SEYFARTH SHAW

Five on Friday

A Practical Playbook for Businesses Adjusting to a Changed Wage-and-Hour Landscape

The Seyfarth Shaw Wage and Hour Litigation Practice Group

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Volumes 1 & 2

Seyfarth Shaw LLP

Letter from the Editors

The laws regarding how, and how much, businesses must pay their employees are changing. Seyfarth's Wage and Hour Litigation Practice Group is comprised of nearly 100 skilled practitioners who are monitoring and assessing the changes. Drawing upon that effort, as well as our collective experience and expertise, we created *Five on Friday* to offer practical, easy-to-understand guidance about what the changes entail and how to shoulder the impact.

Our first volume of *Five on Friday* installments focused almost exclusively on guidance for businesses anticipating and planning for the Department of Labor's then-imminent changes to the Fair Labor Standards Act's most prominent overtime exemptions. We continue in this second volume to provide guidance for businesses preparing for the new rule's December 1 effective date. Throughout both volumes, our fellow Seyfarth lawyers, as well as trusted outside consultants and economists, offer insights on a wide range of important, business-driven questions about the changes. In our second volume, we also offer insight into numerous other topics (e.g., how businesses should adapt as government investigations into wage and hour practices continue to increase in frequency). Exciting times and topics, indeed.

On behalf of the entire Wage and Hour Litigation Practice Group, we invite you to continue using our *Five on Friday* installments as a playbook in your preparation for the changes to the exemptions and for determining how to respond to related government activity. And we hope that you will subscribe to the blog, so that we can continue to offer you strategies and insights that are as current as the changes upon which they are focused.

Sincerely,

Brett C. Bartlett and Kevin Young
Five on Friday Editors

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WAGE AND HOUR LITIGATION PRACTICE GROUP

Five on Friday

Seyfarth's Weekly Chat About the Changing Wage-and-Hour Landscape

Nuts and Bolts of Anticipated Overtime Changes

Featuring Alex Passantino

In this week's *Five on Friday* installment, we sit down with our esteemed colleague (and resident poet), Alex Passantino, to discuss the nuts and bolts of the DOL's anticipated changes to the FLSA's overtime exemption rules. Prior to joining Seyfarth, Alex served as Acting Administrator of the U.S. Department of Labor's Wage & Hour Division. Given his prior experience and continued insights into WHD, Alex is one of the best resources in the country on this topic.

Ready? Let's go.

Q **Thanks for sitting down with us, Alex. Setting aside wayward Google searchers, our readers have heard about WHD's proposed changes to the FLSA's overtime rules. But for those who haven't thought about the issue in a while: what exactly is on the table?**

A Thanks for having me! The gist is this: WHD is on the brink of overhauling the most-utilized exemptions from the FLSA's overtime requirements—the so-called "white collar" exemptions. These exemptions apply to executive, administrative, and professional types. There's also a streamlined exemption test for employees earning over $100,000 per year. WHD's goal appears to be to reduce the number of employees who would qualify for exemption. Although the final rules may change from what was proposed last summer, the potential changes include: (i) an increased salary threshold of $50,440, or something close to it; and (ii) possible tightening of the duties tests. Additionally, the salary level for the highly-compensated exemption will increase to around $125,000, or something close to it. WHD also proposed to automatically increase the salary thresholds annually, like some states do with their minimum wage requirements.

Q **What do you mean by a tightening of the duties tests?**

A Unlike what it did for the salary requirements, WHD did not include specific proposed regulatory language for the duties tests. Instead, it posed a list of duties-related questions. The questions make clear that DOL is at least considering changes that could make the duties tests similar to California's overtime laws, requiring an exempt employee to perform exempt functions more than 50% of their working hours. Or something close to that.

Q **Can the DOL actually do that?**

A There very well may be some procedural issues, as we explained in the comments Seyfarth submitted to the DOL. And not proposing specific language really does go against the spirit of notice-and-comment rulemaking. For a regulatory scheme in which nearly every word gets parsed in litigation, it's unfair to the regulated community not to identify the specific words being considered. But DOL has regulated without specific proposals in the past, and, despite many voices like ours raising significant issues with any changes to the duties tests, it appears the possibility remains on the table.

Q **The rules are in proposed format right now. When do we expect final rules to issue?**

A This has been a bit of a moving target, with the only consistent prediction being that final regulations will be published before the end of the Obama Administration. Based on recent comments by DOL Solicitor Patricia Smith, the latest thinking is that the final rules will drop in July 2016. Once that happens, the rules likely will be effective 60 to 90 days later.

Q **Can Congress stop the rules from becoming final?**

A Depending on what the final rules end up looking like, we can expect legal and political challenges to the regulations. There may be lawsuits challenging the process used by DOL in the rulemaking, or the impact that the massive salary increase will have on particular regions of the country or specific industry sectors (such as nonprofits and the public sector), or whether DOL has the authority to automatically increase the salary. In addition, Congress will almost certainly hold hearings on the issue, as it has already. As for whether Congress can "stop" the rules, there are likely to be efforts to stop implementation of the rule via the appropriations process. I suppose it's also possible to amend the FLSA to negate the rules, but that seems like a pretty steep uphill climb. I'd expect to hear a lot of chatter about the Congressional Review Act in the coming months—the CRA would allow Congress to "undo" the regulations, even if it is unable to stop them from going into effect.

If you'd like to discuss this topic further, you may contact Alex at apassantino@seyfarth.com. You can also contact the *Five on Friday* editors, Brett Bartlett (bbartlett@seyfarth.com) and Kevin Young (kyoung@seyfarth.com), or any of the other excellent attorneys in our national Wage and Hour Litigation Practice Group, whose bios and contact information you may access by clicking here.

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WAGE AND HOUR LITIGATION PRACTICE GROUP

Five on Friday

Seyfarth's Weekly Chat About the Changing Wage-and-Hour Landscape

Navigating the Rising Salary Levels

Featuring Louisa Johnson

In this week's *Five on Friday* installment, we sit down with Louisa Johnson to drill further into one aspect of the proposed changes to the FLSA's white-collar exemptions: the compensation requirements. Louisa is an Atlanta-based partner who regularly advises businesses nationally on wage and hour issues. She helped to spearhead Seyfarth's analysis and response to WHD's proposed changes to the white-collar exemptions.

Q **Last week, we discussed the fact that WHD has proposed changing the minimum compensation requirements for overtime-exempt status. Can you remind us how they might change?**

A Sure. Most exempt employees are classified as such due to one of the three core white-collar exemptions—namely, the executive, administrative, and professional exemptions. These "EAP" exemptions require both that an employee perform certain duties and receive a guaranteed salary at or above a set threshold. At present, the EAP salary threshold is $455 per week. In addition, there is a highly-compensated exemption, which generally applies to salaried employees who perform at least some of the duties required by the core white-collar exemptions and earn at least $100,000 in total, annual compensation.

If WHD's proposed changes to these requirements are finalized without modification, the EAP salary threshold would more than double to approximately $970 per week (which amounts to $50,440 per year). The highly-compensated exemption's salary threshold would rise to approximately $125,000.

Q **WHD has revised the salary threshold for exempt status several times in the FLSA's 78-year history. In some of its past revisions, WHD has tied the salary level to the 10th-to-20th percentile range of salaries being paid to employees in the lowest-wage industries and geographic regions. Did WHD take a similar approach in making its current proposal of a $970-per-week salary threshold?**

A No. While the final rule may look different from the proposal, the WHD has used nationwide data on full-time, salaried workers across all industries, and it has proposed that the new salary level be set at the 40th percentile of such employees' current salaries. Many have raised concerns about the disparate impact that such an approach would have on employers in lower-wage regions or industries and on smaller employers. As discussed in the comments Seyfarth submitted to the DOL, average wages of employees in similar roles can vary substantially by region and by industry. As an employer, the federal government recognizes and accommodates for such variations by paying employees in the same salary grade the same base salary level, but then adding to that base different amounts of "locality pay" to account for geographic cost-of-living variations. The proposed rules include no such accommodation.

Q **Many commentators focus on what these changes would mean in 2016. But the proposed compensation changes are not limited to a static, one-time increase, right?**

A Correct. WHD has proposed a rule that would automatically update the thresholds that we've discussed, without the need for WHD to go through the process of revising the exemption rules each year. It has proposed effectuating the automatic updates by tying the EAP exemptions' salary level requirement to either the consumer price index for urban markets (CPI-U) or the 40th percentile of full-time, salaried workers. Likewise, the highly-compensated exemption's annual, total compensation requirement would be tied to the 90th percentile of full-time, salaried workers. In other words, the EAP exemptions' salary level requirement of $970 per week, and the highly-compensated exemption's total compensation requirement of $125,000 or so per year, would apply only in 2016. The thresholds would rise in 2017 and thereafter.

Q **Indexing is a new concept for the exemptions. And it's quite significant, right?**

A It is incredibly significant and will have at least two distinct consequences for employers. First, indexing would create a new administrative burden for employers, who will have to track rising salary levels to ensure continued compliance and to decide how to handle the timing and amount of any merit-based raises beyond the WHD's required increases. While some employers already face similar burdens in states with indexed minimum wage levels, a key difference here is that the rising threshold could require employers to re-consider each year whether to reclassify the employees at issue. Second, if the EAP exemptions' salary level and the highly-compensated exemption's annual compensation requirement are indexed to the 40th and 90th percentiles of full-time, salaried workers, respectively, then employers should expect that these minimum thresholds will rise quickly in the next few years.

Q **Can you explain to readers your second point—why the compensation levels could spike especially quickly, assuming they're indexed to full-time, salaried workers?**

A Yes. That's certainly the attention-grabber, isn't it? If the rules are finalized as proposed, then many exempt employees who currently earn more than $23,660 per year (i.e., the current EAP salary threshold) but less than $50,440 (i.e., the projected threshold for 2016) will either fall out of the population of full-time, salaried workers due to being reclassified as hourly, or they will receive a raise to at least $50,440. Come 2017, both of these outcomes would contribute to a pool of full-time, salaried workers for which the 40th percentile correlates to a much higher salary than it did the year before, when the pool included many more workers earning between $23,660 and $50,440. This floor-raising effect could repeat itself year after year, causing salary thresholds for both the EAP and highly-compensated exemptions to increase quickly and dramatically.

If you'd like to discuss WHD's proposed changes further, you may contact Louisa at lojohnson@seyfarth.com. You can also contact the *Five on Friday* editors, Brett Bartlett (bbartlett@seyfarth.com) and Kevin Young (kyoung@seyfarth.com), or any of the other excellent attorneys in our national Wage and Hour Litigation Practice Group, whose bios and contact information you may access by clicking here.

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WAGE AND HOUR LITIGATION PRACTICE GROUP

Five on Friday

Seyfarth's Weekly Chat About the Changing Wage-and-Hour Landscape

What's the Deal With Duties?

Featuring Cindy Westervelt

In this week's *Five on Friday*, we visit with Cindy Westervelt to discuss potential changes to the duties requirements of the FLSA's white-collar exemptions. Cindy is Senior Counsel in our Wage and Hour Litigation Practice Group. Prior to joining Seyfarth, she was Vice President, Human Resources for Staples North America and Vice President, Associate General Counsel managing all litigation for the company, including labor and employment matters. Cindy has a wealth of experience to draw upon in advising employers on how to plan for and respond to the changing legal landscape.

Q **In our last installment, Louisa talked about changes to the white-collar exemptions' salary requirements. But we've also heard about potential changes to the duties tests. Is that happening?**

A The short answer is that we don't know. Unlike the salary changes, the Wage and Hour Division did not propose amendments to the current duties tests. Instead, WHD posed several questions to the public that suggest it is considering overhauling the duties tests to make them more like California law.

Q **If the FLSA's duties tests are changed to look more like California, what would that mean for employers?**

A A shift to a California-style duties test would have massive implications for employers in virtually every industry. As most readers know, California's white-collar exemptions are similar to the FLSA's in that an employee's exempt function must be her "primary" duty, but California differs completely in how it defines primary duty. Whereas the FLSA defines primary duty qualitatively (i.e., most important), California uses a quantitative, "stop watch" approach: look at what the employee spends the most time doing, and that is her primary duty. A California-style test could have an especially pronounced impact in the retail, hospitality, and restaurant industries. In these industries, it's not uncommon to see salaried managers who work in the front-line operation and carry out their exempt function alongside lower-ranking hourly employees, either while multi-tasking, teaching by doing, or simply because there is work to do and they want to be perceived as a team player. Such managers' exempt status could be at risk.

Q **Should employers anticipate changes to the duties tests?**

A Well, it's certainly important to plan for the potential change. Like the salary level changes that Louisa talked about, a change to the duties tests would require legwork, and compliance can't be achieved overnight. However, unlike the salary changes—where the fix is more straightforward in the sense that it is a numbers-based decision driven largely by the overall compensation philosophy—changes to the duties tests would almost certainly impact how many businesses operate day-to-day. For example, the changes could result in the restructuring of jobs and require retraining managers of front-line positions on how to make sure someone doesn't accidentally spend too much time performing hourly work and suddenly becoming nonexempt.

Q **It's easy to see how employers might find it difficult to plan for a change that is not yet defined and might not even be included in the final rules. Where would you start?**

A I would identify positions likely to be on the fringe of exempt status and take steps to begin assessing how their time breaks down. If you have California operations, you can look at positions that you classify as nonexempt there, but not elsewhere, and assess whether the California operating model is scalable to the rest of the company, if need be. To be clear, though, there's no one-size-fits-all approach for this. We help employers with this sort of analysis all the time, and it differs based on factors such as the size of the operation, anticipated growth areas, hours of operations and customer demands, and risk tolerance. In addition to our help, use your network—your peers at other companies like yours might have some good ideas as to what they are doing to prepare.

Q **From your in-house experience in the retail sector, is there any other insight you can provide to employers who are in the early phase of examining how the revised white-collar exemption rules might impact their businesses and how to respond?**

A We faced a similar challenge in 2004 when the DOL last changed the rules. At that time, the rules arguably changed in favor of businesses. Here's the sort of thinking that got us through at that time: (1) this is the opportune moment to enter a clear dialogue with business stakeholders about compliance and the core needs of operating the business—it created a dialogue to think creatively about how to be effective and efficient in our operations (which is not always easy when some are stuck in the mindset of, "this is how we do it"); (2) it is also a moment when we can reconfirm that our jobs and the employees within them are functioning as we expect them to—and the way we talk about them, train them, and reward them, reflects the primary duty we want them to have; and (3) we can also take steps to shrink the target that has grown on our back, like so many other businesses, as wage-and-hour litigation and investigations have continued to surge.

If you'd like to discuss WHD's proposed changes further, you may contact Cindy at cwestervelt@seyfarth.com. You can also contact the *Five on Friday* editors, Brett Bartlett (bbartlett@seyfarth.com) and Kevin Young (kyoung@seyfarth.com), or any of the other excellent attorneys in our national Wage and Hour Litigation Practice Group, whose bios and contact information you may access by clicking here.

