As you know, in late June 2015 the Department of Labor (“DOL”), Wage and Hour Division, issued proposed new overtime exemption rules for comment. 300,000 comments were received.

The new rules, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, are expected to raise the salaried threshold to $970 a week or $50,440 per year, automatically update the salaried thresholds going forward, and to change the duties tests.

While we wait for the final rules here are some potential strategies and considerations derived from a presentation we made last month.

1. **Analyze hidden overtime.** Having salaried exempt employees track the hours they are working during a study period does not affect their status. Consider doing a study over the first quarter of 2016 to see how much hidden overtime may be involved by each salaried exempt work group.

2. **Treat as salaried but not exempt.** Compensation can be paid on any basis, including a weekly salary. If an employee who was previously salaried is no longer exempt under the new rules, he or she will need to track hours worked. This does not automatically mean that you need to sacrifice salaried status and the often perceived demotion when an associate is converted from salaried to hourly. A fixed weekly salary can still be paid with overtime in excess of 40 hours worked.

3. **Pay more to maintain exemptions.** Many employers are considering doing precisely this in borderline situations where employees are already close to being paid $970 a week or $50,440 per year (the anticipated 40th percentile threshold).

4. **Reduce hours and control overtime.** Expanding the nonexempt ranks only has impact when overtime is worked. Consider better controls on overtime.

5. **Hire more employees and set schedule below 40 hours.** This combination would reduce the likelihood of overtime being incurred. For example, expanding the work group and reducing the number of regularly scheduled hours provides a larger cushion before overtime liability is incurred.

6. **Analyze best method for making pay adjustments.** Some employers are considering converting currently salaried exempt employees to an hourly rate by simply dividing by 40 hours. A more sophisticated analysis would incorporate hidden overtime and build in an allowance for potential overtime by reverse engineering the base rate.
7. **Consider shutting down your email system after hours.** One of the risks for uncontrolled overtime is the claim that nonexempt employees, a potentially expanded group under the proposed FLSA regulations, don’t stop working when they leave the office. Some social service agencies and non-profits have already taken this step. Explore whether your IT Department can implement this for nonexempt employees.

8. **Consider changing your workweek.** The standard workweek runs from Sunday to Saturday. The practical effect is that in a crunch time week, the long days will fall within the same pay period. By contrast, if your workweek runs from Wednesday to Tuesday, you will have work days within the same week falling in two different pay periods which may allow you to better balance or minimize overtime.

9. **Watch the timing for the final rules.** Things could get (more) political. There is talk that the DOL could time its final rules by handicapping the political process. This means that if there is a prospect of electing a President who might revoke major components of the rules, expect the final rulemaking process may be accelerated. By contrast, if the DOL feels secure that its efforts will not be upset, anticipate that there may be a longer comment period and it may not be completed until near year end 2016.

10. **Pay attention to the gig economy.** More and more industries are looking at a third form of employment, neither an employee nor an independent contractor but an individual engaged on a relatively unregulated “gig” basis. Could this structure work for you in any area?

11. **Explore Belo agreements.** Belo agreements are recognized by the wage and hour regulations starting at 29 C.F.R. §778.400, for example. §7(f) of the FLSA authorizes employers to pay nonexempt employees who regularly work irregular hours a guaranteed weekly amount. This is often referred to as a Belo plan under which an employer pays an employee a fixed salary for all hours worked up to a maximum of 60 in one week. Hours above the maximum must be compensated at a rate not less than one and a half times the agreed upon rate. The regular salary is paid for any week in which the employee works fewer hours.

12. **Explore alternate payment methods – fluctuating workweeks.** There is another alternative – allowing a fluctuating workweek arrangement. This is authorized under 29 C.F.R. §778.114. All employees must sign an agreement reflecting a clear understanding in advance in order to be covered by such an agreement. A DOL coefficient table must be used when compensating pursuant to a fluctuating workweek agreement.

13. **Anticipate potential for litigation.** The approach taken by the DOL is somewhat unusual. While the DOL was forthcoming with regard to the proposed thresholds and bases for same, not so with respect to potential changes in the duties test. The
prescribed approach under the Federal Administrative Procedure Act is to propose a rule and then solicit comment. The DOL has not done this, particularly with respect to any change in the duties test. Its approach may increase the potential for a challenge on the basis of the DOL’s failure to follow appropriate administrative procedures.

These advisories are a token of our appreciation for your loyalty as a client, without which our progress would not be possible. Thank you and best wishes for a happy, healthy, and prosperous New Year.

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