CONSIDERATIONS FOR OIL AND GAS INDUSTRY EMPLOYERS AS THEY CONTINUE TO PREPARE FOR NEW SALARY THRESHOLDS UNDER WHITE-COLLAR OVERTIME EXEMPTIONS

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Employers in the U.S. oil and gas industry should act now to address recent changes to the overtime exemptions for "white-collar" employees. On May 18, 2016, the U.S. Department of Labor (DOL) published its highly anticipated final rule, which more than doubles the salary threshold required for certain executive, administrative, and professional employees to qualify for an exemption from overtime pay under the Fair Labor Standards Act (FLSA). The new rule will take effect on December 1, 2016. In this relatively short time frame, employers must review their current practices, determine which positions should be reclassified and how they should be classified and paid, consider related policies that should be revised, and plan how to communicate changes to employees.

Past DOL enforcement efforts directed at the oil and gas industry have revealed misclassification of salaried positions as a common violation, so employers in this industry should pay particular attention to the new rule and the related opportunity to correct any positions that are currently misclassified as exempt from overtime.

WHAT DOES THE NEW RULE CHANGE?

The minimum salary for white-collar exemptions subject to the salary basis test will increase from $455 per week (or $23,660 annually) to $913/week (or $47,476 annually). DOL set this number based on the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently, the South). The final rule also permits employers to include nondiscretionary bonuses, incentives, and commissions to account for up to 10 percent of the required salary for these exemptions, as long as those amounts are paid on at least a quarterly basis. Catch-up payments are permitted at the end of the quarter.

The minimum salary for workers treated as exempt under the highly compensated employee exemption will be raised from $100,000 to $134,004 annually, which is the 90th percentile of full-time salaried workers nationally.

Beginning on January 1, 2020, both salary thresholds will be automatically adjusted and published every three years to keep pace with the 40th percentile and 90th percentile, respectively.

WHAT STAYS THE SAME?

The final rule makes no changes to the current duties tests. Additionally, the required salary still cannot be pro rated for a part-time employee. Part-time employees who satisfy the applicable duties test, but do not receive at least the minimum salary, must be classified as nonexempt. Their hours must be recorded and, any time they work more than 40 hours in a workweek, employers must pay them overtime of 1.5 times their regular rate.

WHAT CAN EMPLOYERS DO TO PREPARE?

Employers should proactively audit exempt positions to review, reclassify, and correct any existing misclassifications. For employees who fall below the salary necessary to meet an exemption, employers should consider whether to classify those employees as nonexempt — and record hours and pay overtime — or increase their salaries to meet the new levels. It may be necessary to implement new timekeeping procedures, practices, or policies to record newly nonexempt employees' total hours worked each day and workweek and to train supervisors on them. Employers should also look at hours worked by currently exempt employees who might be reclassified as nonexempt to determine an appropriate new rate. If any functions or tasks are redistributed among employees, job descriptions should also be updated.

As part of any internal audit or review process to address exempt/nonexempt classifications, oil and gas employers may also want to take the opportunity to review their current independent contractor arrangements to make sure those individuals are properly classified as contractors and should not be considered employees.[1] DOL issued guidance in July 2015 that made clear that misclassification of employees as independent contractors is a focus of DOL's enforcement efforts.[2] DOL has also been aggressive in its enforcement efforts in the oil and gas industry, as evidenced by its multiyear enforcement initiative known as the "Marcellus Shale Sweep," which started in 2012 in Pennsylvania and West Virginia and then expanded to other parts of the country.

WHAT OTHER ISSUES SHOULD EMPLOYERS CONSIDER?

New issues may arise when previously exempt positions are classified as nonexempt because employers must begin to record and pay for any work suffered or permitted by those employees. Employers will have to address what constitutes hours worked and how they will track and pay for time spent in certain activities, including:

- Activities at the start and end of the workday.
- Travel time, especially between worksites.
- "On-call" time and duties.
- Attendance at meetings or training sessions.
- Responding to email or other work performed away from the job site.