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WAGE AND HOUR LITIGATION PRACTICE GROUP

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Seyfarth's Weekly Chat About the Changing Wage-and-Hour Landscape

Selling the Business on Planning for New FLSA Exemption Rules

Featuring Brett Bartlett

This week, we visit with *Five on Friday* editor Brett Bartlett to dive deeper into how businesses should prepare for the DOL's final revisions to the FLSA's overtime rules. Brett is chair of Seyfarth's Labor and Employment Department in Atlanta and co-Chair of the national Wage & Hour Litigation Practice Group. He's devoted countless hours to helping businesses assess the way they classify employees under state and federal overtime pay laws and has crafted effective and business-practical approaches to managing the kinds of changes that the revised FLSA exemptions might require.

Q **Why is it important for businesses to begin planning for these changes before they become final?**

A We now know that the DOL will almost certainly implement its final exemption rules in or before May, much earlier than DOL representatives previously suggested. The DOL submitted the final rules to the White House on Tuesday, March 15. Typically, White House approval takes 30 to 60 days. These changes are coming fast. While we still don't know what the final rules will look like, we are certain that they will include an increased salary level requirement, and possibly a revised duties tests, as Louisa and Cindy discussed in our prior posts. Businesses that wait to identify the jobs and employees most likely to be impacted will risk being caught on their heels as the new rules become effective. They could miss the opportunity to develop an effective change management plan that avoids potentially severe risks and costs associated with failing to think carefully about how the changes impact the business, what changes should be made to negotiate that impact, and how best to execute and communicate those changes.

Q **Who should be involved in planning for and responding to the overtime changes?**

A Clearly you'll want to involve those responsible for your H.R. and payroll functions. Beyond this, though, we firmly believe in identifying and engaging "stakeholders" and "champions" to be key players in a carefully crafted change management plan. Stakeholders are members of leadership who will take stock in the new rules' bottom line impact and will appreciate, because of the potential impact, the importance of investing time and resources in a change process. Champions are those who can persuade business drivers that the investment is right and necessary. Stakeholders and champions can be the same people. They are crucial to the process. Inside and outside lawyers should be engaged as well, both to help navigate the new legal requirements and to ensure that this sensitive work can remain protected if ever called into question by litigation.

Q **That doesn't sound too hard--just identify the right change management team and off we go. Is that it?**

A If only that were so. Each stage of the change management process needs to be carefully planned. We have actually charted the typical workflow for this kind of process, which interested readers can email us to see. We strive to keep the process simple. But its components remain intricate because they are so important. The development of a careful communications plan is among the most important component. With the stakeholders and champions identified, that plan should allow for succinct but persuasive explanations to business drivers about: (1) the legal developments that will impact how they do business; (2) their role in the change management process; and (3) the need for their cooperation. The plan should also provide guidance around how to address employees' questions and concerns. And it should include—even at the preliminary stages—an outline of how changes will be communicated to the business. Of course, there are many nuts and bolts to be tightened during the assessment—too many to discuss in this forum. But from our experience, we know that an effective communications plan will make the entire process much easier to manage. It should also reduce the risk of employees feeling so uninformed or confused by the changes that they end up in a plaintiffs' attorney's office or at the DOL.

Q **If this process creates a risk of employee claims, why undertake it at all?**

A This is a bit of a no-brainer in today's wage and hour environment. FLSA compliance is an operational necessity. FLSA litigation has been rampant since the last overhaul to the rules in 2004. Employees filed more than 8,000 FLSA lawsuits in 2015—that's over 20 a day! The DOL has also ramped up its investigative efforts. The Secretary of Labor plans to add 300 more wage and hour investigators, and has promised continued reliance on liquidated damages and penalties as well as coordinated efforts with state agencies. The salary level increase will create a bright-line of compliance. Any changes to the duties tests might do so as well. In addition to all of this, wage-related issues have been in the spotlight for quite some time, both in the media and in the political arena, and the release of final rules alongside the nearing of the November elections will cause it to shine even brighter. In our view, all of this calls for immediate attention. The risks associated with a careful assessment are far outweighed by the risks of noncompliance.

Q **In-house counsel already face pressure to justify their line on the budget. And obviously this kind of legal compliance work only adds to the overhead. How might in-house types convince business stakeholders to invest company resources in planning for the new exemption rules?**

A That's a great question. While each business is different, I think it's key to ensure that stakeholders understand that planning for these changes isn't simply the legal tail wagging the business dog. Beyond the sorts of risks that we've already covered, what we're really talking about is how we pay our people. It's an area where we have an incredible interest in getting it right and keeping it that way. Of course, not every business has in-house counsel. For those that don't, feel free to reach out to one of us at Seyfarth for assistance in helping the business to understand why ensuring compliance is such a worthwhile commitment of time and resources.

If you'd like to further discuss WHD's proposed changes and how you can prepare for them, you may contact Brett at bbartlett@seyfarth.com. You can also contact Five on Friday's other editor, Kevin Young (kyoung@seyfarth.com), or any of the other excellent attorneys in our national Wage and Hour Litigation Practice Group, whose bios and contact information you may access by clicking here.

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Five on Friday

Seyfarth's Weekly Chat About the Changing Wage-and-Hour Landscape

First Steps Of A Plan For The New FLSA Exemption Rules

Featuring Dennis Clifford

In this week's *Five on Friday*, we sit down with Dennis Clifford to discuss steps that any business can take to begin planning for the changes to the FLSA's overtime exemptions. Dennis is co-chair of Seyfarth's Labor and Employment Department in Houston. He regularly advises employers on compensation issues, including exempt-status classifications, commission plans, day-rate plans, travel pay, training pay, per diem pay, and pre- and post-shift activities. Recently, Dennis has spent considerable time helping businesses assess and comply with the Department of Labor's revised rules on eligibility for overtime pay.

Q **In our last segment, Brett Bartlett recommended a number of steps that businesses should take as they plan for the new FLSA exemption rules. Among them, he recommended that businesses assess their exempt employee classifications to determine the impact that the new rules may cause. He didn't really discuss timing, and some might ask: why should we conduct the assessment now, when the changes are not even final? Why should they?**

A In 2004, when the DOL last revised the white collar exemptions, its new regulations became effective four months after they were disclosed to the public. That period was provided by the DOL under the Bush Administration. Anyone who was involved with job classifications following those changes can tell you that four months is not a lot of time to assess and potentially restructure a workforce or to reclassify jobs and employees because of a new law. It's conceivable that the Obama Administration's DOL will provide even less time, and—if the DOL's new rules resemble the proposals they made last summer—the impact of these revisions could require much more work than those made in 2004. We recommend that businesses do as much "pre-work" as they can, in advance of what will almost certainly be a mid-May publication date for this *new* law.

Q **What sorts of steps can employers take now, based solely on the proposed rules?**

A As Brett touched on last week, businesses should begin securing buy-in for a plan that ensures a coherent process for considering the rules, identifying necessary changes, and executing those changes. Of course, there's no one-size-fits-all formula to achieve buy-in. It may be facilitated by something as simple as sharing our *Five on Friday* posts and others on our wage-hour blog to generate discussion. Or it could be a conference call with counsel, who can walk through what the changes will likely entail and why they're so important. As buy-in increases, employers might also think more concretely about how they might go about making the changes that they are likely to consider, from reclassifying jobs to consolidating roles to adjusting salary levels. If you need materials or talking points to help open discussion among your stakeholders regarding the reasons why an assessment is important and timely, just email us. We have a variety of presentations and other materials that you might find helpful.

Q

In addition to working to garner buy-in, can you give readers an example of concrete steps that employers can take at this time?

A

Absolutely. A great starting point would be to build a spreadsheet containing all of your exempt employees. You can choose a high-level salary cutoff (e.g., $65,000) to eliminate upper management and executives. Using that list, run a gap analysis to determine the cost of increasing the salaries of employees earning *less than* $51,000 to that amount, which is just above the salary threshold that DOL proposed last summer. Next, run an exposure analysis to determine the cost of reclassifying those employees to nonexempt, overtime-eligible status. If you have a sense of the actual hours they are working, use that as your basis for the analysis. If not, run the analysis based on different hours-worked assumptions (e.g., 2½, 5, 10, 15, and 20 overtime hours per week). Through this analysis, you can compare the cost of increasing salaries to the cost of reclassification. And keep in mind: those exempt employees with salaries greater than the new threshold might also be impacted, especially if they share titles and duties with those at the lower end of the scale. That's why we recommend including them on your initial list for this analysis.

This is not rocket science. It will be eye-opening nevertheless. Let us know if you want to discuss the results or the process for calculating them!

Q

That's excellent. Any other concrete steps you'd recommend at this time?

A

If you already feel confident that certain exempt roles will be reclassified when the new rules become effective, you can start assessing how many hours per week the employees in those roles are working. That information is critical because it will help you assess an appropriate hourly rate, factoring in overtime, as well as whether and to what degree their duties or hours should change when they become nonexempt. For example, you might want to consider converting one 60-hour-a-week exempt employee into two 30-hour nonexempt employees. Or you might want to reduce or eliminate some of the employee's job duties to ensure that she will not typically incur overtime work. Obviously the more information you have in this regard, the better you will be able to make a justified business decision about how to reduce the strain of these new rules on your business.

Q

It makes sense that you'll want to get a feel for the hours currently being worked by roles that you are most likely to reclassify. But the vast majority of exempt roles don't record their hours for timekeeping purposes. How can businesses go about measuring hours worked for these roles?

A

The answer depends on the size and spread of the role. If it's a small role that's situated in just one location, it may be easier to conduct an informal study, having the role's supervisor observe and document when incumbents arrive to work, when they take breaks, and when the leave for the day. They can also draw upon anecdotal interactions with their incumbents, such as when they first hear from them in the morning, both during slow and busy periods, or how late into the day they interact, whether in person or via email. For a role that is larger in size and/or spread across more locations, it becomes much more important to invest in a carefully planned methodology for assessing hours worked. Sometimes, that means working with outside counsel to plan a formal time study that includes both in-person observation and data-centric analysis (e.g., reviewing badge swipes and computer login/logout times) across a representative set of locations and data.

And one more thing. All of this involves the kinds of analyses that we would prefer you do under the protection of an attorney-client or similar privilege. Let's talk.

If you'd like to discuss further any of these issues further, you may contact Dennis at dclifford@seyfarth.com. You can also contact the *Five on Friday* editors, Brett Bartlett (bbartlett@seyfarth.com) and Kevin Young (kyoung@seyfarth.com), or any of the other excellent attorneys in our Wage and Hour Litigation Practice Group, whose bios and contact information you may access by clicking here.

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Five on Friday

Seyfarth's Weekly Chat About the Changing Wage-and-Hour Landscape

An Economist's Take on Preparing for the New Overtime Rules

Featuring Michael DuMond

For this week's *Five on Friday*, we're joined by labor economist Mike DuMond of the economic consulting firm, Economists Incorporated. Mike's consulting experience includes numerous audits, exposure analyses, and statistical modelings for matters involving pay equity, disparate impact, OFCCP, and, of course, wage and hour issues. Mike is someone we've regularly conversed with as we've endeavored to cultivate the most cutting edge thinking around the FLSA's new exemption rules. We're thrilled to share one such conversation in this week's installment.

Q **In our prior two installments, Brett and Dennis discussed the need to prepare now for the new overtime rules that we expect to be published in May or so of this year. From an economist's perspective, do you agree?**

A Absolutely. The impact of the new overtime rules could be quite significant for employers, both in terms of operations and in terms of bottom-line impact. Complicating matters further is the fact that the new rules will affect distinct groups of employees differently, which means an employer will need to have more than one plan in place. And on top of all that, the new rules could be indexed to inflation, making exempt status a moving target for which the plans will need to be revisited each year. For these reasons and the many others that Brett and Dennis mentioned, it is critical for employers to plan ahead so that they are in compliance and fully prepared when the new rules become effective.

Q **How can an economist help?**

A First and foremost, a labor economist can help estimate the financial impact of the new regulations. Fundamental to this analysis is determining which employees are likely to become eligible for overtime pay. For those employees, an employer has the choice of increasing their salary so that they remain exempt, or preparing to pay them for their anticipated overtime work. This type of cost/benefit evaluation is the bread and butter of labor economists.

For exempt employees with salaries just above the current threshold of $23,660, raising salaries to more than $50,000 simply to preserve exempt status is likely impractical. Since these employees will almost certainly become overtime eligible, accurately estimating their actual work hours is paramount. However, employers are unlikely to have reliable data on work hours for exempt employees. Last week, Dennis suggested preparing estimates based on a range of possible overtime hours (e.g., 5, 10, 15 or 20 hours per week) in the absence of information on actual work hours. Another possibility would be to rely on "non-traditional" timekeeping sources to approximate an employee's work hours.

Q

What do you mean by non-traditional data?

A

In most workplaces, there are a variety of devices and systems that track an employee's activities, many of which may record the time and date of those activities. Those data points can help provide an approximation of employees' work hours. For example, if employees have an electronic key that is used to enter the workplace, the time they first enter as well as the last time they leave the building can provide an upper bound on daily work hours. Alternatively, if the job requires that employees spend most of their time on the company's computer network, then the IT department may be able to generate data showing the exact dates and times that employees are logged into their workstations.

Other non-traditional sources of data that include dates and times of potential work activity would include email records, phone logs, and alarm login/logout records. While these alternate sources are far from perfect measures of actual work activity, a labor economist can analyze these data and generate a more reliable and realistic range of potential overtime work. These types of analyses are even more robust when they are a combination of non-traditional data. For example, combining computer activity data with the times that an employee entered and exited the building not only could allow for a clearer picture of hours potentially worked, but it could be analyzed to help understand break periods.

Q

Are there things that a business can do without an economist's help?

A

I strongly recommend that employers carefully review their compensation structure to make sure that they can clearly explain why some jobs will remain exempt under the proposed rules. This is especially important for businesses that rely on broad salary bands, with a wide range of possible pay. Of particular concern is whether a salary band will include both exempt and nonexempt employees under the new requirements. Keep in mind that the DOL may challenge the exempt status of employees who appear to be doing substantially similar work as nonexempt employees, and having employees with different exemption statuses in the same salary band may attract unwanted attention. A safer alternative may be to narrow a salary band so that all employees share a common exemption status.

Relatedly, many companies have established job "ladders" with lower level nonexempt positions and higher level exempt jobs. Even if the exempt positions on a job ladder are in a different job grade or salary band than the nonexempt positions, it is important to compare the job duties of employees on both sides of the annual salary threshold to make sure that the exemption status is warranted. Additionally, a company's job ladder itself may need to be entirely re-evaluated if the new regulations result in lower level, nonexempt employees earning more compensation than the higher level exempt employees on the same job ladder.

