WILLCOX SAVAGE

Employment Law Outlook

Spring 2014

PRESIDENT OBAMA SEEKS TO BROADEN OVERTIME PROTECTIONS FOR EMPLOYEES

William M. Furr

On March 13, 2014, President Obama directed the United States Department of Labor to review the "white collar" overtime exemptions under the Fair Labor Standards Act (FLSA). The FLSA requires employers to pay minimum wage and overtime pay to non-exempt employees. The FLSA exempts "white collar" employees from the overtime requirements, including executives, professionals, administrative employees, computer professionals and outside sales representatives.

President Obama instructed Secretary of Labor Thomas Perez to update the Department of Labor's regulations that define who is entitled to overtime pay under the FLSA. Although the President's direction to Perez was not specific, most commentators predict that the DOL will raise the salary threshold that employers must pay employees in order to qualify for the "white collar" exemptions. The threshold is currently set at $455 per week.

Commentators expect that the DOL will recommend eliminating the exemption for executives who simultaneously supervise employees and perform the same duties as their direct reports. If this occurs, restaurants and retailers are likely to be most adversely affected. Commentators also expect the Department of Labor to narrow the computer professional exemption so that more computer professionals will be eligible for overtime pay.

It will likely take more than a year for the DOL to finalize any recommendations. After the DOL publishes its Notice of Proposed Rulemaking, the public will have between one to three months to comment on the proposed changes. The DOL will then review and respond to the comments before publishing its final regulations. ■

In This Issue...

Navigating the Maze

The Affordable Care Act
Employer Shared Responsibility Provision
Advanced Workshop

Session for Employers with 50 or more Employees

DATE
May 7, 2014

TIME
8:00 AM - 10:30 AM

LOCATION
Willcox Savage
440 Monticello Avenue, Suite 2200
Norfolk, Virginia 23510

SPEAKER
Cher E. Wynkoop, Partner
Willcox Savage

TOPICS

- **Detailed review of the Shared Responsibility Provisions, including recently finalized guidance**
- **Case Studies - Identification of full time employees using look back or monthly measurement methods**
- **Required updates to legal plan documents**
- **Special discussion items (*i.e.*, seasonal employees, interns, adjunct faculty, temporary employees, etc.)**

REGISTER
www.willcoxsavage.com

Complimentary Seminar - seating is limited

Approved for 2 HRCI credits

AFFORDABLE CARE ACT - 2015 TRANSITIONAL RELIEF FROM THE EMPLOYER SHARED RESPONSIBILITY

Cher E. Wynkoop and Corina V. San-Marina

On February 10, 2014, the Internal Revenue Service (IRS) released the final regulations implementing the employer shared responsibility mandate. The mandate was initially set to take effect beginning in 2014.

In July 2013, the IRS issued guidance, which delayed the employer shared responsibility mandate until 2015 for all employers. The final regulations retain this delay, but also provide an extended delay for smaller "large employers," which include employers with an average of 50 to 99 full-time employees (including full-time employee equivalents or "FTEs"). Those employers will not be required to comply with the mandate to offer employees affordable health insurance until the first day of their plan year starting in 2016.

"Full-time employees" are those who work 30 or more hours per week. In determining the number of FTEs during each calendar month, an employer must aggregate the number of hours of service for that calendar month for employees who were not full-time employees (but not more than 120 hours of service for any employee) and divide that number by 120.

In order to take advantage of the transitional relief period, an employer must satisfy the following conditions:

- During the period beginning February 9, 2014, and ending December 31, 2014, the employer does not reduce the size of its workforce or the overall hours of service of its employees in order to fall under the 100 full-time employees threshold.
- During the period beginning February 9, 2014, and ending December 31, 2015 (for an employer with a calendar year plan), or ending on the last day of the plan year that begins in 2015 (for an employer with a non-calendar year plan), the employer does not eliminate or materially reduce the health coverage, if any, it offered as of February 9, 2014.
- The employer certifies that it satisfies all of the foregoing requirements on a designated form to be issued by the IRS.

Given that this additional delay of the employer mandate only applies to employers with 50 to 99 full-time employees (including FTEs), it is imperative that employers with approximately 100 full-time employees (including FTEs) determine whether they fall below the 100 threshold as that will dictate the type of relief that applies to them. During the 2014 calendar year, an employer can use a six-month "look back" period of at least six consecutive months to determine whether they had at least 100 full-time employees (including FTEs).

