Regulatory Update

Greater Cincinnati Compensation & Benefits Association

March 2, 2016

Today's Presentation

- **FLSA**
- **ACA reporting**
- **Recently issued guidance**
- **Upcoming guidance to expect**

PROPOSED CHANGES TO FLSA RULES

Two Requirements for Exemptions

Salary basis test

- Fixed salary, not subject to deductions for variations in quality or quantity of work
- Amount of salary must meet the minimum specified amount

Primary duties test

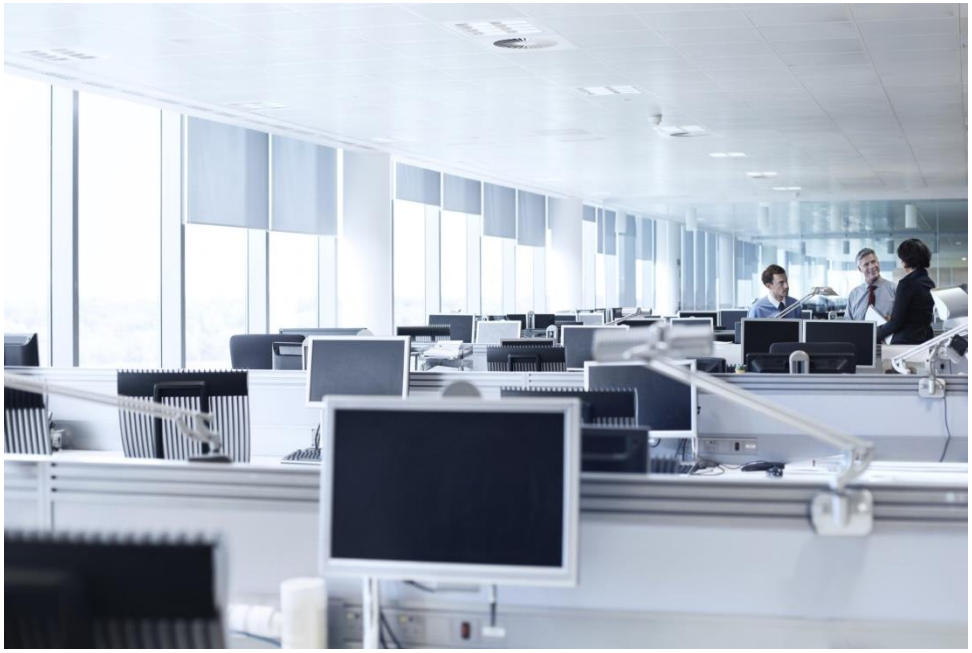
- Job duties must primarily involve executive, administrative or professional duties as defined by the regulations

DOL Proposed FLSA Rule

- **The Department of Labor has proposed a sweeping change to the minimum salary requirement for**
  - Executive exemption
  - Administrative exemption
  - Professional exemption
    - Teachers, lawyers, doctors only; professionals not affected
- "With this proposed rule, the Department seeks to update the salary level required for the exemption to ensure that the FLSA's intended overtime protections are fully implemented"

Exemptions Not Impacted

- Outside sales exemption not affected
- Computer professional exemption not affected either



DOL Proposed FLSA Rule

- **Salary basis test: Increases minimum salary level**
  - From $455/week or $23,660 annually to $970/week or **$50,440** annually
  - *Represents 40th percentile for full-time salaried workers*
- **Highly compensated employee: Increases minimum salary**
  - From $100,000 per year to **$122,148** per year
  - *Represents 90th percentile for full-time salaried workers*
- **Index the exemption's minimum salary to either wage growth or inflation and automatically adjust these levels annually**

Highly Compensated Employee Exemption

- Currently, certain highly compensated employees are exempt from the overtime pay requirement if they are paid total annual compensation of at least $100,000 and perform at least one of the exempt duties or responsibilities of an executive, administrative or professional employee

DOL Proposed FLSA Rule

DOL Proposed FLSA Rule

- **Also solicited comments on possibility of including non-discretionary bonuses to satisfy a portion of the salary requirement**
  - Limited to 10% of weekly compensation
  - Must be paid at least monthly
  - No end-of-year catch-up permitted
- **Commissions are specifically excluded**

DOL Proposed FLSA Rule

Changes to primary duties tests?