Q

If the rules go into effect as they were proposed, are there any strategies that employers (especially non-profits and small businesses) can take to minimize the cost impact?

A

One decision that businesses will face is how to pay employees who are reclassified to nonexempt status. Obviously an hourly rate of pay is the most common option. But where it is possible to do so—and that is obviously something that the lawyers at Seyfarth can advise on—salaried nonexempt status can be a viable option for various reasons, including that it offers enhanced cost control. In exchange for agreeing with an employee that she will be paid a fixed amount each week that is intended to cover all hours worked, a salaried nonexempt employee only needs to be paid an additional one-half of her regular rate of pay for any overtime hours. Under this "fluctuating workweek" pay method, the salary compensates her for her "straight-time." The employee, on the other hand, benefits from the arrangement because she must be paid her fixed salary even when she works fewer than 40 hours, except in a few limited circumstances. Nonexempt employees can also be paid a fixed salary for a fixed number of hours (e.g., $500 per 40-hour workweek). Using that method, a business will not be entitled to pay only half of the regular rate of pay as an overtime premium. It must instead pay at time and a half for hours worked over those that the salary covers. But, as with the fluctuating workweek model, businesses should be able to project weekly labor costs with greater certainty than they can when employees are paid strictly by the hour.

Second, it is crucial to develop a firm grip on the scheduling of nonexempt workers, and particularly those being moved from exempt status, so that unintended overtime is kept to a minimum. This can be particularly essential for non-profits and small businesses, where employees more regularly change their day-to-day roles and assist where needed and changes to overall compensation may have a larger impact on the cost of running the business.

If you'd like to further discuss these issues, you may contact Mike at dumond.m@ei.com. You can also contact the *Five on Friday*'s editors, Brett Bartlett (bbartlett@seyfarth.com) or Kevin Young (kyoung@seyfarth.com), or any of the other excellent attorneys in our national Wage and Hour Litigation Practice Group, whose bios and contact information you may access by clicking here.

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SEYFARTH SHAW

WAGE AND HOUR LITIGATION PRACTICE GROUP

Five on Friday

Seyfarth's Weekly Chat About the Changing Wage-and-Hour Landscape

A California Lawyer's Perspective: Implications Of A California-Like FLSA Exemption Rule

Featuring Catherine Dacre

This week, we visit with leading California wage and hour lawyer, Catherine Dacre, who offers her perspective regarding her state's challenging standards for classifying employees as overtime-exempt. In addition to its proposal to increase the salary level necessary for an employee to be exempt under the FLSA's executive, administrative, and professional exemptions, the U.S. Department of Labor has suggested that it might include in the final rules a quantitative "duties test," which would require employees who devote more than a given percentage of their time to nonexempt duties to be classified as nonexempt. Catherine's experience helping clients to comply with California's already strict rules, as well as her defense of numerous lawsuits filed thereunder, give her an important insight into how businesses might confront the DOL's new rules defining who can be classified as exempt under federal law.

Q **Thanks for joining us, Catherine. As we've mentioned in prior installments, the DOL suggested that it might shift the white-collar exemptions' primary duty tests to California-style, time-based tests. We don't yet know whether it will actually do so. But who better to ask about the impact that the tests could have than a California wage and hour lawyer! From your perspective, what do you think a percentage-of-time-based test would mean for employers doing business outside of California?**

A Obviously it would be ***quite*** a change. In California, the current test for the white-collar exemptions is purely quantitative: an exempt employee ***must*** spend more than 50% of her time performing exempt duties. This requirement impacts a lot of things. For example, to the extent that a job varies from day to day, the question of whether an employee in that job can be classified as exempt will arguably turn on what the employee does each and every day, on every project, and with every type of duty that the employee performs, as opposed to the overall focus and importance of the job and the level of discretion and independent judgment involved. Most jobs involve a mix of exempt and nonexempt duties. With a quantitative test, the balance between the two must be carefully considered, because at the end of the day, the analysis of whether someone is exempt is inflexibly focused on how an employee actually spends his or her time. If the new federal overtime exemptions' duties tests convert to such a quantitative standard, employers outside of California will need to decide how they will ensure that their exempt employees devote sufficient time to their exempt duties. It won't be easy.

Q

Do you have any recommendations for employers considering how they might overcome this difficulty?

A

There is no one-size-fits-all solution. Every industry, every business, and every type of job involves different expectations for employees and different limitations on what can be done to protect the status of those whose work should *intuitively* be exempt. We always recommend, however, three core pillars to support more generalized compliance efforts: (1) ***TRAINING*** that is clear and consistent, with a focus on teaching employees to perform and prioritize their exempt duties *and* instructing managers to make sure their subordinates do what is expected of them; (2) ***RIGOR*** of feedback and accountability, letting employees know when they are not performing as expected, holding them accountable for their failings, and holding their managers accountable for those failings as well; and (3) ***AUDIT*** to confirm that stakeholders recognize more systemic issues that might arise in how employees and managers are doing their jobs. One difficulty we have seen employers encounter in California is with managers whose idea of being part of the team is to work alongside their hourly employees—laudable but risky conduct, especially when a quantitative duties test applies. While they may be simultaneously leading or training, this approach can risk the loss of exempt status, as it becomes more and more difficult to distinguish managers from their subordinates in terms of the work they are performing. Execution of compliance programs based on these three pillars will help to protect against this risk.

Q

Industries and workplaces are rapidly evolving. One byproduct of this could be that an exempt employee performing a given function in Year 1 might be allocating her time much differently by the time Year 3 rolls around. Under a time-based primary duty test, that shift could materially impact the case for exempt status. What can employers do to monitor and react to an evolving workplace to ensure continued compliance?

A

As part of the third pillar I described, exempt status reviews are critical, especially when significant changes have occurred in the organization, management structure, reporting relationships, or staffing model. Far too frequently, when a potential misclassification issue comes up, it is not because the job was misclassified originally, but because the job changed over time and the impact on classification was not considered. Classification analysis should be part of any contemplated changes of significance in an organization's structure. Many times the impact on classification has a material effect on the contemplated changes and it is not even considered.

Q

Let's assume for a moment that the DOL declines to change the primary duty test to a time-based test, but proceeds with raising the salary level to $50,440, indexed for inflation. Presumably that could impact California employers, given that the federal white-collar exemptions' salary level threshold would at that point trump the salary level for California's exemptions. What would this mean for California employers?

A

Many California employers have grown accustomed to being able to focus almost exclusively on California's state overtime laws, given that they are even more restrictive than the federal FLSA. That would change if the salary level for the FLSA's white-collar exemptions rises above the salary level for California's exemptions. That said, such a change would obviously impact California employers a lot less than employers in other states, given that California's salary level requirement is already relatively high. Also, the change could actually help California by slowing the loss of jobs to other states resulting from California's higher salary threshold.

Q

In a similar vein, we've heard a lot about states and municipalities that have increased their minimum wage rates, including states like California and cities like San Francisco. How, if at all, do these minimum wage rates impact the analysis of whether to reclassify an employee as nonexempt in California?

A

It's true that the increased minimum wage in various areas has narrowed the gap between nonexempt and exempt employees. In terms of pure compensation, employers have to look at the total salary package in the context of expectations as to hours worked for exempt employees, and compare that to a nonexempt wage rate, factoring in for overtime. Many have heard of situations in which a nonexempt employee earns more than an exempt employee once you factor in overtime. But compensation is only part of the analysis. Employers looking at classification decisions must consider morale issues, timekeeping burdens, monitoring and enforcing breaks, and a plethora of other compliance issues and constraints that arise with respect to nonexempt employees, most of which are not applicable to exempt employees.

If you'd like to further discuss these issues, you may contact Catherine at cdacre@seyfarth.com. You can also contact the *Five on Friday*'s editors, Brett Bartlett (bbartlett@seyfarth.com) or Kevin Young (kyoung@seyfarth.com), or any of the other excellent attorneys in our national Wage and Hour Litigation Practice Group, whose bios and contact information you may access by clicking here.

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SEYFARTH SHAW

WAGE AND HOUR LITIGATION PRACTICE GROUP

Five on Friday

Seyfarth's Weekly Chat About the Changing Wage-and-Hour Landscape

Paying Attention to Unpaid Interns

Featuring Rob Whitman and Adam Smiley

Thus far in our *Five on Friday* series, we've explored various aspects of the forthcoming changes to the FLSA's exemption rules, including what the new rules might entail, the challenges they will likely create, and how you and your business can confront those challenges (if not turn them into opportunities). We'll have plenty more on that topic in the weeks to come, but this week we thought we'd take a break to focus on one of the many other areas of wage-and-hour law where the fire is burning hot: unpaid internships. For that, we turn to our resident experts on the topic, Rob Whitman and Adam Smiley.

Q **Rob and Adam, we've read your blog posts about the wave of unpaid internship lawsuits over the last few years, but they seem to be centered in New York. What about everywhere else?**

A You're right. The majority of unpaid internship lawsuits have been filed in New York City. Two of these cases—one against Fox Searchlight, a film production company, and another against Hearst, the magazine publisher—drew a lot of attention when they were appealed to the Second Circuit, and the court's opinions will likely be viewed as the leading decisions on this issue for some time. But we've seen similar lawsuits in other states, and any company with interns is a potential target, regardless of location.

Q **So what do you tell employers on this one—is the rule bascially that they're required to pay all interns?**

A Sorry for the standard lawyer answer, but it depends.

If you want to reduce exposure to zero or don't want to invest the time and resources to establish and oversee a compliant unpaid internship program, then the best approach is to pay interns the minimum wage. But if the cost of paying interns is prohibitive, the courts have provided a framework to establish a lawful unpaid internship program.

In several circuits—including the Second, Fourth, Sixth, and Eleventh—the "primary beneficiary" test is used to determine if interns should be paid or not, meaning that the focus is whether the intern or the company realized the primary benefit from the relationship. The Fifth, Eighth, and Tenth Circuits have shown some deference to the DOL's strict 6-factor test, which other courts have rejected. The First, Third, Seventh, and Ninth Circuits have not articulated a test.

Q **Got it. So, based on all of that, what would you tell employers to do with their intern program?**

A While there is no magic bullet (short of paying minimum wage and, if applicable, overtime) to guarantee that your unpaid internship program is completely risk free, here is a high-level list of what to do or not do:

- **DO** maximize the program's educational component, e.g., a speaker series, mock projects, information sessions, open door policies to ask questions about the industry, and attendance at industry conferences or events.
- **DO** require the receipt of academic credit for an internship. Having a college or university "endorse" an unpaid internship program will make it more likely that the program will be viewed as educationally beneficial.
- **DO** train managers to ensure that the program is beneficial for the intern.
- **DO** make clear, preferably in writing, that interns will not be paid.
- **DON'T** use interns in lieu of hiring actual employees. It is okay if interns perform some "work" that *complements* the work of your employees, such as helping with research, but if you would have hired an employee to do this, and instead gave the assignment to the intern to save labor costs, that could tip the scales against you.
- **DON'T** guarantee interns a job. While some interns may eventually be hired, it should not be a "rubber stamp."

Q **Assuming the company provides some of these educational benefits, is it okay if they have interns make coffee and run errands?**

A You should make your own coffee. Or at least get a paid employee to do it for you. Interns should not be given primarily "grunt work." It is okay if they do *some* of this type of work, but it really should be minimal.

Q **For the last question, let's look ahead a bit: what is the future of unpaid internship lawsuits? Where is this wave of lawsuits heading?**

A We don't have a crystal ball, but we think the wave of unpaid internship lawsuits has crested. The Second Circuit's decision in Glatt makes it much more difficult for plaintiffs to obtain class certification. And without class treatment, the incentive to bring these suits goes way down. That said, companies with interns cannot be complacent. Given the media attention that these lawsuits have gained over the past few years, interns are much more attuned to their rights, and are more likely to seek legal counsel if they think they are being treated unfairly.

If you'd like to discuss any of these issues further, you may contact Rob and Adam by clicking here. You can also contact the *Five on Friday* editors, Brett Bartlett (bbartlett@seyfarth.com) and Kevin Young (kyoung@seyfarth.com), or any of the other excellent attorneys in our national Wage and Hour Litigation Practice Group, whose bios and contact information you may access by clicking here.

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SEYFARTH SHAW

WAGE AND HOUR LITIGATION PRACTICE GROUP

Five on Friday

Seyfarth's Weekly Chat About the Changing Wage-and-Hour Landscape

Salary or Hourly? That Is Not the Only Question.

Featuring Kevin Young

In this week's installment, we feature *Five on Friday* co-editor, Kevin Young. A leading member of Seyfarth's national Wage & Hour Litigation Practice Group, Kevin has devoted countless hours to helping businesses plan and execute right-sized strategies for responding to the DOL's changes to the FLSA's overtime rules. Also, as a former tax attorney with an accounting background, Kevin doesn't shy away from math. Thus, we ask Kevin to lend his seasoned perspective to help businesses understand that they ***don't necessarily*** need to pay employees reclassified from exempt to nonexempt status on an ***hourly basis***.

Q **From what we hear in the marketplace, many employers are under the impression that if the DOL's new exemption rules require them to reclassify employees from exempt to nonexempt, they will have to pay those newly reclassified employees on an hourly basis, with overtime calculated at a rate of 1.5 times whatever their hourly rate might be. But hourly status is not the only option for nonexempt labor, right?**

A It's not. While an hourly rate is the most common way to pay nonexempt employees, the FLSA's implementing regulations contemplate a number of other pay plans, such as a day rate, a piece rate, and even a salary. Under the right circumstances, any one of these plans can offer employers a way to reduce their overtime spend by paying overtime hours at a "half-time" rate, rather than "time and one half." The idea behind this is that these forms of compensation—be it a day rate, a piece rate, or a weekly salary—provide straight-time pay to the employee for all of their time worked, leaving only the one-half premium to be paid for any overtime hours.

Businesses that operate in the retail and service industry should also take note that there is an exception from the FLSA's overtime requirements for certain commissioned employees who work in the industry. That exception has been applied to retail store employees, banquet servers, and even some call center "sales" employees.

Simply put, there are a lot of payment and overtime calculation options available to businesses that reclassify employees because of the DOL's new rules.

Q **That's great. But as with so many great things, aren't there devils in the details? To help readers understand, would you please explain how at least one of these options works? Let's go with a day rate.**

Sure. A day rate provides an employee a flat rate for each day she works, regardless of the number of hours worked in the day. If the employee works overtime during the week, then her employer must provide overtime compensation

A

for those hours. To do this, the employer will calculate the regular rate of pay the usual way—all compensation (i.e., the day rate wages) divided by all hours worked. Then, to calculate overtime pay, the employer multiplies that regular rate by 0.5 to determine the overtime premium—the overtime rate is a "half-time" instead of a "time and one-half" rate. The employer then multiplies that half-time premium by the number of overtime hours worked to determine overtime compensation, which it must pay in addition to the day rate wages.