The final regulations also contain a favorable transition rule for larger "large employers," which include employers with 100 or more full-time employees (including FTEs). While those employers are still subject to the employer shared responsibility mandate beginning in 2015, the final regulations loosen the rules governing the application of the "no coverage penalty" for 2015.

As a reminder, this penalty applies if a large employer fails to offer coverage to at least 95% of its full-time employees and their dependents, and one of its full-time employees obtains coverage through a Marketplace and qualifies for premium assistance. Employers that do not satisfy this coverage requirement are subject to an annual penalty of $2,000 (adjusted for inflation after 2014) multiplied by (its number of full-time employees minus 30).

As a result of this transitional relief, employers with 100 or more full-time employees (including FTEs) need to offer coverage to 70% of their full-time employees in 2015 and 95% in 2016 to avoid this $2,000 penalty. In addition, for 2015 (plus any calendar months of 2016 that fall within a large employer's 2015 plan year), if an applicable large employer with 100 or more full-time employees (including FTEs) on business days during 2014 is subject to a penalty for failing to offer coverage, then the penalty with respect to the transition relief period will be calculated by reducing an applicable large employer number of full-time employees by 80 rather than 30.

The final regulations also extend transitional relief to employers who are revising their plans to provide coverage for employees and dependents (which for purposes of the employer mandate does not include spouses), rather than employees alone. An employer that takes steps during a plan year that begins in 2015 towards offering coverage for dependents will not be liable for any potential penalty for that plan year. However, this transitional relief only applies to employers for the 2015 plan year with respect to plans under which: dependent coverage is not offered; dependent coverage that does not constitute minimum essential coverage is offered; or, dependent coverage is offered for some, but not all, dependents.

These transition rules should provide needed relief to employers who are currently working through the inherent difficulties of complying with the employer shared responsibility mandate. However, employers should keep in mind that these transition rules are temporary and limited. So, while delaying planning for compliance with these final regulations until late 2014 (or late 2015 for employers with 50 to 99 full-time employees) might seem attractive, employers should begin working with trusted advisors now to make sure they are compliant by 2016 when the transitional relief ends.■

NAVIGATING THE INTERACTIVE PROCESS

Monica A. Stahly

By now, companies are familiar with the expansive reach of the Americans with Disabilities Act (ADA), and particularly the ADA's Amendments Act of 2008 (ADAAA). Because the ADAAA instituted a more inclusive definition of who properly qualifies as disabled, the Act has, in turn, given rise to more requests for accommodations for these newly qualified individuals. With a surge in ADA litigation and "failure to accommodate" claims, companies should reevaluate their protocol for responding to requests for accommodation, ensuring that they properly and effectively engage in the interactive process.

Once an employee makes a request for reasonable accommodation (whether through a formal company process or an informal appeal to a supervisor), the request itself triggers the employer's obligation to engage in the interactive process. The interactive process requires the employer to discuss whether and what reasonable accommodations would allow the employee to perform the essential functions of his or her position. While the employer has no obligation to accept an accommodation proposed by the employee, the employer has an affirmative obligation to have a meaningful conversation (and likely several follow-up discussions) to identify and explore possible accommodations and alternatives.

The exact format for interactive process is inexact and malleable. While this enables employers to respond to different circumstances, it also creates a great deal of confusion over the extent to which an employer must engage with the requesting employee. The following serves as a practical outline for steps an employer should implement to ensure compliance with the ADA/ADAAA's interactive process requirement:

- **Train supervisors to identify requests for accommodation.** As soon as an employee makes his or her supervisor aware that he or she is having difficulty performing his or her job duties because of a potentially ADA/ADAAA qualifying reason and expresses a desire for an accommodation, the supervisor should notify Human Resources (HR) to step in and begin the interactive process.

- **Set up a face-to-face meeting with the employee to discuss the possibility of accommodation.** To better understand the essential functions of the position, HR should review the employee's written job description and consult with the employee's supervisor prior to the employee meeting.

- **Discuss the employee's job description and identify tasks that the employee is unable to perform.** If the employee raises an undocumented medical concern, HR should provide the employee with paperwork to be completed by his or her treating physician. HR should provide a copy of the employee's job description in the paperwork so that the physician can adequately assess the situation, and HR should specifically request that the physician identify any and all restrictions. The initial meeting is also a good opportunity to ask the employee what accommodations he or she believes will enable the employee to perform the essential functions of his or her position.

