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News & Types: Employment, Labor & Benefits Update

# Employment, Labor & Benefits Update - June 2016

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Practices: Employment, Labor & Benefits

**DEPARTMENT OF LABOR RELEASES FINAL RULE INCREASING SALARY LEVEL REQUIRED FOR WHITE-COLLAR EXEMPTIONS UNDER THE FAIR LABOR STANDARDS ACT**
By Frank Del Barto

On May 18, 2016, after receiving over 250,000 comments, the U.S. Department of Labor ("DOL") released its Final Rule which updates and increases the minimum salary required in order for an executive, administrative or professional employee to qualify for an exemption from the overtime pay requirements under the Fair Labor Standards Act ("FLSA"). Effective December 1, 2016, an exempt employee must be paid at least $47,476 per year in order to be considered an exempt employee. If the employee is not paid $47,476 per year, their salary must either be increased to meet this amount, or the employee must be paid overtime for all hours worked after 40 hours in a given workweek. All employers are affected.

Generally, in order to be considered exempt from the overtime rules, employees must meet all three requirements:

1. The employee must be paid a fixed salary regardless of the quality or quantity of work performed ("salary basis test");
2. The amount of salary paid to the employee must meet a currently specified amount ("salary level test"); and
3. The employee's job duties must primarily involve executive, administrative, or professional duties ("duties test").

Under the Final Rule, the DOL is significantly changing the Salary Level Test.

Key provisions of the Final Rule effective December 1, 2016 are as follows:

1. The salary needed to be considered an exempt employee will increase from $23,660 to $47,476 per year;
2. The salary needed to be considered a highly compensated employee will increase from $100,000 to $134,004 per year;
3. The Rule automatically updates these salary levels every three years beginning January 1, 2020;

4. Employers will be able to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level.

**UNIONS - DID THE NLRB'S GENERAL COUNSEL OPEN THE DOOR TO THE DECERTIFICATION OF UNIONS?**
By Alan M. Kaplan

The General Counsel of the National Labor Relations Board ("Labor Board") recently issued Memorandum GC 16-03 (May 9, 2016) which has wide-ranging implications for companies whose employees are represented by a union. Under the National Labor Relations Act ("Labor Act"), a company has a legal obligation to recognize and bargain with a union when the union has obtained the majority support of the employees in a group (the "unit") within the company. For example, a union may represent a unit of warehouse workers at a company. If a union has won an election to represent the employees, the company has the obligation to recognize the union as the exclusive collective bargaining representative of the employees and the legal obligation to bargain with the union for a collective bargaining agreement setting forth the unit employees' wages, hours and terms and conditions of employment. After a company and union sign a collective bargaining agreement, the company has the additional contractual obligation to comply with the provisions of the agreement.

However, a union may lose its majority support. If a union loses its majority support, a company no longer has the legal obligation to recognize and bargain with the union. The three most common ways for a company to end its legal obligations to recognize and bargain with the union are by withdrawing recognition from the union (1) without a vote by the employees, (2) with a vote by the employees after the employees have filed a decertification ("RD") petition, or (3) with a vote by the employees after a company files a representative ("RM") petition. When a company withdraws recognition without a vote, the union may test the company's action by filing an unfair labor practice charge with the Labor Board. The Labor Board will investigate the union's charge and either dismiss the charge or issue a complaint and hold a hearing at which the company can present evidence that indicates that the union had lost majority support.

The General Counsel of the Labor Board is the chief prosecuting attorney for the agency. He directs the regional directors throughout the country regarding litigation strategy and the arguments to make in hearings. Administrative law judges hear the cases and issue recommended decisions, which could be appealed to the five-member Labor Board. Its members are appointed by the President with the advice and consent of the Senate.

In the recently-issued Memorandum GC 16-03, the General Counsel is now directing the regional directors to argue that a company has violated the obligation to bargain if the company withdraws recognition of a union without obtaining the results of an election either through an RD or RM voting procedure. The General Counsel correctly notes that a withdrawal of recognition could result in unnecessary litigation. In addition, the General Counsel recognizes the importance of letting the employees decide for themselves whether they want to continue to be represented by the union.

However, the General Counsel's desire to have either an RD or RM election can work to a company's advantage in ending its legal obligations to recognize and bargain with a union by filing a RM petition. Under the Labor Act, a company may not unlawfully interfere with the employees' solicitation of their co-workers to sign an RD petition. A company may not encourage the employees to sign an RD petition or solicit the employees' signatures on the RD petition. Whether the employees vote to decertify the union is the employees' decision. Although a company has the right to truthfully inform the employees about the union and share with them information, 29 U.S.C. §158(c), a company may not interfere with, coerce or restrain the employees in their right to have a fair and secret ballot.

However, in the RM process, it is the employer – and not the employees – who files a petition for an election. The election is still fair and by secret ballot. A company begins the RM process by listening to its employees, determining whether there is evidence to show that there is a "reasonable uncertainty" of the union's majority support, and, if so, filling a petition for an election with that evidence. The supporting evidence may be affidavits from supervisors who have heard or seen evidence of the "reasonable uncertainty." The Labor Board's investigator will then investigate whether there is sufficient evidence, and the regional director may order an election.

