Healthcare Employers Should Evaluate Exempt Workers Based on New Overtime Exemption Rules

September 8, 2016

PRACTICES Labor and Employment

The U.S. Department of Labor ("DOL") has issued a final rule, effective December 1, 2016, changing aspects of the Fair Labor Standards Act ("FLSA") regarding overtime exemptions. The FLSA dictates how employees must be paid overtime for working a certain number of hours; however, "exempt" employees who are salaried and who have administrative, executive, or professional job duties do not have to be paid overtime. Previously, these employees had to be paid at least $23,660 per year to quality for the exemption. This salary threshold has been stagnant for over a decade, but now has increased to $47,476 per year ($913 per week) under the new rule. Another exemption for the "highly compensated employee" is increasing from $100,000 to $122,148 per year. In addition to meeting the threshold salary requirements, employers must also show that exempt employees meet the "duties test" for each respective exemption.

Ultimately, as a result of the changes, employers may elect to change employees to an hourly rate and allow overtime, rather than increase the employee's salary. In the healthcare industry, this change will mostly impact administrative employees, who work in human resources, technology and research workers, social workers, technicians, and information technology workers. Healthcare employers must determine whether to increase the salary for certain employees or elect to change to an hourly rate and pay overtime.

Employers who elect to change employees to an hourly rate should consider the following: 1) the communication regarding the change to employees must be clear and include new training; and 2) the computation for overtime must comply with the FLSA, but employers have options regarding how to compute this time.

First, the change in employment status from salaried to hourly should be communicated to the employee clearly, as a change in compensation may come as a surprise to the employee. The employee may need to undergo additional training specific to hourly employees. The additional training may include, but is not limited to, recording hours worked, policies against under-reporting and over-reporting hours, and how to get approval for overtime.

Second, the employer should consider the various ways of computing overtime. The FLSA provides for hospitals and residential care establishments, under prescribed conditions, an exemption from the general requirement that overtime compensation be computed on a workweek basis: the exemption is called the "8 and 80 Overtime System." To use this exception, an employer must have a prior agreement or understanding with affected employees before the work is performed. The 8 and 80 Overtime System allows employers to pay time and one-half for all hours worked over 8 in any workday and 80 hours in the fourteen-day period. See the FLSA Fact Sheet here. In the alternative, healthcare employers can pay at least time-and-one-half their "regular rate" of pay for all hours worked over 40 in a workweek.

Healthcare employers should be particularly mindful of these changes. The DOL's statistics on low wage industries reveal that in 2015 the healthcare industry was one of the industries having to pay

the most in back wages in damages for wage and hour violations. To prepare for the changes coming this December, healthcare employers should conduct an FLSA audit now to determine who may no longer be considered exempt as a result of the new rules.