- **Follow up with the employee by letter or e-mail.** HR should not only recap the initial discussion but also remind the employee of any action items (*i.e.* physician paperwork) and the timeline for completion.

- **Upon receipt of the paperwork, meet with the employee's supervisor to discuss any documented restrictions, possible accommodations, and hardships that may arise as a result of accommodation.** At that point, HR should schedule another meeting with the employee.

- **Discuss any restrictions with the employee, again ask the employee for his or her proposed accommodations, and discuss any alternative accommodations.** Prior to any agreement to implement an accommodation, HR should verify the accommodation with the employee's supervisor.

- **If an accommodation is possible (and does not impose undue hardship), implement the accommodation, document the decision, and schedule regular follow-up with both the employee and the manager.** HR should, by letter or e-mail, inform both parties of the agreed upon accommodation and direct them to notify HR if the accommodation is not working.

- **If the accommodation does not work, meet again to discuss other alternative accommodations prior to considering any adverse employment action, such as discharge.**

Throughout the entire interactive process, HR must thoroughly document all attempts to converse with the employee, any employee reluctance to reciprocate, the details of all discussed accommodations, and any possible accommodations that would result in hardship (specifying the details of the hardship). While an employer need not agree to a request for accommodation unless it is reasonable, the employer must at least discuss alternatives.

The interactive process is not easy to navigate, and an employer may not be able to accommodate all employee requests. However, prior to taking any adverse action against an employee requesting accommodation, employer should contact counsel for guidance to assure that the employer does not run afoul of the ADA/ADAAA.■

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440 Monticello Avenue, Suite 2200
Norfolk, Virginia 23510

KEEP YOUR CLOTHES ON: TSA PRE✓™ PROGRAM INTRODUCED AT NORFOLK INTERNATIONAL AIRPORT

Susan R. Blackman and James B. Wood

What used to be a simple task - boarding a plane - has become a test of speed, modesty, and patience as the Transportation Security Administration (TSA) requires travelers to remove belts, shoes and outerwear, and certain items from carry-on luggage. However, for Norfolk International Airport travelers enrolled in the TSA Pre✓™ program, clearing airport security is becoming a more pleasant experience thanks to expedited screening. TSA Pre✓™ program participants are: 1) given a separate screening line; 2) permitted to leave on belts, shoes, and light outerwear; and 3) no longer required to remove approved liquids and laptops from their carry-on baggage.

To enroll in the program, you must submit an application, pay a nonrefundable fee of $85.00, and appear in person at an enrollment center (in Virginia Beach or Hampton). Pre✓™ applicants must be U.S. citizens, U.S. nationals, or Lawful Permanent Residents and cannot have been convicted of certain types of crimes. If you are already enrolled in the Global Entry program, the NEXUS program, or the SENTRI program, or if you are in the U.S. Military (including Reserves and National Guard), you do not need to apply for Pre✓™, as you are automatically enrolled.

Approximately two to three weeks after visiting an enrollment center, successful applicants will receive a Known Traveler Number (KTN) in the mail, which is valid for five years. The KTN must be entered whenever booking travel reservations through one of the nine participating Pre✓™ airline websites, through one of the third-party airline reservation websites, or even when booking reservations over the phone. You can also store the KTN in your frequent flyer profiles for future travel.

Currently, TSA Pre✓™ has limited operation at Norfolk International Airport - it is only available at Concourse A in the early morning hours. A spokesman for TSA said that a new checkpoint at Concourse B offering a dedicated TSA Pre✓™ lane will be coming soon.

For more information visit: www.tsa.gov/tsa-precheck/application-program.■

CONTACTS

Labor & Employment
William M. Furr, Chair
Wm. E. Rachels, Jr.
Gregory A. Giordano
Samuel J. Webster
Christopher A. Abel
Susan R. Blackman
David A. Kushner
Ashley W. Winsky
Phillip H. Hucles
Monica A. Stahly

Employee Benefits
Cher E. Wynkoop
David A. Snouffer
Corina V. San-Marina
Amber R. Randolph

Immigration
Susan R. Blackman
James B. Wood