2017 Wage & Hour Update: New Overtime Rules
First Run Broadcast: January 5, 2017
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New overtime regulations, the most sweeping in several decades, recently went into effect. These new regulations, issued by the U.S. Department of Labor, expand the number and type of workers who are entitled to overtime. Managerial personnel and others not previously entitled to overtime are now eligible because the “salary base” has been substantially increased. These new regulations will require a major sea-change in the practices of employers. Failure to properly classify a worker as exempt from overtime or as non-exempt exposes employers to substantial financial liability. This program will provide you with a real world guide to the new regulations, how they alter prior practice, best practices for avoiding liability, and a review of recent litigation surrounding the regulations.

- Overview of new overtime regulations – what’s changed, what hasn’t
- Changes to salary basis test for salaried workers
- Managerial and other personnel now entitled to overtime
- Trends in wage-and-hour litigation/classification
- Annual compensation changes for high compensated employees
- Current status of new regulations – Texas litigation and potential changes by the new administration
- Best practices to avoid misclassification liability

Speakers:

Shira R. Yoshor is shareholder in the Houston office of Greenburg Traurig, LLP, where her practice focuses on labor and employment matters and a wide variety of complex commercial litigation. She is experienced in representing management in virtually all aspects of labor and employment law. She regularly counsels employers on managing workplace issues, drafts employment agreements, handbooks and policies, drafts and litigates non-competition and non-disclosure agreements, and investigates claims and complaints by employees. Shira has defended individual and multi-party claims before courts and arbitrators around the country. Ms. Yoshor received her B.A., summa cum laude, from Yeshiva University and her J.D. from the University of Chicago Law School.

Carranza M. Pryor is of counsel in the Atlanta office of Greenburg Traurig, LLP, where he represents clients on a wide range of labor and employment matters. He also has extensive knowledge in complex commercial litigation matters, including securities fraud claims, class actions and real estate disputes. He counsels senior management of companies on business strategies, compliance, and risk management. He has served as an Adjunct Professor of Law at Georgia State University College of Law. Before entering private practice, he served as a judicial clerk to Judge Carl E. Stewart of the U.S. Court of Appeals for the Fifth Circuit. Mr. Pryor received his A.B., cum laude, from Harvard University and his J.D. from Yale Law School.
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“Workin’ Day and Night”
What Every Savvy Company Needs to Know
Wage and Hour Issues

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A SAVVY EMPLOYER KNOWS:

"If you don’t know where you are going, any road will get you there."

-Lewis Carroll
Savvy Employer Road Map

- Overview of New OT/Exempt Rule Changes
- Changes to Salary Basis Test
- Compensation Changes for Highly Compensated Employees
- Current Status of New Rule – Texas Litigation and Potential Changes Under New Administration
- Applying the OT/Exempt Rules to Inpats (imported employees)
- Trends in Wage and Hour Litigation
Road Map for FLSA: Overtime Rule Changes

Current Standards:

- To be OT-exempt under the FLSA, the employer must satisfy three tests:
  - Salary Level
    - Earn $23,660 per year
  - Salary Basis
    - Earn $455 per week
  - Duties
    - Perform certain duties (e.g., (1) performance of office or non-manual work related to general management of business and (2) exercise discretion and independent judgment with respect to matters of significance)
Road Map for FLSA: Overtime Rule Changes

CAUTION:

➢ Most states have their own laws that govern OT exemptions
  ➢ State laws can be different/more stringent than FLSA

➢ Must satisfy both the FLSA tests and analogous state law test to avoid OT liability
Road Map for FLSA: Overtime Rule Changes

- What Was Supposed to Happen on December 1, 2016:
  - Salary Rules
    - Salary Level and Salary Basis more than doubling
    - Both Salary Level and Salary Basis will be indexed to wage growth and will update every three years *
  - Bonus Rules
    - Non-discretionary bonuses and incentive payments can be used to cover a portion of Salary Level and Salary Basis tests
  - Duties test remains the same
Road Map for FLSA:
Overtime Rule Changes

- Salary Level – from $23,660 annually to $47,476 annually
- Salary Basis - from $455 per week to $913 per week
- Highly Compensated Employees (“HCE”) – from $100,000 annually to $134,004 annually
  - Must also meet ($913 per week Salary Basis) and Duties test
Road Map for FLSA: Overtime Rule Changes

- According to U.S. Department of Labor ("DOL") figures, 35% of salaried workers earn less than $47,476 annually ($913/week)
  - These workers are automatically eligible for OT, regardless of the duties they perform
- Workers could earn an additional $12b in OT payments in the next decade
Road Map for FLSA: Overtime Rule Changes

- Salary Level and Salary Basis tests would double
- HCE level to increasing 34%
  - Would be indexed to wage growth with increases every three years

- Nondiscretionary bonuses can be used to satisfy 10% of Salary Level and Salary Basis amounts
  - Must be paid at least quarterly
  - HCEs would still have to meet Salary Level/Basis amounts but nondiscretionary bonuses could be counted toward total compensation
On September 20, 2016, two groups filed lawsuits in the Eastern District of Texas challenging these new rules.