- DOL discusses the tests and solicits suggestions and comments generally on the primary duties tests
- Did not propose specific changes on these points

Business Impact

- **Have you reviewed to determine how this may impact your exempt positions?**
  - Raise salary or reclassify as non-exempt
  - Review application of primary duties test to these employees
- **Is this a good time to reclassify other potentially misclassified employees?**

ACA REPORTING

ACA Reporting

- **Notice 2016-4 delayed the reporting deadlines**
  - 1095-C: February 1, 2016 ➲ March 31, 2016
  - 1094-C
    - Paper filers: February 29, 2016 ➲ May 31, 2016
    - Electronic filers: March 31, 2016 ➲ June 30, 2016
- **Rev. Proc. 2016-11 increased the penalties**
  - $250 per return ➲ $260 per return
- **Good faith compliance standard for inaccurate returns**
  - Corrections may still be necessary

ACA Reporting

- **What do I do with Forms 1095-C that are returned as undeliverable?**

Mailed copies

- No specific instructions (unlike Form W-2)
- Retain necessary records for 3 years after the due date

Emailed copies

- Confirm whether the employer has the correct email address in its records
- Request the correct email address from the employee
- If the correct email address can't be found, send by mail or in person within 30 days after the electronic notice is returned

ACA Reporting

- **How do I report employees who transfer from one of our EINs to another?**
  - Each EIN reports for the months the employee was employed by that EIN
  - For months in which the employee transferred from one EIN to another
    - The EIN for which the employee worked more hours is the employer for the month
    - If the employee worked the same number of hours for each EIN, the EINs must agree on which one will be treated as the employer

ACA Reporting

- **Example**
  - ABC Co. and XYZ Corp. are members of the same ALE controlled group
  - John is employed by the controlled group for all of 2015
  - John transfers from ABC Co. to XYZ Corp. on June 6, 2015
    - ABC Co. reports on John for January – May
    - XYZ Corp. reports on John for June – December

Keep in mind: An offer of coverage from one member of the controlled group is considered to be an offer of coverage from all members of the controlled group

ACA Reporting

- **Do I need to report on the employees of a business that my company acquired in 2015?**
  - ACA guidance generally doesn't address M&A situations
  - General M&A principles
    - **Asset deal:** Employees treated like new hires
    - **Stock deal:** Purchaser inherits all liability of purchased business

Consult legal counsel – do not rely on this presentation as legal advice!!

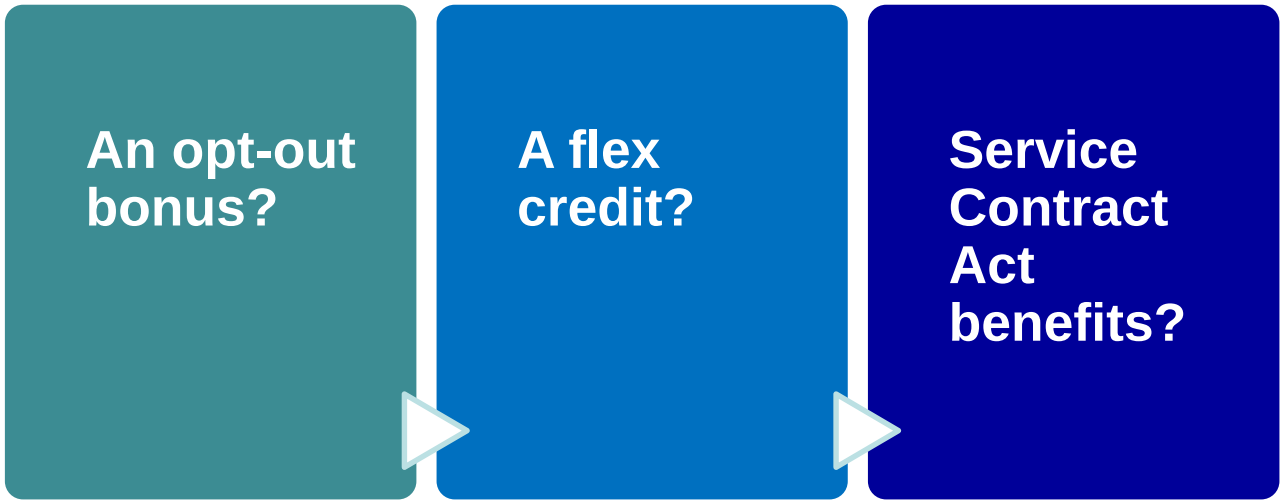
ACA Reporting

- **What if the acquired company wasn't an ALE before the acquisition?**
  - Example
    - BUY Corp. employs 1,000 full-time and equivalent employees
    - SELL Co. employs 20 full-time and equivalent employees
    - BUY Corp. acquires SELL Co. on October 1, 2015

