

Q&A From “Update on Legislation and Regulation in Total Rewards” Presentation - Sept. 20, 2011

1. Regarding FLSA, where is the DOL with notification to exempt employees explaining why they are exempt from OT?

This proposed regulation is scheduled to be released next month. However, it was also scheduled to be released October 2010 and May 2011, so we suspect it may be delayed. All regulations must be sent for review to the Office of Management and Budget before they are released and, as of Sept. 22, this regulation had not been sent for review.

2. There have been lots of reports about DOL audits regarding exempt status. What's the latest? Are they still happening? Nationwide or Iowa?

Check out this website to look up enforcement actions in your area: <http://ogesdw.dol.gov/>

3. On June 23, 2011, a Los Angeles federal district court recently issued a troubling decision for motor carriers using mileage-based compensation for drivers. In that case, the court found that a motor carrier's piece-rate compensation system, which paid drivers based on miles, stops and deliveries, violated California's minimum wage law because it did not directly compensate the drivers for all of their work hours performing activities that did not generate compensation by their performance, including the time spent performing pre-trip and post-trip inspections. The carrier introduced evidence that its piece-rate pay system covered all work performed by the drivers, including the pre-trip and post-trip inspections, but the court ignored the evidence deeming it irrelevant, even if accurate, because the miles, stops and deliveries piece-rate formula did not separately compensate the drivers for their pre-trip and post-trip inspections. The court concluded that the carrier's compensation system therefore violated California's requirement that employers compensate employees for all of their work activities. The carrier in this case faces the potential for tremendous exposure because of the allegedly unpaid hours of work, plus penalties, interest and attorney fees.

While the decision may be appealed and other courts may decide the issue differently, for now the decision calls into question the commonly used activity-based pay systems, which are based on mileage, stops, and/or deliveries.

The WorldatWork Public Policy Department focuses on reporting and analyzing the impacts that legislation, regulation and judicial actions will have on the total rewards profession. If your company operates in the LA area, you will need to comply with the decision, and we suggest you discuss with your internal legal team or a lawyer in the LA area.

4. Any recommendations on how we should 'document' which exempt status (professional, administrative, etc.) applies to each job? Possibly list it right on the job description? Follow up, how often should job descriptions be reviewed even if there are no substantial changes (annually, every two years, etc.)?

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The Wage and Hour Division of the Department of Labor has a lot of very good resources on documentation of exempt status at their website: <http://www.dol.gov/whd/flsa/index.htm>. The specific one on record keeping can be found here: <http://www.dol.gov/whd/regs/compliance/whdfs21.pdf>.

However, the upcoming FLSA regulations may impact the documentation of exempt v. non-exempt. We don't know what's in the regulations yet, so this may be addressed when the proposed rule is released.

5. Regarding the Executive exemption. Is the standard still two direct reports? I've heard where managers of small units may no longer qualify for the executive exemption if they do not have at least 3 direct reports?

Among the tests used to determine whether or not the executive exemption applies to a position, the standard involving direct reports is still two direct reports. The full fact sheet on the executive exemption can be found here: http://www.dol.gov/whd/regs/compliance/fairpay/fs17b_executive.pdf.

6. How are organizations identifying employees impacted by Dodd-Frank regulations? Are they changing their deferral scales? Since guidance is pretty general we are curious to know what, if any, actions companies are taking now.

The WorldatWork Public Policy Department focuses on reporting and analyzing the impacts that legislation, regulation and judicial actions will have on the total rewards profession. As such, we do not report on actions taken by individual companies in response. We have an issue summary on the SEC final rule on executive compensation and golden parachute compensation here: <http://www.worldatwork.org/waw/adimLink?id=49634>. There is also a great workspan article on "Best Practices for Executive Compensation" here: <http://www.worldatwork.org/waw/adimLink?id=54456>.

7. With the advent of technology and social media and the flexibility for when and where employees work, at what point will there be a serious review of the FLSA regulation so non-exempt workers can better benefit from these advances?

There are informal coalitions in Washington that are meeting with lawmakers to discuss just such a review of the FLSA, but there is strong opposition to a comprehensive update of the FLSA. Democrats are worried that overhauling the FLSA would lead to looser worker protections, and some Republicans are worried about increased compliance burdens on businesses.

8. The DOL and IRS (and states) have partnered on a focus toward contract workforce to ensure appropriate worker classification, with implications to documentation of jobs and communication to employees and contract workers. What implications, if any, do you see as the biggest challenges for companies with this stepped up enforcement and pending guidance from these regulatory bodies? Although states indicate they are partnering, it doesn't yet seem through regulatory audits as if they really know what they should be looking for and what questions to ask yet. What should we expect?

Many in the Obama Administration are worried about what they believe is widespread misclassification of regular employees as independent contractors. On Sept. 19, 2011, the Department of Labor, IRS and



seven states (Connecticut, Maryland, Massachusetts, Minnesota, Missouri, Utah and Washington) signed a Memorandum of Understanding. This will enable the DOL to share information and coordinate law enforcement with the IRS and participating states in order to identify employers who are misclassifying employees and to remedy that situation. This agreement is a part of the overall “Misclassification Initiative” begun by Vice President Biden’s Middle Class Task Force. The goal of that initiative is “preventing, detecting and remedying employee misclassification.”

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