For example, let's assume Brad is paid a day rate of $150 per day and, in a given workweek, works 50 hours across 6 days. His day rate wages will be $900 (i.e., $150 rate x 6 days). He is also due overtime pay for his 10 overtime hours. To determine Brad's overtime pay, we first determine the regular rate—here, it's $18 (i.e., $900 in wages / 50 hours). The overtime rate is one-half of the regular rate—thus, it's $9 (i.e., $18 regular rate x 0.5)—and overtime pay due is $90 (i.e., $9 overtime rate x 10 overtime hours). Brad will earn $990 for the week.

Q

That's very helpful. Let's turn to salaries. Many businesses we speak to are struggling with the dilemma of depriving reclassified employees of their salaried status. Salaried employees are proud of their status. There is a prestige and, for some, a sense of accomplishment associated with earning a salary. Can businesses pay reclassified employees a salary?

A

Yes, they can. There are two options. First there is the basic weekly salary option that is associated with time and a half pay. Under the FLSA, it is fine to pay employees a weekly salary that covers a ***set number of hours***. If the employee works overtime, then that fixed number of hours is used to determine the regular rate.

For instance, assume Darcy receives a weekly salary of $700 in exchange for a 35-hour week, and that she works 45 hours in a given week. Her regular rate would be $20 (i.e., $700 salary / 35 hours covered by salary). Darcy is entitled to time and one half her regular rate—which is $30 (i.e., $20 regular rate x 1.5)—for each hour over 40. A half-time option isn't available, as the salary did not provide her straight-time pay for all hours worked, but instead covered only her first 35 hours.

To further the example, let's assume Darcy and her employer instead agree to a weekly salary of $700 in exchange for a 45-hour workweek. And let's assume that in a given week, Darcy works 50 hours. Darcy is owed overtime pay. Her regular rate is once again calculated by dividing her salary (i.e., $700) by the number of hours it is meant to cover (i.e., 45)—thus, the regular rate is $15.56. Darcy has worked 10 overtime hours, but, given that her salary is intended to cover a 45-hour week, she's already been paid straight-time pay for the first 5 hours. For those hours, she need only be paid at half-time, which is $7.78 (i.e., $15.56 regular rate x 0.5). For hours beyond that, she has not received straight-time pay or overtime, so she must be paid at the time-and-a-half rate, which is $23.34 (i.e., $15.56 regular rate x 1.5). Thus, Darcy is entitled to $155.60 (i.e., ($7.78 half-time rate x 5 overtime hours covered by salary) + ($23.34 time-and-a-half rate x 5 overtime hours not covered by salary)), in addition to her salary.

Q

You said there is another option. What is that?

A

Another option that some businesses prefer, especially for employees who work irregular schedules, is referred to as the "fluctuating workweek" method. Under this plan, the employer and Darcy (from the example above) would agree that her $700 salary would cover all hours worked each week, whether few or many. Because the salary under this sort of plan provides straight-time pay for ***all*** hours worked, not just a set number of hours, only the ***half-time*** premium is due for any overtime hours worked.

But there are a few hurdles to using a fluctuating workweek plan. First, the employee's hours must fluctuate from week to week. Some courts read this requirement to mean not only that the employee's weekly hours must fluctuate, but that they must fluctuate above and below 40. Second, a fluctuating workweek plan requires a "clear mutual" understanding between the employer and employee that the salary is fixed compensation for all hours worked each week (apart from overtime compensation). Typically, we advise a short document explaining the plan, including through examples, that the employee signs and returns. The law doesn't require anything in writing. As a best practice, though, we recommend a written agreement.

(**Special Note:** Businesses should beware that some states do not welcome the sorts of hourly-rate alternative plans that we're talking about, including fluctuating workweek plans. California is one of them. Likewise, such plans have been met with some hostility in states like Missouri, New Mexico, and Pennsylvania. It's imperative to check state laws before migrating to one of these plans.)

Q **These are all great alternatives. To close things out, we have to ask: if an employer can reclassify a salaried exempt employee without taking away the salary, do they really need to change anything at all?**

A Yes! Clearly the salaried option is beneficial for a few reasons, including that it may avoid the ego-bruising that often accompanies converting salaried employees to hourly status. But neither this option nor any other that we've talked about alters the fact that the nonexempt employee must start tracking hours, just like an hourly employee. Nonexempt employees are entitled to overtime pay for overtime work. And the only way to identify overtime work is to track hours.

If you'd like to discuss these issues further, you may contact Kevin at kyoung@seyfarth.com. You can also contact *Five on Friday's* other editor, Brett Bartlett, or any of the other excellent attorneys in our national Wage and Hour Litigation Practice Group, whose bios and contact information you may access by clicking here.

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SEYFARTH SHAW

WAGE AND HOUR LITIGATION PRACTICE GROUP

Five on Friday

Seyfarth's Weekly Chat About the Changing Wage-and-Hour Landscape

Tools for Studying Your Employees' Duties

Featuring Elizabeth Arnold and Chester Hanvey

In this week's *Five on Friday*, we are joined by Organizational Consulting Expert Elizabeth Arnold and Industrial/Organizational Psychologist Chester Hanvey from the consulting firm, Berkeley Research Group (BRG). Elizabeth and Chester regularly analyze job duties to help clients evaluate compliance with state and federal wage and hour laws. They use a variety of job analysis data collection methods to study the nature and duration of employees' work, including time and motion observations, structured interviews, and surveys.

Q **In prior installments, we've discussed the fact that the FLSA's "primary duty" tests could possibly shift to a California-like, quantitative requirement. If this happens, employers may need to examine employees' time spent on exempt versus nonexempt work to determine whether they can be classified properly as exempt. Exempt employees don't record their time. More to the point, they don't keep records of their time spent on exempt versus nonexempt duties. Given that, how can employers "examine" these buckets of employee working time?**

A A variety of job analysis methods exist for this purpose. Three that we commonly use in the context of evaluating exemption status are (i) time-and-motion observations, (ii) job analysis questionnaires, and (iii) structured interviews. Each has advantages depending on the specifics of the job and the exemption being evaluated. Regardless of the method used, it is critical to collect reliable data that accurately and comprehensively describes the work employees actually perform.

Q **You mentioned that each method of job analysis—time-and-motion observations, questionnaires, and structured interviews—has certain advantages. At a high level, can you help our readers understand when the time-and-motion observation study makes the most sense, as well as any drawbacks?**

Yes, happy to. We conduct observation studies in many different environments—from tax preparers and garbage truck drivers to recruiters, store managers and beverage salespeople. The major benefit of this type of data collection is that it produces rich, detailed records that reflect the actual work employees perform on the job. Many people, including judges and juries (and even the occasional DOL investigator), like the fact that the data is "real" and is not dependent on the memory or accuracy of self-reports from employees.

Observation studies typically involve observing the entire workday of a carefully-selected sample of employees. For many jobs, we also ensure that observations are scheduled to capture different days of the week and shift

A

times to ensure that many aspects of the job are observed. Observations involve a trained job analyst "shadowing" and recording all tasks performed in tiny segments of time for an *entire work day* without interfering with the employee—it's a tough job! The final product is a detailed and quantitative measure of what employees are actually spending time on the job doing.

As with all methods, there are a few potential drawbacks to an observational approach. First, observers can only record visible tasks. That is, mental tasks—so many of which are exempt—are more challenging to observe, making jobs comprised primarily of these types of tasks not as well-suited for an observational approach. In addition, data can only be collected for tasks that the employee performed on the days the employee was observed and may not include information about unusual or unpredictable activities. Also, to the extent a job is influenced by season or time of year, the observations may not cover these activities. If you work at a party supply store, for example, you want to make sure you have at least some holidays covered in your study.

Q

And how about the questionnaire option?

A

We have used this method for many organizations using different administration methods, including online tools. One major advantage is that we can collect data from a large number of employees relatively quickly and inexpensively. Questionnaires that are designed to evaluate exempt status must be carefully designed with multiple sections to cover different aspects of the job. The process of developing such a questionnaire is intensive and requires involvement from a variety of internal resources.

Self-report instruments like questionnaires have the advantage of measuring non-observable mental tasks, like planning, strategizing, and identifying solutions to problems. We can include questions asking the employees to report when and how often they perform these tasks. In addition, questionnaires allow employees to report their work experience over a longer period of time, going back several years if necessary. Of course any method that involves collecting retrospective self-reports must be designed carefully to avoid issues related to bias and memory decay. Fortunately, there is a large body of research on this topic that can be utilized to generate reliable self-reports.

Another consideration is the fact that, the questionnaire administrator may not have as much control over the administration process as they would like. If the questionnaire is online, for example, the administrator may not be certain that participants reading all instructions carefully and completing the questionnaire in one sitting.

Q

That leaves structured interviews. What do those look like, and where do you typically use them?

A

We have been using this approach more recently to study jobs that are highly technical or widely diverse in terms of tasks. Our structured interview tool is similar to a job analysis questionnaire in that it has multiple sections, each with questions about different aspects of the job. The key difference, aside from questions being asked verbally, is that most questions are open-ended, which gives employees the opportunity to provide detailed responses. This affords a much deeper understanding of the job. Like the questionnaires, interviews are lengthy—several hours each—and can be conducted in-person or virtually using an online meeting software such as WebEx. During the interviews, employees can see the questions and responses being recording in real-time, which allows them to make corrections and ensures accurate data—which may come into play in litigation.

Depending on the resources available, the number of employees which can be included in the study may be limited because of the time required to conduct each interview. In addition, because the responses are qualitative and often quite lengthy, a significant amount effort and time may be required to analyze the data.

Q

Some organizations might lack the resources to conduct a full audit of each exempt employee's duties. If they want to conduct an audit, then how should they decide which jobs to prioritize?

Most organizations employ some jobs that are clearly exempt (e.g., upper management) and others that are clearly non-exempt (e.g., manual laborers). Jobs in between, like first-line supervisors, are where exemption status is so

A commonly disputed. We recommend identifying the "gray area" in the organization and starting by reviewing those jobs and consulting with counsel to determine the legal implications of the data collected.

Of course, for all of these methods, we believe it's wise to involve a business's capable wage and hour lawyers to ensure that the analyses can be best protected under one of the privileges against disclosure in litigation, in the regrettable event that an employee later files suit.

For a further discussion of how businesses might use the analyses that Elizabeth and Chester describe as they consider the impact of the FLSA's new exemption rules on their operations, please contact *Five on Friday's* editors, Brett Bartlett and Kevin Young, or any of the other excellent attorneys in our national Wage and Hour Litigation Practice Group, whose bios and contact information you may access by clicking here. And, of course, you may contact Elizabeth and Chester directly by clicking here.

We at *Five on Friday* want to hear from you! If there's a topic or question that you would like us to cover in a future installment, please email it to FiveonFriday@seyfarth.com—we promise to keep you and your company's identity confidential when we cover it in a future post. If you'd like to access a past installment, you can do so by visiting. If you'd like to access a past installment, you can do so by visiting www.wagehourlitigation.com/five-on-friday—the password is **seyfarth**. ■

WAGE AND HOUR LITIGATION PRACTICE GROUP

Five on Friday

Seyfarth's Weekly Chat About the Changing Wage-and-Hour Landscape

Automatic Annual Salary Increases for Exempt Employees: Economists Discuss the Index Options

Featuring Bo Shippen and Michael DuMond

This week, we welcome our labor economist friends from Economists Incorporated, Drs. Michael DuMond and Bo Shippen. Mike joined us several weeks ago to offer an economist's take on the impact of the DOL's anticipated changes to the FLSA's white-collar overtime exemptions. This week, we've invited him and Bo back to *Five on Friday* to shed light on a more specific aspect of the changes: the DOL's proposal to index the exemptions' salary level requirement.

Q **The DOL suggested that the new exemptions' salary level requirement might be "indexed" so that it could be increased each year to adapt to the changing needs of the American workforce. Would you please remind us what it would mean if the salary level were "indexed"?**

A Indexing in this context is the process of linking the salary level threshold to a measure of the annual U.S. inflation rate, typically measured by the Consumer Price Index (CPI). The CPI is a measure of the average change in prices paid by urban consumers for a market "basket" of goods and services. The market basket contains over 200 categories and includes items such as milk, coffee, televisions, gasoline, prescription drugs, rent, and apparel, just to name a few examples.

While the DOL has increased the salary threshold in the past, those adjustments have been 10 or more years apart. The last adjustment was over a decade ago. The DOL is interested in indexing the salary level so that it is automatically adjusted each year.

Q **You mentioned that CPI as an option the DOL is considering, but aren't there two CPIs? What is the difference between the indexes?**

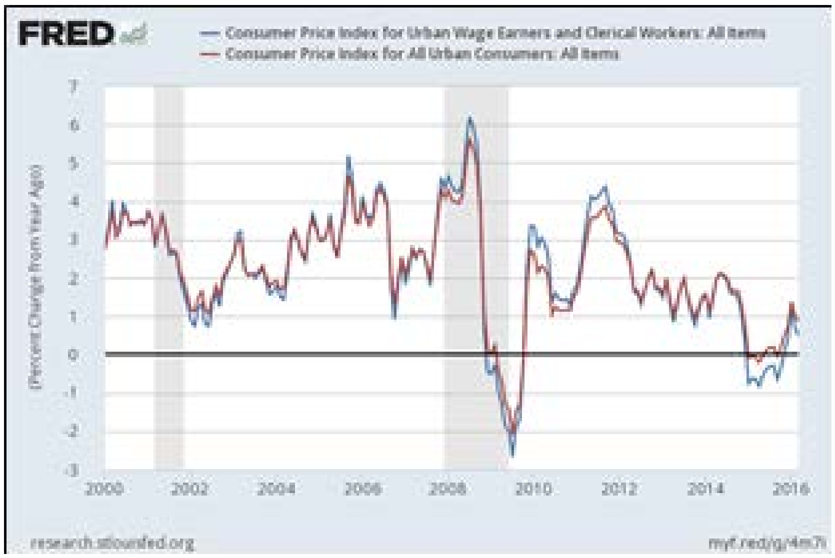
A The historical definition of the "CPI" was the Consumer Price Index for urban wage earners and clerical workers—now known as the CPI-W. More recently, there has been a shift to the CPI-U, which is the Consumer Price Index for all urban consumers. The CPI-W was the only Consumer Price Index until the CPI-U was introduced in the 1970s to cover a much broader group of consumers. The CPI-W covers around 32% of the U.S. population, while the CPI-U covers over 87%. The Bureau of Labor Statistics (BLS) had intended to do away with the CPI-W, but the plan was criticized by unions and some in Congress, so today we have both indexes. The CPI-W is still used for Social Security cost of living adjustments, while the CPI-U is used to index federal income tax brackets.

