



## Employment Law Bulletin

August 2016

*This may be the most important employment law update you read this year.*

### **Exempt vs. Nonexempt Employees – Are Your Employees Properly Classified?**

**All employees, no matter whether they are paid a salary or on an hourly basis, are entitled to overtime pay unless they are specifically EXEMPTED from state and federal overtime laws.**

**EXEMPT** employees are those who meet the very specific salary and duties requirements of the federal and California exemptions to be "exempt" from overtime. **All other employees are "nonexempt"** and entitled to overtime if they work more than 8 hours in a workday or 40 hours in a workweek (10 daily and 60 weekly for agricultural employees). This distinction and the proper classification of employees as "exempt" are extremely important and are the subject of an upcoming change in federal law that applies to California employees.

**As of December 1, 2016, the federally-required minimum salary for exempt employees will rise to \$47,476**, a substantial increase from the current \$23,660 minimum salary. For the first time, the federal minimum is higher than the corresponding California standard (currently \$41,600). While the threshold for the California salary requirement will rise each year with the scheduled corresponding increases in the minimum wage, California's minimum required salary will not be at or above the federal minimum required salary until 2019. The federal minimum salary will increase again in 2020.

Given the significance of this increase in the salary requirement, the looming deadlines and the surrounding media attention, the **exempt vs. non-exempt classification issue** should be pushed to the top of your to-do list. While the salary aspect is an important factor in determining whether your exempt employees are properly classified, it is equally important to take a close look at the exempt vs. non-exempt classification from the duties side as well.

In California, an employer must not only meet the salary threshold but must also ensure that the employee is spending more than 50% of his or her working time on "exempt" duties. Because an incorrect classification can lead to serious wage/hour liability for the employer, the best approach when examining exempt vs. non-exempt classifications is to look at both the duties and salary tests, and make sure you can prove both tests are met for each employee classified as exempt.

To begin, you should first make a list of all of the currently exempt positions in your organization and obtain a current **job description** (JD) for each position. Some will clearly be exempt and likely will not require any compensation increase to meet the new federal minimum standard, or much significant analysis as to whether the duties test is met. For others, obtaining an up-to-date and accurate JD and accurate information about how the incumbent actually spends his or her time is imperative.

Once the JDs are accurate, we recommend that you run them by the incumbents to see if they think the JDs accurately reflect the work they are doing, and the percent of work time spent on each category. Next, do the math to determine whether more than 50% of working time is spent on exempt duties. The goal by this point will be to know who is reasonably and legally defensibly exempt as to the duties test, and then to make sure those positions are paid at a salary that meets the required salary minimum.

It is important when setting a salary now to consider the ramifications of any mandatory increases over the next few years. It is also important to do this analysis and any compensation changes in a way that does not inspire any employees to start looking at the potential for filing a claim if you've inadvertently misclassified them as exempt in the past. Be intentional about how you talk about this project and how you handle the requests for review of JDs. Low-key prospective legal compliance with a new law should be the message, without any indication that you may also be cleaning up past problems.

As you may have guessed, this process takes care and time. Because the California salary requirements change each year going forward, and the federal minimum salary rises again in 2020, the process you are setting up now will be something that you use repeatedly. Err on the side of making it as systematic as

possible to accurately obtain information to update your JDs and the salary data so you can have confidence in your classification decisions.

We strongly recommended that you begin this process well ahead of the December 1, 2016 deadline and are here to help you with any questions. If you're not sure if your employees are properly classified as exempt, please give us a call. We're happy to help.

## **Proposed Legislation to Take Away The 10 Hour Overtime Standard for Agricultural Employees**

As many of you know, California AB 1066 has passed committee this week and will be winding its way through the House and Senate. By 2022, AB 1066 will eliminate the 10 hour day for agricultural employees before overtime is payable. If this proposed legislation becomes law, beginning 2019, overtime will be payable in staggered increments as follows: 9.5 hours in 2019; 9 hours in 2020; 8.5 hours in 2021; and 8 hours in 2022. We will continue to monitor the bill's progress and keep you informed. Now is the time to weigh in with your local legislators.

## **Save The Date for SMT's Annual Employment Law Update**

January 13, 2017

Morning Seminar 8:30 - 10:30 am

Afternoon Seminar 1:30 – 3:30 pm

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