



## **2017 Employment law Update 1– EAP changes to minimum exempt wages.**

It is that time again when the fresh chill of the fall air brings in warm memories of families gathered around celebrating another holiday season and employers are bombarded with new legislation that makes them wonder why they run a business.

While I can't answer that question annually GCG updates for clients and friends, changes to employment laws that affect a majority of employers. This series of updates address California changes signed into law by the Governor as of 9/13/16 for the upcoming 2017 year and Federal Exemption law.

***The information below is designed to provide general information and guidance concerning employment-related issues. It is presented with the understanding that Greear Consultant Group, LLC is not engaged in rendering any legal opinions. If a legal opinion is needed, please contact the services of your own legal advisor, or ask GCG for a referral.***

### **Department of Labor (DOL) Increase to exempt wage Effective 12/1/16**

Under the Direction of President Obama the DOL released its final rule, May 18, 2016 on what are referred to as the “white collar” exemptions or more specifically Executive, Administrative and Professional (EAP) exemptions for minimum salary. A significant amount of salaried employees fall under these exemptions.

Currently under federal law exempt employees are paid a minimum of \$455 per week, under California law employees under the EAP exemption are currently paid \$800 per week (double minimum wage).

All employers regardless of size and location in the states are impacted by this significant final rule.

### **CAUTION – California employers**

Numerous clients have approached us asking if they can change their exempt employee's status to non-exempt and implement an Alternative workweek (four 10 hour days) without having to pay overtime.

In a word yes, **however** there are very specific rules regarding implementing an alternative workweek in California failure to follow the rules such as not having a vote, or not registering after the vote with the Department of Labor Standards Enforcement (DLSE) can result in costly litigation.

#### **\* Key Provisions of the Final Rule \***

The Final Rule focuses primarily on updating the salary and compensation levels needed for EAP workers to be exempt. Specifically, the Final Rule:



1. Sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, currently the South, which is **\$913** per week or **\$47,476** annually for a full-year worker;
2. Sets the total annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally, which is \$134,004; and
3. Establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles and to ensure that they continue to provide useful and effective tests for exemption.

Additionally, the Final Rule amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level. The Final Rule makes no changes to the duties tests.

### **What's an employer to do?**

If a job analysis was not conducted on your exempt employees to determine if in fact they are exempt you may want to consider having an HR professional or attorney perform a job analysis on current exempt positions.

Other options include:

- 1) Increase the salary of any affected employees who meet the duties test to at least \$913 to retain their exempt status under the FLSA as well as California law. For salaried exempt employees in California who are presumably already receiving \$800 per week (or more), any salary increase should be slight (up to 14%).
- 2) Maintain salary of affected employees at \$800 per week to preserve the California exemption (assuming the duties test is satisfied) without increasing the salary to \$913 per week, and pay FLSA overtime at one-and-a-half times their regular rate of pay for hours worked over 40 in a week. This option would allow California employers to continue to exempt the affected employees from California's daily overtime and double time rules, as well as avoiding the state's onerous meal and rest period requirements.
- 3) Reclassify the affected employees to non-exempt status and pay an overtime premium rate of one-and-a-half times or double (if applicable) their regular rate of pay for any overtime hours worked. This option may be desirable for exempt employees in risky jobs whose duties place them near California's 50% threshold.
- 4) In addition to reclassifying the employees to non-exempt, restructure compensation to offset anticipated overtime labor costs, such as reducing the affected employees' base salaries or other wages (subject to at least the applicable hourly minimum wage), then allocate saved labor funds to help pay for any overtime worked. This way your total weekly pay obligations remain near the same levels.



- 5) In addition to reclassifying the employees to non-exempt, adopt an alternative work week schedule (for example, 4 x 10 or 9/80) which, if passed by 2/3 of the affected employees in a properly implemented secret ballot election, could exempt an employer from paying daily overtime of up to 10 hours in a day or up to 40 hours in a week.
- 6) Reclassify the employees to another applicable exemption, if expedient, such as outside salesperson or inside commission salesperson. The requirements of satisfying these exemptions may be less costly than increasing the salary or paying the overtime.
- 7) Reduce or eliminate overtime hours.
- 8) Adopt a combination of the above approaches.

Have fun out there!