Interestingly, the Labor Board's new, so-called Quickie Election Rules, issued in early 2015, may facilitate the filing of an RM petition. Although many decry the new rules because they help unions organize employees and proceed to elections easier and faster, the Labor Board's processing of RM and RD petitions will be easier and having an election will occur faster under the Quickie Election Rules. An election under RM and RD petitions may take place within 14-21 days, rather than 40 days under the previous election rules. Therefore, the union will have less time to campaign on its own behalf. A company has its own rights under Section 8(c) of the Labor Act to express "any views, argument, or opinion…, if such expression contains no threat of reprisal, or threat, or promise of benefit." 29 U.S.C. §158(c). In addition, if a regional director dismisses an RM petition, the employees may file an RD petition and start the election process all over again. In the meantime, the union is weakened by the employees' disaffections. Of course, a union may file an unfair labor practice to block an RM or RD petition. However, the Labor Board's own Quickie Election Rules make it more difficult to block an election.

What actions should companies with unionized employees take? First, companies should become aware of the RM and RD procedures and the new regulations issued by the Labor Board last year. Second, a company should listen to its employees and comply with the Labor Act when utilizing the RM procedure. Since 1935 when President Roosevelt signed the Labor Act into law, the foundation of the Labor Act has been the employees' right to choose for themselves whether to be represented by a union. Section 1 of the Labor Act states that it is the policy of the United States to protect "the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing." 29 U.S.C. §151. Section 7 states that employees have both "the right…to form, join or assist labor organizations" and "also have the right to refrain from any or all such activities." 29 U.S.C. §157. Companies should take care to effectuate the policies and purposes of the Labor Act, while making strategic decisions to de-unionize.

*Mr. Kaplan is a former prosecuting attorney and hearing officer of the NLRB who worked in the Labor Board's Chicago Regional Office after having worked as an attorney in the General Counsel's Washington, D.C. office.

**HEALTH & WELFARE - MY INSURANCE COMPANY KEEPS ME COMPLIANT, RIGHT?**
By Frank J. Del Barto

Many companies mistakenly believe that their fully-insured group medical insurance carrier provides them with the appropriate plan documents in order to be in compliance with the plan document and summary plan description requirements under applicable federal law. Although insurance carriers will typically provide a master contract and a certificate of insurance, these documents do not normally meet the legal requirements and must be "wrapped" with various missing provisions in order to be in compliance.

Plan Document: In accordance with ERISA Section 402, every employee benefit plan must be established and maintained pursuant to a written instrument that provides for one or more named fiduciaries who have the authority to control and manage the operation and administration of the plan. Additionally, the plan must provide a procedure for establishing and carrying out a funding policy, describe any procedures for the allocation of responsibilities for the plan's operation and administration, provide a procedure for amending the plan, identify who has the authority to amend the plan, and specify on what basis payments are made to and from the plan. Because the group insurance carriers provide a system-generated document, many of these requirements must be met by means of a separate document that "wraps-around" the insurance company's contract, thereby creating an acceptable and compliant plan document.

Summary Plan Description (SPD): Similarly, an insurance company's certificate of insurance must often be "wrapped" to include several required provisions. The SPD is the primary vehicle for informing employees about the plan, its operation, and its requirements. As such, it must be written in a manner calculated to be understood by the average plan participant and must be sufficiently comprehensive to inform participants of their benefits, rights and obligations under the plan. Group insurance carriers provide a system-generated certificate of insurance that may not include the provisions required in an SPD. In such cases, additional provisions must be added by means of a separate document that "wraps-around" the insurance company's certificate to create an acceptable and compliant SPD.

To create a compliant SPD from an insurance company's certificate of insurance, the plan sponsor must often add several additional provisions in a wrap document, including but not limited to:

- The plan name
- The plan sponsor's name and address
- The plan sponsor's employer identification number
- The type of welfare plan
- The type of administration of the plan (contract, insurer)
- The name, business address and business phone number of the plan administrator
- The name of the person designated as agent for service of legal process
- The plan's requirements respecting eligibility for participation and for benefits
- The plan sponsor's termination rights.

A complete SPD must automatically be provided to participants within 90 days of becoming covered under the plan and generally must be furnished every five years if changes have been made to the SPD information or the plan is amended.

Because some plan documents must be furnished automatically (SPD) or upon written request (plan document, latest Form 5500s) within 30 days, we recommend that all employers review their compliance posture with regards to these required documents. Certainly, we can assist clients in preparing these wrap documents or reviewing those created by outside brokers and consultants to ensure legal compliance before adoption.

For more information about this or any other employment law topic, please contact Frank Del Barto, Chair of the Employment, Labor & Benefits Group, at 847.734.8811 or via email at fdelbarto@masudafunai.com.