Keep in mind: The good faith compliance standard applies only to forms filed – penalties will apply for failure to file required forms

ACA Reporting

- **How do I report affordability of coverage when I offer**



ACA Reporting

Remember

- If …
  - An employer offers minimum essential coverage to at least 70% of its full-time employees and their children in 2015
- Then …
  - The employer mandate “B” penalty will apply with respect to any employee who obtains the premium tax credit
    - An employee is not eligible for the premium tax credit if the employer offers affordable minimum-value health coverage
    - BUT “affordable” means different things to different people

ACA Reporting

- **What does the employee pay for the employee-only tier of the employer's lowest-cost minimum-value option?**
  - If that amount is not more than 9.56% of the *employee's household income*, the amount is affordable for purposes of
    - Whether an exemption applies under the individual mandate
    - Whether the individual is eligible for the premium tax credit
  - If that amount is not more than 9.56% of the *employee's safe harbor compensation amount*, the amount is affordable for purposes of
    - The employer mandate penalty

ACA Reporting

- **Example**
  - Employee's 2015 household income is $24,000
  - Employee's 2015 W-2 wages are $24,000
  - The base premium cost for the lowest-cost minimum-value plan was $100 per month in 2015
  - In 2015, the employer offered a $50/month cash bonus to anyone who waived health coverage

$24,000 ÷ 12 = $2,000

$150 ÷ $2,000 = 7.5%

$24,000 ÷ 12 = $2,000

$200 **÷ $2,000 =** ***10%***

ACA Reporting

Employer Mandate	Individual Mandate/ Premium Tax Credit
$24,000 ÷ 12 = $2,000	$24,000 ÷ 12 = $2,000
$150 ÷ $2,000 = 7.5%	*$200* ÷ $2,000 = *10%*

- **Options**
  - Report the individual mandate/premium tax credit value
    - More accurate reporting for the employee
    - Employer will have an opportunity to explain before a penalty is assessed
  - Report the employer mandate value
    - Inform employees that they can obtain accurate values by calling the number listed on Form 1095-C

RECENT GUIDANCE

Independent Contractors: DOL Administrator's Interpretation No. 2015

- **Says most independent contractors are actually employees**
- **Whether a worker is an employee under FLSA is determined by the economic realities of the working relationship between the employer and the worker**
- **Labeling the worker an "independent contractor" and/or having an "independent contractor agreement" is not enough**
  - FACTS determine the relationship; the agreement, however, should memorialize and summarize the key facts

Independent Contractors: DOL Administrator's Interpretation No. 2015

- **DOL and state agencies have targeted independent contractor misclassification over recent years**
- **Reasons**
  - Misclassified workers are denied access to overtime, company benefits, unemployment and workers' compensation insurance, and other protections/benefits
  - Misclassification also generates substantial losses to the federal government and state governments in the form of lower tax revenues, as well as to state unemployment insurance and workers' compensation funds
  - It forces workers to pay the entirety of their payroll (FICA) tax

DOL Administrator's Interpretation No. 2015

- **Provides DOL opinion of how this test should be applied to workers**
- **Not binding on courts**
- **However**
  - DOL interpretation generally entitled to deference by the courts
  - Gives preview of how DOL will apply this test in enforcement actions

Independent Contractor Misclassification

- **DOL notes that employers are turning to contingent worker arrangements to save costs, such as use of contractors, temporary agencies, labor brokers, third-party management**
- **Of these arrangements, DOL says independent contractor misclassification is the most damaging to workers and the economy**
  - In most other arrangements, workers have access to benefits, unemployment and workers' compensation insurance through the third-party agency/employer

Economic Realities Test

- **Goal of the economic realities test is to determine whether a worker is economically dependent on the employer (and is therefore an employee) or is really in business for himself or herself (and is therefore an independent contractor)**
- **Broader test than the "common-law employer right to control test" – more workers would be deemed employees under the economic realities test**

