

## **You've Been Meaning To Perform That FLSA Audit . . . Now You Have A Deadline.**

As you've most likely heard by now, the U.S. Department of Labor has implemented major increases in its salary thresholds for exempt and non-exempt employees under the Fair Labor Standards Act (FLSA). The Department has more than doubled the current salary threshold for the exemption from \$455 per week (\$23,660 per year) to \$913 per week (\$47,476 per year). And it has increased the total annual compensation amount required to exempt highly compensated employees from \$100,000 to \$134,000. Moreover, all these thresholds will automatically increase every three years. The regulations become effective December 1, 2016.

**Why does this matter?** Failure to properly pay or classify an employee exposes employers to significant damages. A misclassified employee can recover back wages or unpaid overtime going back three years (longer in some state laws), liquidated damages of up to 100% for willful violations, and attorneys' fees and costs. In addition, employers can be liable for retroactive employee benefits and back employment taxes on the unpaid wages, such as social security, Medicare, and unemployment tax. Beyond that, employers under government enforcement actions must open all of their books to the Department inquiry into all employee classifications and payments.

**Particular issues for nonprofits.** Although the Department has declared that it "values the enormous contributions that non-profit organizations make to the country," many nonprofits are particularly troubled by the threshold increases because they are incapable of increasing their revenues through classic for-profit increases in production or services. Indeed, despite Department assurances that it will not enforce its FLSA regulations against nonprofits as it does against for-profit enterprises, most nonprofits have opted simply to follow the for-profit FLSA guidance as a "best practices" approach. As a result, nonprofits are faced with the added task of not only shuffling their employees between the exempt and non-exempt classifications, but trying to justify to their donors the predictable payroll increases on the balance sheet.

**New To-Do List.** As your nonprofit reviews its employee classifications, here are some options:

- J Evaluate whether to bump up the salaries of employees who are on the borderline of the \$47,476 cut-off to make them non-exempt and avoid overtime costs and headaches.
- J Pay overtime above a salary. It may be better to keep an employee at the current below-threshold salary level and simply pay the overtime when accrued. This, admittedly, works best for employees who seldom work overtime.
- J Consider reclassifying some employees by adjusting their job duties, giving more or less responsibility in order to shift them into the exempt or non-exempt status, respectively.
- J Implement policies that prohibit employees from taking overtime without prior permission. (Note that employers must still pay nonexempt employees who work overtime without authorization - but they can discipline them for doing so.)
- J Consider claiming an entire exemption from FLSA requirements if your nonprofit performs no "business purpose" and your employees engage in no "interstate commerce."

**Do I need to hire a lawyer?** Certainly, a skilled HR consultant can walk a nonprofit through the new thresholds and employee classification process. But given the sensitive nature of allocating resources and reclassifying employees, an organization runs the risk that its internal communications will be discoverable in any litigation challenging the employer's decisions. By working with legal counsel, on the other hand, the nonprofit's discussions, deliberations, emails, and correspondence with its attorneys - if properly conducted - can be protected by the attorney-client privilege from later discovery. This can be a valuable protection as a nonprofit navigates the potentially dicey discussions of employee compensation, value, and longevity.

In the category of "Don't try this at home," if a nonprofit decides it wants to opt out completely from the FLSA regulations, the careful review of each employee's status under federal and state law requires nuanced legal judgments that shouldn't be attempted without legal counsel. Finally, the nonprofit gains an additional defense to any lawsuit or investigation by the very fact that it has performed an FLSA audit. This demonstrates the nonprofit hasn't ignored or tried to skirt the regulations, but has made a good-faith effort to follow them.

And all this by December 1, 2016.



**Christine Lambrou Johnson**, *Of Counsel* at Gammon & Grange, P.C., is an experienced litigator representing employers in their obligations under federal and state employment law. She prosecuted dozens of FLSA wage and hour law claims while serving as Assistant Attorney General for the State of Illinois, and successfully defended numerous discrimination suits.

**Gammon & Grange, P.C.** conducts Employment and FLSA Audits to ensure compliance with the patchwork of state and federal regulations and ultimately to help nonprofits and for-profits alike flourish as their employees thrive. Ms. Johnson would be happy to provide a no-cost initial consultation to determine whether your organization could benefit from the audit.

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