Both indexes use the same market basket sample of prices, but the CPI-W uses slightly different weights to reflect the difference in spending habits of urban wage earners from the spending habits of other urban consumers.

Q **Practically speaking, why would the difference matter?**

A While the DOL has not yet announced whether it will tie the salary threshold to an index, there is some thought that it will be linked to the CPI-W. The CPI-W could be politically preferable to the CPI-U, since the CPI-W is specifically tailored to wage-earners rather than to the larger population of urban consumers.

As a practical matter, the inflation rate is virtually the same under either CPI. The graph below shows the two side-by-side since 2000. The blue line is the inflation rate as measured by the CPI-W; the red line is the CPI-U inflation rate. The CPI-W is slightly higher in some years—for example around 2008, and again in 2012—while the CPI-U is higher in other years.



US. Bureau of Labor Statistics, Consumer Price Index for Urban Wage Earners and Clerical Workers: All Items [CWUR-0000SA0], retrieved from FRED, Federal Reserve Bank of St. Louis http://research.stlouisfed.org/fred2/series/CWUR-0000SA0, last checked May 4, 2016; and US. Bureau of Labor Statistics, Consumer Price Index for All Urban Consumers: All Items [CPIAUCNS], retrieved from FRED, Federal Reserve Bank of St. Louis http://research.stlouisfed.org/fred2/series/CPIAUCNS, last checked May 4, 2016.

Q **Assuming the DOL sets the salary threshold for $47,000 in 2016, what would indexing to the CPI mean to 2017 and beyond? And how would it change things if the adjustments instead started in 2018?**

A Indexing the salary threshold to the CPI would have a minor impact as long as inflation remains low. Since 2000, the CPI has recorded an annual inflation rate of around 2.2%, and the Federal Reserve has indicated that it would like inflation to run around 2% per year. A 2% inflation rate at the starting salary threshold of $47,000 would yield an increase of about $1,000 annually for the first several years.

Inflation is not always constant, however, and the CPI could increase substantially more than 2% in the future. If inflation increased by 10% in a year, for example, a prior salary threshold of $50,000 would increase to $55,000, compared to $52,500 for an inflation rate of 5%. It will be imperative for companies to monitor the inflation rate so they are not caught off guard.

Q **Is there anything that businesses can do to reduce the burden of dealing with an ever-increasing, automatic annual pay raise?**

The DOL's initial proposal was to link the salary threshold to the 40th percentile of salaried workers, which would likely lead to much larger increases than the CPI option. Indexing to the CPI—as many experts expect the DOL will do—should lead to a more gradual and predicable path for future increases, as long as prices and inflation remain

A relatively stable. The BLS publishes and updates CPI data monthly. Employers could use that data to anticipate changes to the salary level over the course of the year.

Of course, predicting future salary levels and preparing for their impact are two different things. There's no one-size-fits-all answer about what businesses should do to best absorb the impact, but it's a question that they should start thinking through now, if they haven't already.

If you'd like to discuss these issues further, you may contact Mike and Bo by clicking here. You may also contact *Five on Friday*'s editors, Brett Bartlett and Kevin Young, or any of the other excellent attorneys in our national Wage and Hour Litigation Practice Group, whose bios and contact information you may access by clicking here.

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SEYFARTH SHAW

WAGE AND HOUR LITIGATION PRACTICE GROUP

Five on Friday

Seyfarth's Weekly Chat About the Changing Wage-and-Hour Landscape

Today, we take a brief interlude from our standard *Five on Friday* format. Thus far in our series, we have presented discussion on the nuts and bolts of the anticipated changes to the FLSA's overtime exemptions, provided insight into how businesses should plan for the new rules, and discussed the various pay methods available for those reclassified to nonexempt status. We have spoken with skilled lawyers across Seyfarth's Wage and Hour Litigation Practice Group, former Wage and Hour Division officials, economists, and consulting experts. We have been blown away by feedback from our readers, who seem to find *Five on Friday* accessible, practical, and useful—and who have taken time to email us to share fantastic ideas for future installments.

In sum, we are excited about the dialogue we have cultivated with our readers, and we are excited to advance and expand the dialogue in the weeks to come

As we sit on the precipice of the new rules' publication, we thought it would be useful to provide this workbook, which encompasses the discussion we've had so far. We have broadened today's distribution list, as well, to provide the workbook to some who have not yet subscribed, but whom we know have a keen interest in wage and hour matters (and particularly in the imminent changes to the FLSA exemption standards). We hope that you all will find the workbook helpful and that, if you have not yet done so, you will find the substance of our discussions to be a compelling reason to subscribe to receive future *Five on Friday* installments.

In addition, we are excited to share news of Seyfarth's FLSA Exemption Resource Center which our colleagues have created to provide helpful resources to businesses considering how to prepare for and respond to the changes. By visiting the Resource Center, you will find an Employer's Toolbox, links to our publications regarding the exemption standards and wage and hour laws generally, various webinars concerning the new standards and how they might apply to specific industries, and other resources that provide context for these tumultuous times. We hope you will visit the site, check out the resources we have posted there, and—especially important to us—let us know if there are other resources that you would like to see. We have numerous resources that we can share, though many would be best shared in a privileged communication.

We appreciate the time you have spent with us during the past several months. We looking forward to engaging in further discussions about the wage and hour topics most important to you. For now, we'll look forward to seeing you next Friday.

Brett C. Bartlett
Kevin Young
Five on Friday Editors

Alex Passantino
Former Acting Administrator
United States Department of Labor
Wage and Hour Division

www.seyfarth.com

Five on Friday Blog | May 13, 2016

SEYFARTH SHAW

WAGE AND HOUR LITIGATION PRACTICE GROUP

Five on Friday

Seyfarth's Weekly Chat About the Changing Wage-and-Hour Landscape

Communicating Change

Featuring Philippe Weiss

For this week's *Five on Friday*, we are excited to feature a great friend of the blog, Philippe Weiss. Philippe leads Seyfarth Shaw at Work, Seyfarth's dedicated compliance services and training subsidiary. Given his expertise in the area of workplace communications, we've asked Philippe to speak with us about how employers can communicate with their employees about potential changes in the wake of the DOL's decision to overhaul the salary level requirements of the FLSA's core minimum wage and overtime exemptions.

This *Five on Friday* is longer than our typical installment because we believe the topics that Philippe addresses are so important for businesses to consider now, as they develop their plan for compliance prior to December 1.

Q **The DOL's changes to the FLSA's overtime exemptions have received an incredible amount of press, and we'd imagine that the spotlight will shine even brighter as we near the December 1 effective date. Do employers need to proactively address the changes in communications to their employees?**

We think of this question in terms of a simple mantra: Communicate. Communicate. Communicate. But with care and consistency.

Strategic and purposeful communication—if not considered carefully—may pose among the greatest risk for employers in connection with the exemption changes. Many clients report to us, anecdotally, that this is the one area they failed to adequately account, or plan, for in connection with the last major revision to the exemptions in 2004.

A Communications to employees should, as a best practice, be both proactive and responsive in nature. There is no "one size fits all" communications plan or set of scripts that are guaranteed to work, even within a specific industry. So we caution against the temptation of simply pulling forms off-line or from a generic source. Certainly, employers do not want to surprise anyone with the changes they intend (and are required) to make; therefore, level- and group-relevant announcements are critical. These communications should focus on the company's plan and steps that have been decided upon, as well as employ simple, user-friendly language.

In addition, it's important to understand when and how the legal changes should (or should not) be referenced in particular internal communications. We have seen employers invite major risk because managers were expected to describe legal developments or the company's obligations to employees. Depending on the workplace, managers may be ill-equipped to handle this task with the precision it demands. When pressured by employees (especially those closest to them) to provide information, managers may make inappropriate admissions. Accordingly, it is important to take time to plan what will be said on a group/level basis, as well as on a person-to-person basis by your managers.

In terms of a plan, and given the above, developing a calendar of who is to communicate with whom, and when and how, as well as a collaboratively drafting a set of vetted, effective, and safe "response scripts" for questions that may find their way to managers is an approach with obvious benefits.

Q **What about questions from the most curious employees? As we've discussed in past installments, the process of developing and executing a plan to respond to the changes will take time. How can employers handle questions raised by employees before their plan is complete?**

Our mantra can be reduced to two words: Awareness and Empathy.

This is a really important question, as we have to account for the employee whose curiosity directly or indirectly results in a challenge to a manager on behalf of a group employees, as well as other possibilities. We are already hearing anecdotes regarding employees who are approaching different managers with the same question and then comparing the answers they hear. And with the NLRA-conferred rights of employees to discuss wages with one another in the workplace, we should expect more questions (and more challenging exchanges) to come sooner rather than later.

A Since developing a communications plan and a robust, relevant set of manager response scripts does take time, one key best practice is to create and provide your key managers with clear, simple, generalized (but fully accurate) responses so they are not caught off guard. We think it is important to ensure that these high-level (and largely short-term) responses convey two critical concepts and commitments: Awareness and Empathy.

Awareness means that we, as a company, are staying abreast of developments and are planning accordingly. (Note that we did not say: "we are on top of how the law is changing." While such a statement may be entirely accurate, we see no reason why the company should be injecting the law into any such exchange, even by reference, especially when a manager is doing his/her best to speak on our behalf.) Instead, consider a script such as: "Thank you for asking. The company is tracking developments carefully and we will be sharing information as soon as we can." (adapted to a specific industry/company).

Empathy. We may want to acknowledge the fact that people are concerned. Our client and training surveys clearly reveal that employees are, and will likely be, increasingly worried of what could come on December 1st, and beyond. We also want to be careful not to be drawn into a discussion that is highly personal or places undue pressure on the manager involved. Accordingly, an expression of genuine empathy is not only appropriate, but it will pay genuine dividends. One script articulation that conveys empathy might sound something like this: "We know that many of our people will be very interested to know what this all means. That is why we are committed to developing next steps with appropriate care and planning."

Having collaboratively developed customized iterations of the above scripts and others (and broader sets of what we call "script folders") in working sessions over the last few weeks, we have seen such a simple, appropriate articulation provide confidence to managers and employees alike.

While training on the range of skills and messages that will emanate from your company's individual planning process will take longer, in the short term, key managers should have safe tools and texts at the ready.

Q **Obviously the particulars of a communication plan like the one you've referenced depends on the employer and the change it's making, but do you have any general, high-level advice for messaging around changes stemming from the new overtime exemption rules?**

Remember that: Consistency Calms the Waters. Beyond the guiding principles of showing awareness, empathy (and avoiding unnecessary legal discussion), we do see several consistent emerging risk areas/practices:

(1) Managers avoiding conversations with employees. This is why, even as a short-term step, training your managers on the latest fundamentals and strategies around engaging in difficult conversations and engaging in consistent

management provides a set of skills that will serve them well in these very unique discussions. We always say: Consistency Calms the Waters.

A

(2) Companies failing to effectively alert an executive team on what is coming and why their plan and related investment is both required and carefully planned. As such, we find that a high-level "executive briefing" that includes the "why," and "how" of the process, and tracking tools that illustrate how you are monitoring both steps and progress will help achieve buy-in. An added benefit is that giving executives a high-level glimpse of the communication scripts you will share with managers will enable your top people to model and mirror the language that you need others to employ. We trained an executive team at a retailer, and the CFO injected one of our "manager scripts" that we had previewed for him during a national sales meeting presentation one month later. The result was a reinforcement of training messages that we were delivering for the company's managers.

(3) Failing to create a communications calendar that ensures you remain accountable to proactively inform groups/levels and prepare managers to respond. Remember, we need to avoid surprising employees and Consistency Calms the Waters. It is also critical for managers to have clarity around which questions they are equipped to answer, and which they should be escalating to HR and your compliance team. We recently delivered an exercise with a client (around pay practices) entitled "HC or ME?" where they quickly learned what to escalate, when and how.

(4) Not gathering expected questions. Part of effective planning to communicate includes brainstorming the kind of questions managers expect to hear, or may have heard in the past when critical changes were announced. Including key managers in your planning process (particularly those "who have their ear to the ground") can provide you with most valuable insight regarding what kind of questions and/or concerns will be raised.

(5) Responding by "Blaming the Government." This should not be an issue of blame. Rather, the message should be that the changes are a reality and the company will be making the best possible decision to support its operations, clients/customers, employees and long-term goals and values.

Q

We also know that you're a huge proponent of meaningful, impactful training around workplace policies and practices. For employers that end up reclassifying employees from exempt to nonexempt status, what training opportunity do you think could be the easiest to overlook?

A

Here, our mantra comes down to: Practice. Practice. Practice.

Certainly, once you have your communications plan and targeted announcements in place, and once you have collected likely questions from key managers and drafted effective, user-friendly responses, training your manager how and when to use these scripts—as well as how to effectively manage newly nonexempt employees—is crucial. Dealing with employees who were previously exempt, who must follow timekeeping rules, who work overtime without permission, etc., should be covered and emphasized.

Training sessions should be high impact and fully interactive to better ensure that your managers build a consensus around best practices that matter in your operating environment. We recommend that examples and scenarios used in training be concise and company-relevant, and take-aways delivered repeatedly to ensure that your participants will apply the skills consistently when encountering similar situations post training. As we have said before: Consistency Calms the Waters

The biggest oversight we see is failing to provide managers sufficient opportunities to practice the skills needed to be confident when using the organization's "Response Scripts," which have been created for them. We say: Practice, Practice, Practice.

Q

When is the best time to conduct training, whether for the employees who are affected by a change or for the supervisors who oversee them?

Start now. But pick your moments.

A

In terms of training on consistency in management and engaging in difficult conversations (the foundational content), anytime works. However, we feel the sooner the better, so your managers can have a great foundation and some lead time before receiving and practicing the specific skills related to reclassification.

In terms of a second, more targeted reclassification, exemption driven course (what we have called "Managing to Keep Time"), many of our clients are targeting the August through November timeframe. The key is to ensure that your ultimate messages and skills both imprint and are sustainable so that once December rolls around, your managers can confidently and effectively recall and apply everything they have learned. And that you, therefore, see results in terms of positive employee reactions and buy in.

We also recommend using your communication calendar to align development and customization of all your working sessions, including Working Sessions I and II, as well as your ultimate manager training.

If you'd like to discuss any of these issues further, you may contact Philippe at pweiss@seyfarth.com. You can also contact the Five on Friday editors, Brett Bartlett and Kevin Young by clicking here, and you can find bios and contact for the other excellent attorneys in our Wage and Hour Litigation Practice Group by clicking here.

