1, 2021, the minimum wage will increase annually based on cost of living, as measured by the consumer price index.

Local Regulation of Minimum Wage

- Local ordinances may provide a higher minimum wage, an outcome which has already come to fruition
 - Flagstaff voters approved Proposition 414, which raises the minimum wage in Flagstaff to \$12.00 per hour starting in July 2017, and which will increase to \$15.00 by 2021.
 - The minimum wage in Flagstaff would increase by the cost of living, and remain at “not less than” the prescribed levels or \$2.00 above Arizona’s minimum wage.

Minimum Wage: Tipped Employees

- Employees who receive tip income can continue to earn \$3.00 per hour less than the minimum wage if their employer can prove the employee is earning at or more than the minimum wage when tips are counted.

Tipped Employees Continued ...

A.R.S. § 23-363(C)

A tip credit only applies where “the employer can establish by its records of charged tips or by the employee’s declaration for federal insurance contributions act (FICA) purposes that for each week, when adding tips received to wages paid, the employee received not less than the minimum wage for all hours worked.”

Minimum Wage: Notice and Recordkeeping

- The Act imposes new notice and recordkeeping requirements
 - Employers must post a notice of employees' rights under the Act and keep payroll records for four years.
 - Model notices compliant with the Act have been issued by the Industrial Commission of Arizona.

Paid Sick Leave - Accrual

- Beginning July 1, 2017, Arizona employers must provide paid sick leave
 - Employers with fewer than 15 employees – one hour of paid sick leave for every 30 hours worked, up to 24 hours a year.
 - Employers with 15 or more employees – one hour of paid sick leave for every 30 hours worked, up to 40 hours a year.
 - Exempt employees are assumed to work 40 hours per week for purposes of paid sick leave accrual (unless their normal work week is less than 40 hours).
 - **Employers are not prohibited from adopting or retaining an earned paid sick time policy *more generous* than the one required herein.**
A.R.S. § 23-378(A)

Paid Sick Leave - Use

- Employees employed as of June 30, 2017 may use paid sick time as soon as such time accrues
- Employees employed on July 1, 2017 or after may be required to a 90 day waiting period prior to use (although they begin accruing immediately upon hire)

Paid Sick Leave – Accrual Versus Use

- Employees are entitled to **accrue** paid sick leave year after year and there is no cap on accrual from year to year.
 - *Proposed* regulation allows employers to place a 40-hour cap on what can be rolled over from year to year. However, currently, this is just a proposal. As the law stands, there is no cap on accrual from year to year.
- Employees can be capped on the **use** of paid sick leave (40 hours / 24 hours – depending upon the size of the employer)

Paid Sick Leave – Carry over

- Employees may carry over earned sick leave to the following year.
- Employers can avoid the rollover, but only if the employer pays out the earned sick leave at the end of the year and grants the full allotment of sick leave for the following year.

Paid Sick Leave – Reasons for Leave

- Reasons employees may use paid sick leave
 - Employee’s own physical or mental illness
 - Care for the employee’s family member who has a physical or mental illness
 - Public health emergency
 - To ameliorate the effects of domestic violence, sexual violence, or stalking of the employee or employee’s family member
 - Other circumstances

Paid Sick Leave – Notices and Paychecks

- Employers must post a notice in the workplace that outlines employees' right to paid sick leave and their protections under the Act.
 - Employers must itemize on employees' paychecks
 - the amount of paid sick leave available to the employee,
 - the amount of sick leave taken by the employee in the year to date, and
 - the amount of pay the employee has received as paid sick time, if any.
 - Failure to do so shall raise a rebuttable presumption that the employer did not pay the required minimum wage rate or earned paid sick time.
- A.R.S. § 23-364(D)**

Paid Sick Leave - Documentation

- There are numerous types of documentation that may be acceptable from employees to demonstrate they are entitled to paid sick leave. For example:
 - A doctor's note
 - A signed statement from the employee, or
 - A protective order
- Employers cannot require that employees disclose the details about the health condition of the employee or family member, or the details of the domestic violence, sexual violence, abuse or stalking.

Paid Sick Leave - Increments

- Employers must permit employees to use paid sick leave in the smaller of (1) hourly increments; or (2) the smallest increment that their payroll system uses to account for absences or other time.

Paid Sick Leave – Replacement Employees

- Employers cannot require employees, as a condition of using paid sick leave, to find a replacement worker.

Paid Sick Leave – Misc. Protections

- Employers cannot count the use of paid sick leave as an absence that leads to discipline or termination.
- Employers cannot retaliate against employees for using or seeking to use paid sick leave.

Paid Sick Leave – More On Retaliation

- If an employee exercises rights under Prop 206 (for example, takes a paid sick day), and if there is any adverse action against the employee within 90 days, it is presumed that the employee was retaliated against!
- Can overcome presumption only by clear and convincing evidence.

Paid Sick Leave – Pay out upon termination or rehire

- Employers do not need to pay out the paid sick leave upon termination of employment, but if the same employee is rehired within nine months of termination, the accrued, unused sick leave needs to be reinstated and the employee can use that balance immediately upon rehire.

Enforcement

A.R.S. § 23-364(H)

A civil action to enforce this article may be commenced no later than two years after a violation last occurs, or three years in the case of a willful violation, and may encompass all violations that occurred as part of a continuing course of employer conduct regardless of their date.

Enforcement

A.R.S. § 23-364(H)

“No verbal or written agreement or employment contract may waive any rights under this article.”

Questions?

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