Economic Realities Test

- The nature and degree of the alleged employer's right to control as to the manner in which the work is to be performed
- The alleged employee's opportunity for profit or loss depending upon his or her managerial skill
- The alleged employee's investment in equipment or materials compared to that of the alleged employer
- The permanency of the worker's relationship with the employer
- Whether the service rendered requires a special skill
- The extent to which the service rendered is an integral part of the alleged employer's business

Comparison of Factors

DOL	Courts
Integral part of business	Permanency of relationship
Opportunity for profit or loss due to managerial skills	Degree of skill to perform services
Worker's investment compared to employer's investment	Worker's investment in equipment or materials for the task at issue
Degree of [business] skill to perform services	Opportunity for profit or loss due to technical and managerial skills
Permanency of relationship	Right to control
Control	Integral part of business

Fact-Based Inquiry

Ultrasound Technician	Satellite Installer
"No Right to Control" Reality: Company places orders for customer with IC; no further control over filling order	*"No Right to Control"* Reality: Company schedules windows of time for technicians
"Not an Exclusive Relationship" Reality: Worker started part-time and chose to increase hours; lots of medical facilities in the area	*"Not an Exclusive Relationship"* Reality: Rural location means no other sources of work available; he never turned down an assignment; "windows" didn't allow for outside work
"Not Integral to the Business" Reality: Providing ultrasounds not heart of company's full-service medical facility like it might be at a laboratory	*"Not Integral to the Business"* Reality: Installing satellites more central to key business purpose

Joint Employment: DOL Administrator's Interpretation No. 2016-1

- **January 20, 2016**
- **More and more, businesses are varying organizational and staffing models by, for instance, sharing employees or using third-party management companies, independent contractors, staffing agencies or labor providers**
- **DOL says joint employment more common**

Temporary Workers

- **Temporary workers fill an important role for the business**
- **The staffing agency is generally the "common-law" (actual) employer of temporary workers placed at a client**
  - ACA
  - Taxes
  - Some state laws like workers' compensation/unemployment
- **Relationship between the company and staffing agency is contractual**

Joint Employment Obligations Set by Statute

- **Under some statutes, the "client" already has some legal obligations to temporary workers even if not the common law employer**
  - Title VII and other discrimination laws: Client company has anti-discrimination obligations to temporary worker (i.e., disability accommodations, anti-harassment) regarding the client's work environment
  - FMLA: Sets out specific rules for both the primary and secondary employer

Joint Employment under the FLSA

- **If considered the employer or joint employer of a temporary worker, the company may be liable under the FLSA as if that worker was the company's regular employee**
  - "Joint and several liability"
  - Combines hours worked during joint employment for purposes of overtime
- **DOL says "employment" broadly defined**
- **Important to maintain distinctions between temporary workforce and regular workforce to reflect that the company is not a joint employer**

Applicable Test

- **What test applies?**
  - Common-law “right to control” test – ACA, taxes, state laws usually
  - Economic realities test – FLSA (wage and hour)
    - Key is economic dependence
- **What is the difference?**
  - Easier to show joint employment under economic realities test than to find a company is the common-law employer under the right to control test
  - Right to control versus actual control

Joint Employer – Economic Realities Test

- **Key factors under the test**
  - The extent to which the potential joint employer directs, controls or supervises the work performed
  - The extent of control over the terms and conditions of employment; can be indirect control over hiring, firing, rate or method of pay, etc.
  - The permanency and duration of the relationship
  - The repetitive and rote nature of the work
  - Whether the worker's services are integral to the business
  - Whether the work is performed on the potential joint employer's premises
  - The extent to which the potential joint employer performs certain administrative functions

How to Limit the Company's Liability?

- **Allow the temp agency to send workers based on predetermined criteria; the company should not interview or select workers**
- **Separate badges, timekeeping, helmet colors – other distinctions you can make between regular and temporary workers**
  - Staffing agency should handle timekeeping
- **If a temporary worker is problematic**
  - Report problems to the temp agency (either directly or through HR)
  - Provide temporary agency opportunity to determine proper course of action
  - Do not directly discipline or review performance of the worker

How to Limit the Company's Liability?

- **Treat temp agency relationship as contract**
  - Include indemnification language and obligations of staffing agency
- **Do not assign temporary workers to perform duties other than those contracted with temp agency**
- **To the extent possible, work with the temp agency to accommodate the needs of a temporary worker with a disability**
  - Or be able to justify why it would be an undue hardship to do so
- **Ensure that all temporary workers are not subjected to discrimination or harassment**
  - The best way to avoid the co-employer issue is to prevent discrimination or other claims in the first place!

