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Start Planning Now To Comply With Recent Changes To Federal Employment Law

By Shane P. Swilley– Employment Law Group

The Feds have been busy this year with passing new rules that will affect employers across the country. Many of these changes take effect in the next few months, so here's a friendly reminder to get you to start game-planning for compliance.

- ***DOL Raises FLSA Mininum Salary for Overtime-Exempt Employees***

The Fair Labor Standards Act (FLSA) requires employers nationwide to pay employees at least the Federal minimum wage ($7.25/hour) and overtime pay for time worked over 40 hours in a workweek, unless the employee qualifies for one of the narrow exemptions set forth in the law.

The most well-known overtime-exempt employees are commonly referred to as "salary-exempt." These are those employees who qualify for the Executive, Administrative, or Professional worker exemptions. These exemptions require that the employee meet both (1) the strict "primary duties" test specific to each exemption and (2) be paid on a salary basis (as opposed to an hourly basis). The new U.S. Department of Labor (DOL) rule substantially raises the minimum salary for these exemptions from $23,660 annually (or $455/week) to $47,476 (or $913/week), exclusive of any credit for board, lodging or other facilities. Remember, though, that paying the employee on a salary basis alone does not qualify the employee as overtime-exempt. The employee must also meet the "primary duties" test for the specific exemption. A list of the "primary duties" for these and other exemptions can be found on the DOL's website at this link.

The FLSA also currently exempts from overtime those Highly Compensated Employees (HCE) who are paid on a salary basis, meet a less strict "primary duties" test, and receive total annual compensation of at least $100,000. The new rule increases the minimum annual compensation from $100,000 to $134,004.

After the new salary levels take effect, employers may include nondiscretionary bonuses and incentive payments that are paid quarterly or more frequently, including commissions, to satisfy up to 10 percent of the new salary levels.

The new rule does allow employers some limited opportunities for "make-up" payments in the event an employee does not meet the minimum salary requirement during a particular period. For the exemptions other than the HCE exemption, if the employee's weekly salary and nondiscretionary bonuses and incentive payments do not equal 13 times the minimum weekly salary (or $11,869) for a calendar quarter, then the employer can make one final payment no later than the next pay period to cover the difference. For the HCE exemption, employers can make one payment during the first quarter following the year in question if the total annual compensation was not reached for that year.

These changes go into effect December 1, 2016. If the new requirements are not met, then the employee will longer be considered exempt from being paid overtime. To prepare, employers should review each of their exempt-designated employees to determine: (1) if the employee meets the applicable primary duties test to qualify as exempt; and (2) whether their salary needs to be increased. In some instances, it may make more financial sense

to switch to paying an employee overtime instead of increasing their salary. For assistance, you should consult with an employment law attorney or qualified HR professional.

- ***OSHA Adopts New Rules Requiring Electronic Reporting of Workplace Injuries***

The Federal Occupational Safety and Health Administration (OSHA) adopted a new rule requiring many employers to start reporting and submitting information regarding workplace injuries and illnesses to OSHA electronically. This information will be used by OSHA to track workplace injuries and illnesses, and for posting on the OSHA website in an effort to shame employers into taking workplace safety seriously. Employers covered by this rule should already be recording and preserving the information internally. These reporting requirements go into effect January 1, 2017.

The new OHSA reporting requirements apply to: (1) establishments with 250 or more employees that are currently required to keep OSHA injury and illness records; and (2) establishments with 20 to 249 employees that are classified in certain industries with historically high rates of occupational injuries or illnesses, such as construction and manufacturing. A list of those high risk industries can be found by clicking this link.

The new OHSA rule also prohibits employers from discouraging workers from reporting an injury or illness; requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation; clarifies the existing requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not discourage employees from reporting; and incorporates the existing prohibition on retaliating against employees for reporting work-related injuries or illnesses. These provisions went into effect on August 10, 2016, but OSHA is delaying enforcement until November 1, 2016. Employers can meet the obligation to inform employees of their rights by posting a version of the OSHA Job Safety and Health – It's The Law poster from April 2015 or later. A free copy can be obtained from OSHA by clicking this link.

- ***New Federal Trade Secrets Bill Protects Whistleblowers Who Disclose Your Trade Secrets***

On May 11, 2016, President Obama signed into law the Defend Trade Secrets Act to create a federal system of trade secrets law. The law provides many of the same trade secret protections already that have long been available under Oregon's Uniform Trade Secrets Act.

However, there is one unique provision of the law that employers should be aware of. The new law provides that an individual cannot be held criminally or civilly liable under any Federal or State law (including, it seems, Oregon's trade secret law) for disclosing a trade secret under the following circumstances:

1. The trade secret is disclosed in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney, for the purpose of reporting or investigating a suspected violation of law;

2. The trade secret is disclosed as part of a lawsuit, so long as the information is filed under seal; or

3. The trade secret is disclosed to the individual's attorney or filed with a court under seal as part of a lawsuit against the employer for reporting a suspected violation of law.

The law also requires employers to notify their employees of the laws protections listed above. The notice must be provided in any contract or agreement the employer has with its employees that governs the use of trade secrets or other confidential information. This includes confidentiality and nondisclosure agreements.

START PLANNING NOW TO COMPLY...
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Employers who fail to include the notice in their employment agreements are barred from seeking certain damages or recovering attorney fees under the Defend Trade Secrets Act if a claim is brought against the employee. To preserve their rights under the law, employers should revise their employee confidentiality agreements to include the required notice.

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If you have any questions about the content of this newsletter, please contact Shane P. Swilley at (503) 276-6074 or swilley@cosgravelaw.com.

Take advantage of our free consultation to review the current state of your employment policies and procedures. This service is invaluable to ensure compliance with current employment laws. For more information or to schedule an appointment, contact Shane Swilley.

If you or your company has been threatened with litigation, or a lawsuit or complaint has been filed, then contact the head of Cosgrave's Employment Law Group, Tim Coleman, at (503) 219-3810 or tcoleman@cosgravelaw.com for a consultation.

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