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SEYFARTH SHAW

WAGE AND HOUR LITIGATION PRACTICE GROUP

Five on Friday

Seyfarth's Weekly Chat About the Changing Wage-and-Hour Landscape

Peeling Back the Onion on the New Overtime Exemption Rule

Featuring Kerry Friedrichs, Amanda Sonneborn, Josh Henderson, and Alex Passantino

For this week's *Five on Friday*, we look to a panel of Seyfarth attorneys to lead us on a deeper dive into some aspects of the new FLSA exemption rule that have not received quite as much mainstream attention as they probably should. We will start the conversation with *Five on Friday* co-editor, Brett Bartlett. From there, we'll loop in Kerry Friedrichs and Alex Passantino, both of whom we've featured in prior installments, as well as Josh Henderson and Amanda Sonneborn. Josh serves as Vice Chair of Seyfarth's Labor and Employee Relations Group, while Amanda serves as Co-Chair of our ERISA and Employee Benefits Litigation Practice Group. We're excited to share with you such an important array of insights from such a qualified set of panelists.

Q **Brett, most commentators discussing the DOL's new FLSA exemption rule have been focusing only on the increased salary level and the December 1 effective date. Obviously there's a lot more to this issue. What opportunities and risks does the new rule potentially create that we are we not hearing about?**

A That's an important question. We've been looking at the new rule from every possible angle. It has many important implications that are flying under the radar. There are four that we would like to highlight this week. One involves the welcome ability to use bonuses, incentive payments, and commissions as a means to satisfy at least a portion of the increased salary level requirement. The second relates to the use of employee benefits as a means to offset increased compensation costs that the new rule will cause. Third is the concerns that businesses—particularly those with unionized workforces—should have about employees transitioning from exempt salaried status to nonexempt status. And the fourth, which is not a concern for many businesses but is a very consequential one for government contractors, involves the disruption that the new rule could cause businesses under the federal Service Contract Act. Let's turn to today's panel of subject matter practitioners to discuss each of these a bit more fully.

Q **Let's turn first to a provision that's created a lot of buzz, but which carries risks and opportunities that have lingered below the surface. Kerry, one of the only business-friendly features of the revised rule is to allow up to 10% of the salary threshold to be met with incentives, non-discretionary bonuses, and commissions. What do businesses considering the 10% allowance need to keep in mind?**

While the 10% rule will no doubt help some businesses meet the new salary level requirements, there are several things to keep in mind when considering this option:

- Businesses need to review the forms of pay they might use to meet the 10% requirement to ensure they qualify. The regulations specify that non-discretionary bonuses, "other incentives," and commissions are creditable. While it's clear that discretionary bonuses do not qualify, the rules leave open whether other common forms of pay, such as shift differentials, are "incentives" that can be credited toward the salary requirement.
- Businesses need to make sure that the additional payments are made on a quarterly or more frequent basis. Annual and semi-annual bonuses will not qualify, even if they are large and non-discretionary.

A

- Businesses need to keep in mind that the 10% rule really limits the amount of incentive compensation that can count toward the salary requirement—only up to $4,747 per year (or $1,186 quarterly). Thus, an employee must be paid at least $42,729 annually in guaranteed salary.
- Businesses relying on the 10% rule will need to carefully review the compensation of their exempt employees each quarter to determine if "catch-up" payments are required to bring an employee's compensation up to the minimum of $913 per week for the quarter. This adds a layer of periodic review that is not currently part of many businesses' compensation review practices, and will require additional attention to ensure that catch-up payments are timely made.
- Finally, businesses should take the opportunity to review the lawfulness and effectiveness of their current bonus, incentive, and commissions plans. Many such plans develop over years of ad hoc negotiations during rapid recruitment and hiring processes. Others are simply dated and have not been kept in compliance with changing state law requirements. Now is a great time to get those plans in shape.

Q

Those are really great points, Kerry. Now let's get outside of the letter of the regulations and turn our focus to other impact areas. Amanda, one potential impact area is employee benefits. It's not too surprising that businesses who will face increase labor costs due to the new rule are looking for cost savings in other areas. Employee benefits seem like a likely target. Is there any truth to that?

A

For better or for worse, it is true. We already are talking to businesses, both large and small, about what benefits they may reduce to make up for increased labor costs. Aside from the Affordable Care Act, there are very few laws, federal or state, that require businesses to provide any benefits. In fact, as we must often remind courts and plaintiffs' lawyers, ERISA—the statute that governs employee benefits—is not a mandate statute. It does not require that employees receive any particular benefit; rather, it merely requires that certain rules are followed if a business decides to give particular benefits. So benefits are a natural place for businesses to look to offset increased labor costs. Businesses making the hard choice to reduce benefits in order to remain successful (or solvent) should plan carefully, however, as there are legal pitfalls to avoid. As important, businesses should develop sensitive communications plans for notifying their employees about any reductions and helping them understand the reasons for them.

Q

Thanks so much, Amanda. Josh, turning to your area of expertise, what risks, if any, do you foresee the new rule creating in the area of traditional labor law?

A

The new rule should affect the labor relations calculus of both union and non-union employers.

The NLRA's core protections extend to employees. Notably, "supervisors" are excluded from the definition of employee, along with "confidential" employees (such as HR) and independent contractors. The new rule create several risks under this framework. For example, employers that elect to reclassify supervisors could thrust them into NLRA coverage if they remove certain supervisory job responsibilities (e.g., responsibility to hire, transfer, suspend, promote, discharge, reward, discipline, or, in the turn phrase of the NLRA, "responsibly to direct" employees) that they may require of exempt supervisors. When formerly exempt supervisors convert to overtime-eligible status, they may become targets for organizing efforts by unions who believe that their changed responsibilities have transformed them into employees under the NLRA. Similarly, although exempt professional and administrative employees already can unionize, the loss of exempt status for some of these employees may raise their profile among unions by revealing similarities between the work they perform and that of others that a union seeks to organize.

The lesson here is that, for non-union employers, groups of reclassified employees may be attractive to union organizers. For employers with incumbent unions, the question may arise as to whether formerly exempt employees who were either not covered by the NLRA or who were not otherwise susceptible to organizing efforts should be included in an existing bargaining unit of employees. If there is a chance that they should be, then that could lead to a call for a new union election or an "accretion," which would allow formerly exempt employees to be added to a bargaining unit through a unit clarification proceeding before the NLRB.

It's completely understandable if this makes employers uneasy. I hate to be the bearer of bad news. I do want, however, for employers to be aware of the risks so they can reduce them where possible.

Q

That's such a valuable insight, Josh. Alex, turning to you, it seems like the new rule might also be troubling for businesses entering contracts with the U.S. government. We've heard that the increased salary threshold exceeds the salary paid to many of the exempt workers on contracts covered by the Service Contract Act. What does the salary increase mean for SCA-covered government contractor employers?

A

The SCA excludes from its wage and fringe benefits requirements workers who are exempt under the FLSA's white-collar exemptions. In fact, where a contract is around 90% FLSA-exempt workers, the entire contract is exempt from the SCA's requirements. So, the increase will have a significant impact on government contractor employers. They will need to either raise the salaries of these workers to keep them exempt, or they will need to convert them to nonexempt, which, for those workers performing the work called for by the contract, also means converting them to SCA employees. Many of the positions will not match up nicely to the positions on the wage determination, which will require the employer to request and obtain a conformance (which may or may not ultimate result in additional pay to the employee) for the position. The employer may perhaps enroll the employee in a different, SCA-compliant, benefits plan and/or change the nature of the employee's vacation accrual to comply with the SCA.

Increased costs, whether they take the form of increased salaries of "overhead" employees or increased hourly pay to SCA employees, mean that government contractors will need to take a look at all of the contract tools at their disposal to ensure that their contracts remain profitable. When dealing with and pricing new contract proposals or re-bids, they will need to determine how best to staff the contract in light of the new threshold—in some cases, it may make sense to raise salary levels, in others, it may make sense to reclassify and seek a conformance. Regardless, it's something that government contractors should be considering now; the new salary level takes effect on December 1, so all future contracts will be impacted by the change.

If you'd like to discuss any of these issues further, please feel free to email Kerry, Amanda, Josh, or Alex. You can also contact the *Five on Friday* editors, Brett Bartlett and Kevin Young by clicking here, and you can find bios and contact for the other excellent attorneys in our Wage and Hour Litigation Practice Group by clicking here.

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SEYFARTH SHAW

WAGE AND HOUR LITIGATION PRACTICE GROUP

Five on Friday

Seyfarth's Weekly Chat About the Changing Wage-and-Hour Landscape

The Intersection of Overtime Pay and Pay Equity

Featuring Christine Hendrickson

This week, we're excited to introduce you to Christine Hendrickson, a leader in our national Pay Equity Group. As pay equity issues have joined wage and hour issues in a sprint to the forefront the employment law landscape, Christine has emerged as an expert in the area, helping clients of all sizes to understand, prepare for, and mitigate risk to evolving pay equity laws. We've asked Christine to shed light on this area of the law and how it overlaps with the new overtime exemption rule that we've explored over the past several weeks.

Q **We've heard so much about wage and hour issues lately. We've also heard as much, if not more, discussion about pay equity. Would you give us a brief summary of what's going on there?**

A Three big things have happened this year. First, there's been a big push from the EEOC and the OFCCP on pay equity. With legislative action completely stalled in Congress, these agencies have been charged with moving the President's pay agenda forward, and they've both undertaken significant initiatives and beefed up enforcement. The EEOC's proposed EEO-1 pay report has gotten the most press, but the OFCCP has also been aggressive on pay. A few years ago the OFCCP threw out its old playbook on analyzing pay claims and introduced a new methodology, which involves performing sophisticated statistical analyses in nearly every audit. Just this month, OFCCP just introduced new sex discrimination rules, which codify the new methodology, so it looks like this will continue. We are seeing bigger compensation fines that ever before from the OFCCP.

The second big change is a wave of states moving to introduce aggressive equal pay laws. In January, new laws in California and New York altered how equal pay claims are analyzed in those states, lowering the bar for equal pay lawsuits. Maryland has since followed suit, and we're seeing pay equity proposals in other states across the country.

The last trend I'm seeing is a trend toward pay transparency. We are seeing a push from shareholder groups, like Arjuna Capital, to pressure companies to release pay data. This began with a focus on tech companies, but it's now expanding to other industries, like finance. Also, more clients than ever report that their employee resource groups (ERGs) are asking about pay equity. Simply stated, there seems to be a far greater expectation of pay transparency.

Q **What are you recommending that businesses do in response to these all of these new requirements and proposals?**

While the law is moving quickly, the core recommendations have not changed. Most fundamentally, businesses should ensure that their compensation philosophy matches how they're actually paying employees. Even with all of the changes in the law, there is plenty of room to pay employees according to legitimate factors that match

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the company's values. It's remarkable how much compensation structures and philosophies vary by industry and business. For some, experience is paramount. Others value education, credentials, or specific skill sets. Many pay those in revenue-generating roles more than those in support roles. Some want to have major differentiation based on performance. Others compensate base the differentiation on specific deliverables. Often businesses value a combination of these.

Regardless of compensation method and philosophy, the key is the connection between what the business says it values and how it actually pays. It's not uncommon to see an business that says it's a "pay for performance" company but, when you really analyze how they pay their talent, they're not uniformly rewarding top performers in the way they intend. Beyond pay equity considerations, it's important from a business perspective to identify the mismatch because it could cause you to lose top talent that you should be retaining.

The best way to ensure that there is a match between what the business says it values and how it actually pays its employees is to perform a proactive pay equity analysis. It is, of course, essential to ensure that businesses are conducting these highly sensitive analyses under the attorney-client privilege so as to avoid the "no good deed goes unpunished" phenomenon. This is particularly important with a pay analysis, because we often find that what appear at first glance to be discrepancies are actually completely defensible differences. For example, you could have differences in the IT function. Once you take into account credentials and certifications, what appeared to be differences are actually explained by skillset. If those initial results were discoverable, it would give fodder to plaintiffs' attorneys without actually ensuring that employees are paid fairly and equally. I think the importance of conducting these analyses under privilege are heightened with the new overtime rules, which puts even more focus on employee pay.

Q

You mention the new overtime rules. Do you think there is any overlap between the issues that businesses should be considering as they strive to comply with the new FLSA rule and with the pay equity standards that seem to present risks under state and federal laws?

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I absolutely do. As businesses are evaluating whether to reclassify positions and/or adjust compensation, it is easy to unintentionally trigger pay equity issues. For example, assume you have two supervisors who you are bringing above the new $47,476 threshold. If one supervisor is a female with 10 years of experience and the other is a male with only 2 years, bringing them both to $48,000 could unintentionally create compression and pay equity issues.

A similar issue arises when employees are reclassified to overtime-exempt. If you're using current salary as the basis for the conversion rate, any underlying differences in salary between men and women would be magnified. Other issues could result from using a greater number of assumed weekly hours to determine the converted rate. Or, if there are race/ethnicity or gender differences in the opportunities to work overtime after the conversion, there could be significant differences in annual compensation. I think failing to evaluate whether those differences are appropriate and defensible is not only a missed opportunity, but also a potential trigger for a plaintiffs' attorney to argue the that the pay differences were the result of willful action, which has legal consequence in some states.

As businesses will likely be required to report various forms of annual compensation, including overtime pay, under the new EEO-1 report (the proposed report anticipates reporting W-2 wages), it is important to evaluate factors like these when deciding a new compensation method and level. This is particularly true because, according to the DOL, women and people of color will be disproportionally impacted by the new overtime rule. The DOL estimated that 2.3 million women will become eligible for overtime, compared to 1.9 million men. It also estimated that 28% of Hispanic and African American salaried employees will become eligible for overtime pay. As a result, I think all employers implementing wage adjustments should consider the potential pay equity impact.

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We have recommended that businesses conduct various analyses and audits to ensure that they can comply with the new overtime exemption rule by December 1, 2016, You mentioned conducting pay analyses to mitigate pay equity risk. How can in-house lawyers weigh what appears to be competing priorities?

I feel for in-house lawyers and HR leaders who are trying to balance a plate full of competing, and sometimes conflicting, priorities. Here, however, I think that an overtime exemption assessment and a pay equity analysis are

A natural companions. Much of the data collection and analysis for either project is the same. As a result, adding a pay equity analysis should not result in significant expense or delay for an employer that has decided to audit its exempt job classifications. Further, if you're adjusting pay as a result of the new overtime rule, it's a perfect opportunity to also make pay-equity-driven adjustments without needlessly raising red flags with employees. And, of course, conducting both projects simultaneously helps avoid the unintended pay equity issues mentioned above.

Q **Are there other practical considerations or misconceptions about pay equity about which businesses should be mindful?**

A I think there is a misconception that a pay equity project will take up considerable bandwidth or will be a mind-numbingly awful group math project. Especially for businesses already conducting overtime reviews, a pay equity analysis is a fairly discrete project. It usually takes less than two weeks from the time that we have data to the time we deliver initial results. It's quite manageable.

