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News & Types: Employment, Labor & Benefits Update

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Practices: Employment, Labor & Benefits

WAGE AND HOUR - ALL OF OUR EMPLOYEES ARE PAID A SALARY

By Frank J. Del Barto

As we begin 2017, it is often valuable to review lessons learned in 2016. On several occasions during 2016, we were asked to consider the same inquiry. The inquiry, which often took the form of a request to confirm a current pay practice was, "It's OK to pay all of our employees a salary, right?" Although the answer is simple, this question necessarily requires a review of the need to first properly classify all employees as either exempt or non-exempt under the law.

In short, a company may pay all of its employees a salary rather than an hourly wage rate. However, the real issue is whether the employee is entitled to receive overtime pay when working more than 40 hours in a workweek, under federal law, or more than other mandated hours under different state laws. In many cases, even salaried employees must be paid overtime for all hours worked at time and one-half the employee's regular rate of pay. Therefore, before considering whether or not to pay an employee a salary, rather than an hourly rate of pay, companies must first classify all of their employees as either (a) non-exempt or (b) exempt under both federal and state wage payment laws.

As a result of this initial classification requirement, every employee should be considered entitled to receive overtime pay, unless the employer may rely upon a specific legal exemption from the overtime pay requirements. The specific legal exemptions, which are known as the "white collar" exemptions, are the executive, administrative, professional, outside sales, computer professional and highly-compensated employee exemptions. To qualify for one of these exemptions (except outside sales), an employee must be paid on a salary or fee basis as defined in the regulations and must also have job duties that meet the requirements of the specific exemption upon which the employer intends to rely for classification purposes.

Based on our 2016 experience, an employee's actual job duties did not always match the requirements of the particular exemption being relied upon by the employer. For example, we were asked to consider the status of employees labeled "administrative assistants," "inside sales representatives" and "field service engineers" who are responsible for installing, repairing and replacing machinery. However, a review of their primary duties and the applicable legal guidance often resulted in a finding that these positions were non-exempt and therefore

entitled to overtime pay. As a result, although an employer may pay these non-exempt employees a salary, they were also entitled to overtime pay.

To remedy this classification issue and to properly calculate overtime pay due, these salaried non-exempt employees must record and report the hours they have worked. Because some of the employers improperly treated their "salaried employees" as always "exempt," the employer had no time records to rely upon to calculate overtime payments these employees should have received. This unwittingly exposed the companies to wage and hour litigation and monetary liability for unpaid overtime.

The classification of employees is not always easy. Job titles alone are insufficient and job duties change over time. To properly classify employees and to ensure that all employees are being paid properly, all employers must periodically review the classifications of their employees. Even a minor improper payment issue may result in significant monetary damages and the award of attorneys' fees to the employee. Therefore, legal advice may prove necessary to manage the company's risk.

NEW YORK CITY - NEW YORK CITY EXTENDS WAGE PROTECTIONS TO VENDORS
By Asa W. Markel

The City of New York adopted its Freelance Isn't Free Act (Law No. 2016/140) on November 16, 2016. The new law, also known as FIFA, will take effect in New York City (NYC) on May 15, 2017. Some sources in the media have estimated that there are some 4 million freelancers in NYC, constituting an enormous workforce. Companies who rely on outside vendors for services, including accounting, visual or graphic design, website design, construction, information technology and marketing, will now need to consider auditing and changing their vendor contracting practices. The FIFA may apply even though a company may not be doing business in NYC if any of its vendors may do business in NYC.

The FIFA is designed to protect freelancers, who are defined as not only individuals, but also any company that is comprised of one individual, as long as the individual is not an attorney, licensed medical professional, or commissioned sales representative. If a company utilizes a freelancer for a project of $800 or more, or utilizes $800 worth of the same freelancer's services within a 120-day period, the company will be required to sign a written contract with the freelancer that includes all of the information required by the FIFA. The FIFA also protects the freelancer's ability to enforce his or her rights by prohibiting companies from harassing, intimidating or taking other adverse actions against freelancers in the event they do seek to enforce their rights to payment. In the event that a company fails to pay the freelancer as agreed or commits any other violation of the FIFA, the freelancer may begin administrative proceedings against the company or sue the company for double damages and attorneys' fees. These protections are similar to the protections most states, including New York, afford to outside sales representatives who earn commissions.

Since the FIFA will not take effect until May 2017, companies still have time to begin changing their vendor contracting processes.Each vendor will need to be scrutinized to determine if the vendor is located in NYC and is classified as a freelancer under FIFA. If so, companies will need to ensure that they are complying with FIFA, regardless of whether they themselves do business in NYC. Otherwise, a non-complying company may find itself facing a judgment from the courts of New York requiring payment of twice the original contract

amount, as well as the unpaid vendor's attorneys' fees. This sort of result will be particularly distressing for companies that need time to negotiate with their vendors over the reasonableness of the work performed and its value. Therefore, companies will be in better shape to control the cost of outside services, if the considerations of FIFA are taken into account at the time a vendor contract is written and signed.

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.