Travel Time

Because employees in various occupations in the oil and gas industry frequently travel, employers will likely need to review policies and practices regarding compensation of travel time to ensure proper payments are made to any employees who are converted to nonexempt status.

Employers typically do not have to pay employees for time spent in ordinary travel between home and work. Similarly, if an employee's worksite changes daily and the travel is a normal occurrence for the position, time spent commuting between home and the first worksite of the day (and returning home from the last worksite of the day) may not need to be compensated.

However, if a nonexempt employee is traveling out of town for a job that keeps him or her away from home overnight, the general rule under the FLSA is that the employer must compensate the employee for any travel that takes place during what would otherwise be his or her normal work hours, including those corresponding hours on regularly scheduled days off (e.g.,Saturday and Sunday). If the employee is traveling outside of his or her normal work hours, travel time spent driving must be paid, but time spent as a passenger in a plane, train, bus, boat, or car generally need not be paid.

If an employee has gone home after the regular workday has ended, and he or she is called to travel a substantial distance to handle a customer emergency, the time spent traveling should also be compensated.

Waiting/On-Call Time

Employers are required to pay for time that a nonexempt employee spends on-call if the employee is unable to use the time effectively for his or her own purposes. The key question is whether the employee is "waiting to be engaged" (likely not compensable) or "engaged to wait" (compensable). If the employee is required to remain on the employer's premises, the employer is most likely required to pay the employee for that time. Other factors to consider include the frequency of calls, whether the employee can conduct personal activities during the on-call period, and the frequency of interruption from work calls.

Meeting/Training Time

The time that nonexempt employees spend in meetings, lectures, or training is considered hours worked and must be paid, unless all four of the following criteria are met:

- Attendance is outside regular working hours.
- Attendance is voluntary.
- The course, lecture, or meeting is not job-related.
- The employee does not perform any productive work during attendance.

Email/Remote Access

Keep in mind that an employer may be required to pay nonexempt employees for time reading and responding to work-related email messages after hours and for work-related phone calls or other work employees perform remotely. Although some of this time may be considered *de minimis* (and thus not compensable), employers rely too heavily on the *de minimis* rule at their peril. Employers may want to consider whether they can limit such after-hours work by restricting remote access and, if not, how they can track time spent on work-related matters outside of normal working hours. Employers should be also be certain that they have an exception time reporting system in place so that they can effectively track time spent on work-related matters away from the worksite and outside of normal working hours.

Unauthorized Hours Worked

Even if the employer does not specifically authorize the work, employees must be paid for any work "suffered or permitted" by the employer. When the employer knows or has reason to believe that the employee is continuing to work, regardless if it is in violation of a company policy requiring prior approval for additional work, the time is considered hours worked and must be tracked accordingly. Employers should be cognizant of and monitor any work employees are engaged in beyond the end of their scheduled shifts and include any such hours in the calculation of overtime.

ADDITIONAL RESOURCES

For a more in-depth discussion of how employers can use the new rule as an opportunity to evaluate and make changes in their practices, *see* K&L Gates Webinars "Leveraging the USDOL's Proposed White Collar Exemption Changes: What Employers Should Be Doing Now" (April 2016) and "Implementing USDOL's New Minimum Salary Requirements for White-Collar Exemptions" (June 2016).

Notes:

[1] In any compliance review, it might be worthwhile to watch for other wage and hour issues, as there are a variety of practices in the industry (such as bonus payments and day rates without additional overtime pay) that frequently result in unintentional violations of wage and hour laws. For more information on common violations and issues to watch in the oil and gas industry, *see* "Avoiding Wage & Hour Violations in the U.S. Oil and Gas Industry," presentation and written materials, http://www.klgates.com/avoiding-wage-and-hour-violations-in-the-us-oil-and-gas-industry-02-18-2015/.

[2] *See* K&L Gates Legal Insight, "DOL Issues New Guidance on Independent Contractors," (July 23, 2015); *see also* K&L Gates Webinar, "Assessing Independent Contractor Relationships: Can They Survive the USDOL's Interpretation?" (September 2015).

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