Road Map for FLSA: Overtime Rule Changes

- District court held that the new rule exceeded DOL’s authority under FLSA.
- Held: New rule amounts to “de facto salary-only test,” which may be unlawful
- Rule applies to all states, so nationwide injunction required
Road Map for FLSA: Overtime Rule Changes

- On December 1, 2016, DOL moved for expedited appeal of ruling – Fifth Circuit granted request
- On January 3, 2017, Judge Mazzant issued order denying request for stay of proceedings
- WHAT NEXT?!!!
Road Map for FLSA
Overtime Rule Changes

- While injunction is only temporary and not a ruling on merits, it may reenergize early 2016 Congressional attempt to stop the new rule from taking effect.
- President-Elect Trump has not spoken specifically about the overtime pay regulation.
- Trump has said he would rollback business regulations that do economic harm.
Road Map for FLSA: Plan Ahead

- Employers have time to consider options
- Reclassifications based on Duties Test are not affected
- Wait and see
  - Injunction is not a ruling on merits
  - Position of Trump Administration
  - Rule unlikely to remain as written
- If already made changes, consider sticking with them
Road Map for FLSA: Applying the OT/Exempt Rules to Inpats (imported employees)

- Bringing employees to the US to work means adapting their status to US wage/hour laws.
- Just because an employee has the title “manager” in another country does not mean they are exempt in the US.

Ensure the work being performed meets an exemption. Or consider paying them hourly and monitor their hours.
Road Map for FLSA: Applying the OT/Exempt Rules to Imported Employees

- Case study: Inpat from China
  - Global executive in China
  - Makes less than the exemption minimum in the US
  - Seconded from China and on a 2 year assignment

- What do you do?
  - Does FLSA apply?
  - What happens upon return?
Road Map for FLSA: Applying the OT/Exempt Rules to Imported Employees

Case study: Inpat from the UK

“Manager” in the UK

- UK contract allows him to opt out of overtime laws in UK, which is standard procedure
- Seconded from UK and on a 2 year assignment
- Can you rely on his UK contract in which he has opted out of overtime pay?
If you don’t know where you want to go, you won’t know that you’ve taken a wrong turn.
“Don’t Stop ‘Til You Get Enough”
More Wage and Hour Litigation In 2017
Equal Pay: Emerging Trend In Litigation

- EEOC to collect summary pay data
  - Expansion of EEO-1 reporting
- Implementation Date: March 2018
- Purpose of Rule
  - To facilitate equal pay by assisting the EEOC “in identifying possible pay discrimination, and assist[ing] employers in promoting equal pay in their workplaces.”
Equal Pay: Emerging Trend in Litigation

- Data collected
  - W-2 earnings
  - Hours worked
  - Compensation data is in addition to employment information employers are currently required to submit annually on race, ethnicity, and gender

- Affected Employers:
  - Private employers including federal contractors and subcontractors with 100 or more employees will report summary pay data
  - Federal contractors with 50-99 employees will not report summary pay data, but they will continue to report employees by job category, sex, ethnicity, and race
Minimum Wage: Increase In Pay, Increase In Litigation

- In 2016, there was an increase in prosecutions of federal and state minimum wage and overtime law violations.

- Nationwide there has been an 10% increase in wage and hour litigation annually.

- Federal Minimum Wage: $7.25
Minimum Wage: Increase In Pay, Increase In Litigation

- Several states have proposed or passed bills to increase minimum wage in 2017:
  - California- $14.00 (effective date July 2017, slated for increase to $15.00 effective July 2018)
  - Florida-$9.25 (effective date July 1, 2017, slated for an increase to $10.10 effective July 1, 2018)
  - Illinois- $11.00 (effective date July 2017)
  - Massachusetts- $11.00 ($3.75 for tipped employees) and $16.50 per hour for working on a Sunday
New Day for Joint Employer Litigation: Indirect Control

- **Browning Ferris Industries** (“BFI”)
  - 3-2 decision; previous joint employer standard no longer applies to current workplace circumstances
  - BFI, owner/operator of a recycling facility, held to be joint employer with temporary agency that supplied workers to facility
  - Eases the criteria for company to be considered joint employer- Indirect or potential control over works is sufficient to impose liability
New Day for Joint Employer Litigation: Indirect Control

- Franchisor and Franchisee Relationship could impose joint employer liability
  - In *Kucher v. Domino’s*, a former employee alleges that he was made to routinely work 20 hours a week off the clock and was not paid overtime compensation for hours worked in excess of 40 hours per week
  - NLRB has found McDonald’s is a joint employer with its franchisees in multiple wage and hour claims around the country (cases are ongoing)
Back Wages

- DOL Hotel Enforcement Initiative
  - Employees working off the clock
  - Being paid straight time for overtime hours
  - Not being paid for mandatory training time
  - Violating child labor laws restricting minors’ work hours

- In FY 2016, 41 investigations in Southeast Texas
  - Recovery of $285,000 in wages and liquidated damages
  - Over 125 workers
Back Wages

- Minnesota-based company agreed to pay 15,909 employees nationwide a total of $976,765 in back wages and liquidated damages.

- Company took deductions for uniform costs.

- In addition to back wages, company will:
  - Pay civil penalties of $99,825 for violating FLSA.
  - Conduct formal training on FLSA requirements.
Retaliation

- DOL focusing on places where violations rates high but workers are not likely to speak up – e.g., restaurant industry

- Federal law protects those who file wage complaints with the DOL and cooperate with its investigations

- DOL enforces wage and hour laws without regard to the immigration status of workers.

- Investigations even where no complaint lodged
QUESTIONS?