Also, while we use sophisticated tools to analyze pay and our reports contain valuable but dense information (like measurements of the strength of the model—the "r-squared"), the results are actually very intuitive. One of my colleagues in Seyfarth's Pay Equity Group, Dave Baffa, has a great explanation of what regression analysis is, which I often borrow when talking with clients. He says the goal of a regression analysis to make everyone an "apple" (instead of having apples and oranges). The regression analysis does this by assigning a value to each factor important to pay so that you can isolate any differences that may be based on sex and/or race.

So, for example, within a company, if you looked only at manager pay in the Marketing department, the average pay might be $65,000. But there would be legitimate differences in levels of responsibility within the rank. So, for example, a Marketing Manager might average $60,000, and the Marketing Director might average $80,000. So, even if a male Marketing Director made $20,000 more than a female Marketing Manager, it would still be legitimate because those differences are expected and accounted for by the scope of responsibility. Moreover, there may be differences in the amount of experience. So a very senior Marketing Manager with 10 years of in-house experience may make $8,000 more than a newbie Marketing Manager. The regression would account for these differences.

At the end of the day, a pay equity analysis allows you to determine if similar males and similar females have similar pay and make adjustments where appropriate. After the analysis is complete, businesses can evaluate whether changes need to be made to pay and/or to pay policies. This is particularly timely in light of the new overtime rule.

If you'd like to discuss these issues with Christine, please feel free to email her by clicking here. You can also contact the *Five on Friday* editors, Brett Bartlett and Kevin Young by clicking here, and you can find bios and contact for the other excellent attorneys in our Wage and Hour Litigation Practice Group by clicking here.

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WAGE AND HOUR LITIGATION PRACTICE GROUP

Five on Friday

Seyfarth's Weekly Chat About the Changing Wage-and-Hour Landscape

The Devilish Details of Job Descriptions

Featuring Noah Finkel

This week, we're excited to feature Noah Finkel, co-Chair of the Wage & Hour Litigation Practice Group in Seyfarth's Chicago office, to discuss something many employers are thinking about these days: job descriptions. How can they help? How can they hurt? How, if at all, can they play a part in our efforts to help employers prepare for and respond to the FLSA's changed overtime exemptions? Noah has a wealth of experience counseling employers on these very issues. Today, we're excited to share his insights with our *Five on Friday* community.

Q **Noah, as we all know, job descriptions are not determinative of whether a job is exempt under the FLSA. But they're certainly still relevant, right?**

A They are. To be sure, a job description can be relevant—and potentially quite helpful or quite harmful—under a host of employment laws, not just the FLSA. Under the ADA, a job description accurately describing a job's essential functions can be an important tool for assessing whether an employee can perform those functions with or without an accommodation. Under the NLRA, a current job description can prove relevant to the analysis of whether an employee is a "supervisor," and therefore excluded from the labor law's core protections.

Of course, to your point, an accurate job description can also be quite relevant under the FLSA. Given that most exempt employees' exempt status under the Act turns in part on their "primary duty," the job description can be a key piece of evidence in virtually every FLSA misclassification case.

Q **Many employers are now working with legal counsel to survey the exempt jobs within their workforce and assess which, if any, need to be reclassified to nonexempt or modified to ensure continued compliance with the FLSA's exempt status regulations. How do job descriptions play into this process?**

A What role job descriptions play in the assessment depends on the employer and, most importantly, the accuracy of their job descriptions. If we feel comfortable that a job description for a given job provides an accurate picture of its primary function, then we can use the document as a starting point for developing an understanding of the job, which we can then test through follow-up review. It can really help to streamline and speed up the review and make it more efficient.

If, on the other hand, the job description is not accurate, then we can use the exemption assessment to serve the dual function of rendering the best possible job classification decisions, as well as improving the job descriptions to make them accurate.

Q **Why is it important to have accurate job descriptions? And why not just do away with job descriptions and avoid the hassle of updating them as a job changes over time?**

A That's a really good question. As I mentioned before, a well drafted, accurate job description can be relevant and helpful under a host of employment laws. This is especially true with respect to the FLSA. While a job description is not dispositive of an employee's exempt status, it can be an effective tool for establishing an employer's expectations of the employee, which is critical to the "primary duty" analysis that guides most misclassification cases. Moreover, where an employer has a practice of requiring employees to periodically review and sign their job description to acknowledge its continued accuracy, the job description can become an even more powerful piece of evidence in the event of litigation, not to mention a terrific way to foster an open dialogue that allows the employee to tell their employer if any core aspects of their job have changed.

But as you alluded to in your question, it's critical that the job description be accurate. As much as an accurate job description can help, an *inaccurate* job description can hurt, especially in the case of an exempt employee. Let's say an employer faces a putative collective action from a group of store managers who claim they were misclassified as exempt under the executive exemption. Those store managers claim that managing is not their primary duty, and that stocking shelves or serving customers is most important. The employer defending the litigation will maintain that the management functions performed by these employees are what are most critical to the success of the store in which the managers work. But if the job description for the store manager position does not accurately document the managerial duties performed, a court may find the employer's argument wanting even though, in reality, managing the store is their most important duty. In other words, if employees perform exempt duties, their job descriptions better say that. If they don't, the job descriptions will be used against the employer in litigation.

Q **What are some best practices for updating a job description to ensure that it's accurate?**

A As I alluded to before, it's important to foster a dialogue between (i) those who design a given job based on an intended function, and (ii) the "boots on the ground" who have the best opportunity to witness the job in action. Employers should solicit feedback from supervisors and the like to ensure that the essential functions listed in a job description continue to describe the job's central function over the course of time. Smaller employers may favor a face-to-face approach, while larger employers may require a more formalized and multi-layer process. Whatever the case, the employer should aim to establish regularity around the review, openness in its communications, and a well-documented history of its efforts, including storing any signed job descriptions in an employee's file and maintaining past and present versions of each job description.

Q **Finally, we know that every L&E attorney has their own personal views on what a job description generally should or should not contain. You've been doing this a long time, Noah. What are some of your preferences?**

A Here are five big items for me:

1. I know I keep saying it, but the job description must be accurate. Any decent attorney will tell you that. The job description is a worthless piece of paper—and potentially damaging—if it fails to accurately describe the given job.

2. I like to avoid listing as "essential functions" various duties that could easily be assumed of any job. "Follow all Company policies" or "Handle tasks assigned by supervisor" are the sort of items that could be easily assumed for any job in the organization. To list obvious functions like this only adds fodder for those who desire to make a job look robotic or rote, even when it's not.

3. I find that some employers inadvertently diminish an employee's role by over-explaining a given duty. As an example, a given law firm might describe one of a Senior Associate's several functions as, "Draft or assist in drafting pleadings." In my view, it's far more preferable to say, "Draft pleadings." The shorter statement is less wordy; it remains accurate; and it accentuates the core function that the employer is trying to describe, which is drafting pleadings.

4. Similarly, we see many employers who attempt to describe 100% of an employee's job within the job description. This is rarely necessary, and it can backfire in many ways. In my opinion, the job description simply needs to convey the title, basic information about reporting structure, a job summary, and the essential functions of and qualifications for the job. All too often, we see employers endeavor to describe not only the job's essential functions, but also a list of everything an incumbent could possibly be called upon to do. This could create bad and misleading evidence for litigation, not to mention an enormous burden for whoever is tasked with keeping the description accurate.

5. Make sure your job descriptions for exempt jobs support the reasoning that caused you to classify the jobs as such. If incumbents are expected to supervise, hire, fire, train, discipline, manage inventory, plan the budget, or perform any of the other many exempt functions described in the FLSA's controlling regulations, then make sure the job description clearly and prominently communicates that fact. If those within the position will be handling large-scale projects, setting the direction of a given department, leading cross-department teams, or other discretion-laden activities, then have the job description relay this fact.

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SEYFARTH SHAW

WAGE AND HOUR LITIGATION PRACTICE GROUP

Five on Friday

Seyfarth's Weekly Chat About the Changing Wage-and-Hour Landscape

As we roll into the Fourth of July weekend, we want to take a moment to check in on how you're doing with your development and execution of a plan to comply with the DOL's revised overtime exemption rule, which will go into effect on December 1.

As a reminder, the new rule will require businesses to pay exempt executive, administrative, and professional employees at least $913 per week (i.e., $47,476 annually). Employees classified as exempt under the highly-compensated exemption will need to receive at least $134,004 per year, with at least $913 per week paid on a salary basis. Any employee whose pay does not meet these thresholds as of December 1 and who does not satisfy another exemption will automatically become entitled to overtime pay for any overtime work.

After the holiday, businesses will have less than five months to assess the new law's impact on their workforces and operations, establish a plan for how to proceed, and execute that plan in a way that maximizes the likelihood of buy-in and compliance and minimizes the chance of hindered morale or interest in litigation.

Many businesses have made great strides already. Others have barely started. If your business falls into the latter camp, we encourage you to consider lighting a firecracker under the process. December will be here before we know it.

For those wondering how to get started, we invite you to visit Seyfarth's FLSA Exemption Resource Center. And feel free to send us an email—we're happy to discuss these issues one-on-one…especially after the Fourth!

We wish you a safe, happy, and fun Fourth of July.

Brett and Kevin
Five on Friday Editors

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SEYFARTH SHAW

WAGE AND HOUR LITIGATION PRACTICE GROUP

Five on Friday

Seyfarth's Weekly Chat About the Changing Wage-and-Hour Landscape

FLSA Compliance For Franchises…and the Joint Employer Tightrope

Featuring John Skelton

For this week's installment, we're excited to spend a few minutes with John Skelton. John is a partner in our Boston office who regularly counsels and defends franchisors and franchisees in a wide range of legal matters. For today's discussion, we've asked John to help readers understand how they can take steps to ensure franchisees' compliance with the FLSA's changed overtime exemption rules, without increasing their exposure to joint employment allegations.

Q **John, you represent franchisors and franchisees in various industries. From your perspective, are franchisees aware of the DOL's revision to the definition of who can be classified as exempt from the FLSA's minimum wage and overtime requirements?**

A Each franchisee's level of sophistication can vary widely. Some are quite sophisticated multi-unit operators with dedicated resources designed to keep up with the latest changes in the law. But there's also no shortage of individual, so-called "mom-and-pop" operators that might not have the resources to keep pace. Such franchisees often expect the franchisor to provide guidance on issues like this. That, of course, creates a dilemma for the franchisor: non-compliance by franchisees can create bad publicity for the brand, but, as recent joint employer cases reflect, franchisors must be careful not to exert control over a franchisee's employment-related actions.

Q **If franchisees are not aware of what they must do to comply, does that place franchisors in jeopardy? Or are the franchisors safely isolated from liabilities that arise from franchisees' failure to follow the FLSA's and other laws' requirements?**

A There's legal and reputational risk for the franchisor anytime a franchisee is in violation of the law. While franchise agreements generally require a franchisee to comply with all laws, including applicable wage and hour laws, if the franchisor takes affirmative steps to ensure compliance, that then creates risk that the franchisor will be deemed a joint employer and liable for any wage violations. The NLRB, the DOL, and other state enforcement authorities are focused on franchise networks and are looking to hold franchisors liable as a "joint employer" for actions by individual franchisees. For example, in 2014 the NLRB issued complaints against McDonald's USA, LLC, as a joint employer with certain McDonald's franchisees. Two years later, the DOL issued Administrator's Interpretation No. 2016-1, which addressed joint employment under the FLSA. And within the last couple months, the New York Attorney General sued Domino's, asserting that the franchisor was a joint employer of workers at ten New York stores and, thus, liable for such workers' alleged unpaid wages.

Quite simply, this is a tricky issue for franchisors. While they must be careful not to create a joint employer situation, franchisors will want their individual franchisees to be aware of relevant changes to laws that affect the franchise operations

Q **What can franchisors do to reduce or eliminate the risks that franchisees' potential violations might cause?**

A Being mindful not to raise the joint employer risk, franchisors should alert franchisees of relevant changes and remind them of their obligation to make sure that the franchised operations are in compliance with all applicable laws, including relevant wage and hour laws. Whether through bulletins, newsletters, or training programs, franchisors should try to inform franchisees of important changes affecting the franchise operations. Whatever the means, however, the franchisor needs also to emphasize that the franchisee is ultimately responsible for understanding its legal obligations and ensuring that its operation is in compliance. If getting the word out about important changes through a franchisee training programs, the franchisor should: (i) limit attendance to the actual franchisee and not undertake to train lower level managers or workers; (ii) only discuss the general legal requirements, not how they apply to individual operations; and (iii) include an explicit disclaimer that it is up to the individual franchisee to work with its own legal counsel to determine how these rules apply to their operations and that it is up to each individual franchisee to develop and implement their own policies.

Q **As part of the training, can the franchisor simply direct the franchisee to take necessary steps to comply with the law?**

A No. Dictating what a franchisee must do to be in compliance, or how it should structure or manage its workforce, would be significant evidence of the type of control that could give rise to a finding of joint employment. Educating franchisees of their obligations is one thing, telling them what to do is quite another. Also, any training being offered should not be mandatory. Rather, it should only be offered as a benefit for franchisees.

Q **Do you have any pointers for how franchisors should inform and train franchisees about their need to comply, while avoiding joint employment risks?**

A Yes. First, any communication to franchisees via training, bulletin, or newsletter should (i) make clear that the individual franchisee is solely responsible for all employment and personnel matters, including wage and hour compliance, and (ii) urge each franchisee to get independent advice for their particular situation. The franchisor should also make clear that the information being provided is solely for informational purposes and is not intended to be franchisee-specific. Second, the franchisor should expressly disavow any control over the franchisee's employment-related policies or decisions. The franchisee is an independently owned business. Third, if it is going to offer a training program, the franchisor should consider offering the seminar by outside counsel so that it's the lawyer, not the franchisor, providing the information, which reinforces the franchisor's position that each franchisee is responsible for its own employment decisions.

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WAGE AND HOUR LITIGATION PRACTICE GROUP

Five on Friday

Seyfarth's Weekly Chat About the Changing Wage-and-Hour Landscape

How to Handle a Wage & Hour Investigation

Featuring Alex Passantino

In this week's *Five on Friday* installment, we sit down with our esteemed colleague (and resident poet), Alex Passantino, to discuss an increasingly prevalent challenge for employers: random investigations by the Department of Labor's Wage & Hour Division. Prior to joining Seyfarth, Alex served as Acting Administrator of the Wage & Hour Division. Given his prior experience and continued insights, Alex is one of the best resources in the country on this topic.

Q **Thanks for joining us, Alex! As we've all seen, the Wage & Hour Division seems to have ramped up its investigative activity over the last year or two. What, exactly, are the WHD Investigators looking for?**

A Investigators are authorized to conduct investigations under the Fair Labor Standards Act (minimum wage, overtime, child labor), the Family and Medical Leave Act, the Service Contract Act, the Davis-Bacon and Related Acts, and a number of more obscure laws. WHIs are investigating for compliance with one or more of those laws. The investigation may arise because an employee made a complaint to WHD, or it could be part of a larger enforcement plan targeting your industry nationally or locally, or it could simply be a random investigation. If you've been investigated by WHD previously, it's also possible that the current investigation is to provide a check-up on recidivism.

