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Memorandum

TO: Troy Bredenkamp, NREA Managers
FROM: Dave Jarecke
DATE: May 23, 2016
RE: FLSA 2016 Changes

In May 2016, the Fair Labor Standards Act (FLSA), which governs federal minimum wage and overtime pay requirements, was amended. Those changes are effective December 1, 2016. The Fair Labor Standards Act (FLSA) establishes minimum wage and overtime pay standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments.

Who Does the FLSA Apply To? All PPDs and Coops

1. Enterprise Coverage: Employees who work for certain businesses or organizations (or "enterprises") are covered by the FLSA. These enterprises must have at least two employees and are:

- (1) those that have an annual dollar volume of sales or business done of at least \$500,000
- (2) hospitals, businesses providing medical or nursing care for residents, schools and preschools, and government agencies

2. Individual Coverage: Even when there is no enterprise coverage, employees are protected by the FLSA if their work regularly involves them in interstate commerce. The FLSA covers individual workers who work for a company that is "engaged in commerce or in the production of goods for commerce."

What does the FLSA require?

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as a bona fide executive, administrative, professional and outside sales employees. There is also an exemption for Highly Compensated Workers. To qualify for an exemption, employees generally must meet certain tests regarding their job duties and be paid on a certain salary basis. Job titles do not determine exempt status.

Administrative Exemption

In order to qualify for the administrative exemption, three elements must be met:

1. The employee must be compensated on a salary or fee basis of at least **\$913** per week, or **\$47,476** annually;
2. The employee's primary duty, i.e. most important duties, must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; 29 C.F.R. § 541.200
3. The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. 29 C.F.R. § 541.200

Additional guidance is available for elements two and three. To meet element two's "directly related to management or general business operations" the employee must perform work directly related to assisting with running the business. The regulations provide example categories: finance, advertising, marketing, personnel management, public relations, labor relations, and human resources. 29 U.S.C. § 541.201(b).

To meet element three, the employee must exercise of discretion and independent judgment regarding matters of significance. To determine whether an employee exercises discretion and independent judgement, consider these factors: the employee has the authority to make independent choices free from immediate supervision: whether the employee performs work that affects business operations to a substantial degree; whether the employee has authority to commit the employer in matters that have a significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without approval; whether the employee has authority to negotiate and bind the employer on significant matters: whether the employee is involved in planning long- or short-term business objectives. 29 C.F.R. § 541.202(b). This does not require the employee's decision to be final; rather, it can be revised or reversed without negating their exercise of discretion and independent judgment. 29 C.F.R. § 541.202(c)(e).

The determination of whether an employee is exercising discretion and independent judgment regarding matters of significance, goes to “matters of significance.” This simply refers to the level of importance and the consequences of the employee’s work. There are no specific examples or instances of per se “matters of significance.” Rather, it must be considered in the context of the previously listed factors. Importantly, an employer experiencing financial loss is not sufficient in itself for the work to be considered “significant.”

Executive Exemption

In order to qualify for the executive exemption, four elements must be met:

1. The employee must be compensated on a salary or fee basis of at least **\$913** per week;
2. The employee’s primary duty must be management of the company or a subdivision of the company in which the employee is employed; 29 C.F.R. § 541.100
3. The employee must customarily and regularly direct the work of two or more other employees; 29 C.F.R. § 541.200
4. The employee must have the authority to hire or fire other employees or the employee’s recommendations as to hiring and firing must be given particular weight. 29 C.F.R. § 541.200

Additional regulations provide guidance on how to interpret the proceeding elements. In element two, §541.102 provides that ‘management’ includes activities such as selecting employees, setting and adjusting employee pay rate, directing the work of employees, maintaining production or sales records for use in supervision or control, and appraising employees productivity. Additionally, in element two, §541.103(a) provides that a ‘customarily recognized department or subdivision’ must have a permanent status and continuing function.

To satisfy element four, the following factors should be examined to determine if the employee’s hiring and firing decisions are given ‘particular weight’: whether it is part of the employee’s job duties to make such suggestions and recommendations; the frequency with which suggestions and recommendations are made or requested; and the frequency with which the employee’s suggestions and recommendations are relied upon. §541.105. Typically, the suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs.

Professional Exemption

In order to qualify for the professional exemption, two elements must be met:

1. The employee must be compensated on a fee basis of at least **\$913** a week;
2. The primary duty of the employee must be the performance of work that requires knowledge of an advanced type of field that is customarily acquired through lengthy specialized intellectual instruction or the primary duty of the employee requires invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. §541.300.

To meet the second element, §541.301(a) provides a primary duty test comprised of three elements. To qualify, 1) the employee must perform work requiring advanced knowledge, 2) the advanced knowledge must be in a field of science and learning; and 3) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. §541.301(a)(1)-(3).

2016 Changes Summary

The primary change is the increased salary threshold component for exempt employees from **\$455** a week to **\$913** a week. The new rule also includes a mechanism in which the salary amount for the administrative, executive, professional exemption and the highly compensated worker exemption will automatically update every three years based on wage growth. The new rule will not change any of the existing job duty requirements necessary to qualify an individual for an exemption.

Please contact me with questions or to evaluate specific positions and their exempt status.