Changes to the Determination Letter Program

- **Individually designed plans**
  - 5-year staggered remedial amendment cycles end January 1, 2017
    - Filings are permitted until January 31, 2017 for
      - Plan sponsors with EINs ending in 1 or 6
      - Controlled and affiliated service groups with Cycle A elections in place on January 31, 2012
    - Filings are permitted anytime on or after January 1, 2017 for
      - Initial qualifications
      - Plan terminations
      - Other circumstances prescribed by IRS/Treasury
  - Determination letters will not have expiration dates
    - Expiration dates on letters issued before January 4, 2016 are no longer effective

Changes to the Determination Letter Program

- **Pre-approved plans**
  - 6-year restatement cycles continue to apply
    - Existing defined contribution plans – April 30, 2016
    - May apply for a determination letter only if there are limited modifications to a volume submitter plan
  - Plan sponsors moving from an individually designed plan to a pre-approved plan must do so by April 30, 2017

Permitted Amendments to Safe Harbor Plans

- **Notice 2016-16**
  - Mid-year amendments generally may be made to safe harbor 401(k) plans if
    - Either
      - The amendment doesn't impact information that is required to be included in the safe harbor notice

      or

      - The plan sponsor provides an updated safe harbor notice and opportunity to change elections
    - And the amendment is not a prohibited amendment

Permitted Amendments to Safe Harbor Plans

Prohibited amendments

- Increase the number of years of service required for vesting in the safe harbor contribution
- Reduce the population of employees eligible to receive safe harbor contributions
- Change the type of safe harbor plan

Prohibited amendments in certain circumstances

- Increase matching contributions by
  - Changing or adding a formula to determine matching contributions
  - Changing the definition of compensation used to determine matching contributions
- Permit discretionary matching contributions

Permitted Amendments to Safe Harbor Plans

- **Some mid-year changes are subject to special rules**
  - Plan year change/adoption of a short plan year
  - Adoption of safe harbor status
  - Reduction or suspension of safe harbor contributions
  - Changes from safe harbor status to non-safe harbor status
- **In any event, plans still must comply with otherwise-applicable rules such as**
  - Anti-cutback rules
  - Nondiscrimination rules
  - Anti-abuse rules

DB Plan Nondiscrimination Testing

- **Example**
  - DBP Co. sponsors a defined benefit pension plan
  - Only those eligible employees hired before January 1, 2005 are eligible to participate in the plan
  - The employees who are eligible to participate in the plan have received pay raises over the years
    - More and more become highly compensated employees
    - It becomes harder and harder to satisfy nondiscrimination testing

DB Plan Nondiscrimination Testing

- **Proposed regulations**
  - Would ease nondiscrimination requirements for closed DB plans
    - Sponsors may rely on these rules now – effective as early as the 2014 plan year
  - Would ease nondiscrimination requirements where a DB plan is aggregated with a defined contribution plan for testing purposes
    - Regardless of whether the DB plan is closed
  - Would require any plan that does not provide benefit accruals on the basis of objective business criteria to meet a higher threshold to satisfy the nondiscrimination requirements
    - Consider QSERPs or other formulas that apply to specific employees by name

UPCOMING GUIDANCE

EEOC Proposed Rule to Collect Pay Data

- **January 29, 2016 – EEOC proposed changes to EEO-1 report to require payroll data to be reported by**
  - A company with at least 100 employees
  - Companies with common ownership/management with at least 100 employees
  - A company or any of its establishments that
    - Has 50 or more employees, and
    - Is not exempt as provided by 41CFR 60-1.5, and either
      - Is a prime government contractor or first-tier subcontractor and has a contract, subcontract or purchase order amounting to $50,000 or more

      or

      - Serves as a depository of government funds in any amount or is a financial institution

Employee Benefits

- **Definition of fiduciary − final regulations sent to OMB on January 28, 2016**
- **Notice 2015-87 previewed future guidance**
  - How opt-out payments will impact affordability
  - Indexing the affordability threshold
  - Clarifying “hours of service” for ACA purposes
  - Addressing when non-educational organizations must use the educational organization rehire rule
- **“Cadillac Tax” delay is causing IRS/Treasury to reconsider priorities**

Questions?

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