Q **What's the most important thing to do when an investigator shows up at your door? What should an action plan entail?**

A Typically, your company will receive a scheduling letter from WHD for an investigation. Sometimes, a WHD investigator may just show up unannounced at your worksite. Although the urge might be to react frantically at the news of your selection for investigation, when you get that letter (or that knock at the door), take a step back and consider your response. The decisions you make in the initial phases of the investigation can have far-reaching consequences as the investigation progresses.

At the outset, it is important to determine the scope of the investigation. Sometimes, an investigator will be interested only in a very narrow issue. Discussing or providing information that may reveal other potential compliance problems can be highly damaging—particularly now that there is a focus on enterprise-wide compliance by WHD. You do not want an investigation involving a single exempt position classification at a remote location to morph into a corporate-wide payroll practices compliance action. In some cases, the investigator may tell you the scope, but other times the investigator may not. If you cannot determine the scope of the investigation, be particularly cautious in providing any information other than what is specifically requested. In addition, many times it is possible to limit the scope even from the information requested.

A good checklist for next steps may look like this:

- Consult with your employment counsel before meeting with the investigator
- Ask the investigator to schedule the meeting at a time convenient for you
- Determine the scope of the investigation
- Only provide documents and information that are relevant
- Understand the documents and keep a list of what you have provided
- Be professional and maintain communication with the investigator
- Consult with your employment counsel before acknowledging any violations or agreeing to pay any penalty.

Q **What is the basic structure of an investigation?**

A The investigator will meet with a company representative to obtain general information about the company's business, payroll practices, and timekeeping. The investigator will review your records and ask for copies of particular documents, such as time sheets and pay records.

The investigator will then interview employees. The number of employees will vary from investigation to investigation. The positions that the investigator interviews will as well.

At the conclusion of the investigation, the investigator will schedule a time to discuss his or her findings. Take notes! You probably will not receive a written explanation of your violations. Instead, employers typically receive a document summarizing the back wages due to employees as a result of any violations. You should review the document in detail and consult with counsel before you sign it.

Q **What are the biggest mistakes you've seen employers make in handling an investigation?**

A Agreeing to findings without taking the time to review them. Some investigators will attempt to strong-arm employers into agreeing that they violated the law. Investigators make mistakes—review their findings, review their calculations. Don't let the investigator force you into signing a document 5 minutes after seeing it for the first time.

Q **How do you think investigations will change in the year to come, with new rules on the horizon and a new administration coming in?**

A The next year is likely to be more of the same -- aggressive enforcement, focus on "fissured" industries (such as hospitality), and increasing efforts to put pressure on "top" employers, whether by asserting joint employment or by using other means, such as press releases and the hot goods provision of the FLSA.

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Five on Friday

Seyfarth's Weekly Chat About the Changing Wage-and-Hour Landscape

A Theoretical Approach to Efficient Exempt Classification Audits

Featuring Kevin Young

The weeks and months separating employers from December 1, 2016—the effective date of the new overtime exemption rule—continue to melt away. Those who haven't started already have little time to review their exempt job classifications and develop and execute a strategy around any necessary changes. One question that may surface fairly early in that process is how to go about assessing an employer's most populous and scattered jobs in a coherent, cost-effective manner. For ideas on that, we turn to our co-Editor, Kevin Young, who's spent the past several months helping employers to confront this very question.

Q **We've talked in prior weeks about how important it is for employers to assess and confirm the classification of exempt jobs across their workforce. It's easy to think about reviewing a job with just a handful of employees and a single location. But what about those jobs at the other end of the spectrum? Hundreds of incumbents? Multiple regions of the country? Worse, what if the job's title is the same as another job whose incumbents perform different duties? Complicated stuff that seems potentially expensive to confront, right?**

A That's a great question, and it's one we've heard often from businesses that have engaged us to help in this sort of effort. Our short answer is that the process matters most. The right process will untangle these complications and make costs (and burden) manageable.

Obviously, a business—and its capable counsel—could not expect to examine how each of the many employees does his or her job at each of the multiple locations where the job exists. For a small job with just a few incumbents working at a single location, the "direct touch" process might be viable as a means to learn how each incumbent employee does his or her job. For jobs, however, with a broader geographic scope and potentially more variability in how employees fulfill their responsibilities, we rely on a process incorporating what we refer to as *theory building and theory testing.* This process is rooted in the idea of using a tailored sampling methodology designed to deliver accurate results without having to turn over every stone to get there.

Q **Let's dive a little deeper on that. Assume we have a 150-incumbent job spread across 30 locations. What's the gist of the theory building/testing process?**

We'd start with theory building, with the goal of relying on high-level resources to paint a picture of what we expect a job to look like. How is the job described on paper? How is it paid, trained, and evaluated? What is the hierarchy above and below the job? And what do we think the job is actually doing? All of this helps to build a theory, and the last question is most important. It requires that we identify the stakeholder in the business (and the outcome of the job's review) who has the best possible understanding of what the job requires and how employees *should* fulfill those requirements. Through that person, we work to understand as much as possible about the job, from what it's day-to-day looks like, to what types of decisions it makes, to how it differs between location types (e.g., small vs. big, rural vs. urban, newer vs. more established).

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Once we've developed a theory about a job, we set out to test the theory. We'll talk to select individuals who have direct interaction with incumbents to assess whether our theory holds; i.e., do employees in the role *actually* do what the stakeholder *expects* them to be doing. We refer to these resources as subject matter experts, or "SMEs." In the testing process, we develop information from a sufficient collection of SMEs to allow us to examine each aspect of the theory that we built through our preliminary work and higher level interviews. For example, if we theorize that a manager might spend a little more time managing in a well-established location than in a brand new location, then we'll include at least one SME who can speak to each location type.

Q

That makes sense. But what do you do if the theory fails—if whatever you see in the field simply doesn't align with what you expected to find?

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While there are various ways to proceed from that point, the goal will be to adjust and then re-test the theory until we can reconcile the two. For example, if we expected to hear that an analyst role spends very little time on data input, but learned from a given SME conversation that data input actually comprises a meaningful amount of time in an incumbent's day, then we'd consider exploring through additional SME conversations whether the discrepancy is more exception or more rule. If it's the latter (i.e., if our initial theory was right), then we'd obviously want to find a way to explain the discrepancy—for instance, perhaps that one incumbent was performing more data entry because the role that typically does it simply doesn't exist at the location—because that'll allow us to better understand the overall job.

Q

As we all know, whether a given employee satisfies the white-collar exemptions' duties tests depends largely upon *actual* duties. Couldn't some adversaries say that anything short of a person-by-person review falls short?

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They could say that, but I don't place much stock in it. The main reasons employers are undertaking these sorts of reviews isn't to satisfy plaintiffs' attorneys. Wearing my lawyer's hat, I would say that the core objectives are, instead, to: (i) ensure that employees are properly classified; and (ii) support a "good faith" defense in the event of litigation. As to the first objective, if a person-by-person review is ultimately cost-prohibitive, then the logical alternative isn't to do nothing—it's to find a way around the hurdle, such as the sort of sampling I've talked about.

As to the second objective, the FLSA's good faith defense to liquidated damages is satisfied where an employer shows that it had "reasonable grounds" for believing that its alleged act or omission was not a violation of the FLSA. Typically, this requires that the employer undertake some specific investigation or inquiry aimed at compliance. Nothing about the rule requires an employer to speak with or surveil each exempt employee in its workforce. The question is whether the employer had reasonable grounds for its classification decision. While every case and court is different, our general view is that a coherent sampling methodology, such as the approach we've talked about today, could certainly support such a showing under the right circumstances.

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That's all well and good. But lawyers are expensive and—in fairness—can be viewed by business operators to be strains on profitability. If you take off your lawyer's hat and try to look at all of this from a business's perspective, are there non-legal benefits that can derive from the process that you have described?

A

I'd encourage business operators who cringe at the prospect of a process like this to consider non-legal benefits with an open mind. The process can serve to better educate management and, eventually, employees about the day-to-day experience of various jobs and the overall workforce. It can identify where expectations are not being met. It can highlight which jobs are most crucial to profitability. It can help develop opportunities to shift or adjust priorities to become even more successful. And there really is no better time to undertake all of this self-critical analysis than when a change to the law justifies it. With just four months standing between now and the new rule's effective date, that time is now.

If you'd like to discuss these issues further, you may contact Kevin at kyoung@seyfarth.com. You can also contact *Five on Friday's* other editor, Brett Bartlett, or any of the other excellent attorneys in our national Wage and Hour Litigation Practice Group, whose bios and contact information you may access by clicking here.

We at *Five on Friday* want to hear from you! If there's a topic or question that you would like us to cover in a future installment, please email it to FiveonFriday@seyfarth.com—we promise to keep you and your company's identity confidential when we cover it in a future post. If you'd like to access a past installment, you can do so by visiting www.wagehourlitigation.com/five-on-friday—the password is **seyfarth**.

WAGE AND HOUR LITIGATION PRACTICE GROUP

Five on Friday

Seyfarth's Weekly Chat About the Changing Wage-and-Hour Landscape

Not Your Grandmother's DOL: A New Frontier for the Home Care Industry

Featuring Lucas Deloach

In this week's *Five on Friday*, we visit with Lucas Deloach to discuss major wage and hour developments in the home care industry. Lucas regularly counsels home care companies of all sizes on a variety of employment law matters, including wage-and-hour compliance. He also speaks to industry associations and franchise owner groups about legal developments impacting the industry.

Q **Many home care companies are keenly aware of the shifting wage and hour environment in which they operate. But for those who are not closely tracking such developments, what has happened?**

A For decades, home care agencies classified many of their care workers as exempt from federal minimum wage and overtime requirements under the companionship exemption and, for those who qualified as live-in workers, exempt from overtime requirements under the live-in domestic service worker exemption. In October 2013, the DOL issued its Home Care Final Rule, which provided that workers employed by third-party agencies no longer qualified under either exemption. The Final Rule also narrowed the definition of what services could be provided by a home care worker to qualify for the companionship exemption. After the Final Rule was unsuccessfully challenged in federal court, the Wage and Hour Division began enforcing the new regulations last November. In addition to an increase in WHD enforcement activity, we've seen a surge in FLSA litigation targeting home care companies.

[NOTE: Certain state laws required the payment of minimum wage and overtime to home care workers prior to DOL's Home Care Final Rule. In addition, some states have enacted Domestic Workers' Bills of Rights that impact an employer's wage and hour obligations.]

Q **So, practically, how has the regulatory change impacted home care companies?**

A Put simply, this is a sea change for many home care companies. They are laboring to square their care delivery model with the new minimum wage, overtime requirements, and recordkeeping requirements for many of their employees.

At base, there are "structural" challenges to transitioning previously exempt home care workers to nonexempt status. The industry proliferated under regulations that allowed for the exemption of a major portion of its workforce. Under the original rules, companies built a care delivery model that allowed them to provide affordable care services while also routinely staffing each case with the same employees to ensure continuity of care. A home care company may have also developed its care delivery model to allow for Medicaid reimbursement, and as a result, may be constrained in defining the costs of its services. The increased labor costs have forced companies to consider alternative staffing arrangements, the viability of a Medicaid reimbursement model, and increased fees for their care services.

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How can home care companies begin to address these structural challenges?

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The first step is to move toward compliance and reduce exposure. Because the bulk of a home care company's workforce has likely been classified as exempt, it's important to train key personnel on basic tenets of nonexempt pay practices and to train the workers themselves on their new obligations as nonexempt employees. Central to this training is accurate time reporting and certification of reported time. In the home care setting, such reporting can be particularly challenging, because care workers are remote workers with unique work arrangements.

Additionally, non-hourly pay arrangements—such as day or visit rates—are common in the industry. As our readers know, while hourly rates are the most common method of payment for nonexempt employees, the FLSA regulations provide for alternative pay arrangements, such as a day rate or a piece rate. As discussed in a prior *Five on Friday* installment, if properly implemented, these alternative methods may lessen the overtime burden, because overtime hours are paid at "half-time" and not the traditional "time and a half."

Finally, there are unique considerations related to compensable time given the working arrangements of many care workers. For example, many home care companies employ caregivers who sleep during shifts. In addition to the exclusion of bona fide meal periods, these companies may reach an agreement with employees who are on duty for 24 hours or more to exclude up to eight hours of sleeping time. For those who qualify as true live-in caregivers, as defined by the WHD, employers may also reach an agreement to exclude bona fide sleep time, meal periods, and other off-duty time. They may not, however, exclude sleep time for employees who work shifts of less than 24 hours.

To be sure, there are detailed requirements governing the exclusion of sleep time. Home care companies should closely adhere to, and document such adherence to, these requirements. As we have discussed before, the WHD recently published a Field Assistance Bulletin discussing the exclusion of sleep time from hours worked by domestic service employees. Note also that state law may require a different treatment of sleep time.

Q

It seems that home care companies have already had to address many of the issues now before most companies working to comply with the DOL's new exemption rule for white-collar employees. Should the industry think about this impending change in conjunction with their efforts surrounding the Home Care Final Rule?

A

That's a great point. The home care industry certainly has to reckon with the December 1 effective date of the new exemption rule. For example, trained nurses such as RNs did not qualify for the companionship or the live-in domestic service worker exemptions, even in their original iterations. RNs may, however, qualify for the FLSA's professional exemption. Home care companies should use this as an opportunity to review their exempt job classifications and develop a comprehensive response plan.

Q

This is very helpful for home care companies. What about companies that simply screen and refer independent contractor home care workers to clients?

These companies—typically referred to as nurse registries—should expect WHD scrutiny, given the Division's independent contractor misclassification initiative in addition to its focus on the home care industry. In 2015, the WHD issued an Administrative Interpretation that included an expansive interpretation of the FLSA's "suffer or permit to work" definition of "employ" and broadcasted its intent to intensely scrutinize purported independent contractor relationships.

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More recently, the WHD published a Home Care Guide addressed to consumers and their families. The Guide cautions consumers who use or manage home care services that they may be the employer of that worker and discusses the potential for joint employment if that worker is provided by a third-party agency. This is significant for nurse registries, given WHD's recent indication in another Administrative Interpretation that it will utilize joint employment relationships to find statutory coverage and collect back wages from larger entities. Additionally, we've seen an uptick in misclassification litigation against nurse registries.

Accordingly, nurse registries and similar models must evaluate their relationships with independent contractors and consider how the WHD and courts would interpret that relationship.

If you'd like to discuss these issues with Lucas, please feel free to email him by clicking here. You can also contact the *Five on Friday* editors, Brett Bartlett and Kevin Young by clicking here. And you can find bios and contact for the other excellent attorneys in our Wage and Hour Litigation Practice Group by clicking here.

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