

## Are You Prepared for Changes to the Fair Labor Standards Act?

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### PRACTICE AREAS

Employment and Labor

The U.S. Department of Labor ("DOL") enforces the Fair Labor Standards Act ("FLSA"); which established standards for minimum wage, recordkeeping, and overtime pay at the federal level. Currently, the FLSA provides that employees must be paid a minimum wage of \$7.25 per hour, plus one and one-half times the employee's actual regular rate of pay for any hour worked over 40 hours in a work week. Individual states have the power to institute additional or more restrictive provisions related to those areas governed by the FLSA. For example, many states have a minimum wage requirements exceeding \$7.25.

Over the past few years, there has been a significant increase in legal claims arising under the FLSA, from increased putative class action wage claims made by disgruntled employees to increased focus by the DOL in conducting random audits of employers. In our experience, a significant number of employers are unprepared for such legal challenges and have little if any knowledge of whether their internal policies and practices are actually compliant with the FLSA. Although the FLSA, on its face, seems simple enough (*i.e.*, \$7.25 per hour minimum and time and one-half for overtime), there are numerous, complicated and often misunderstood aspects to the general rule (such as the impact of bonuses on the overtime calculation, when hourly employees must be paid for travel time, waiting time, dual job duties and more.)

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Equally misunderstood are the so-called "white-collar" exemptions under FLSA for executive, administrative, and professional employees. The "white-collar" exemptions provide that employees who perform specific job duties and are paid a minimum base salary of at least \$455 per week are exempt from the minimum wage and overtime requirements of the FLSA.

Unfortunately, whether an employee's job duties meet the requirements of an exemption is not always clear and often becomes a focal point during a DOL audit.

### So What's New?

On February 12, 2014, President Obama signed an Executive Order increasing minimum wage for employees of businesses that contract with the federal government (*i.e.*, federal contractors) to \$10.10 per hour beginning January 1, 2015. The minimum wage for tipped workers of such federal contractors is increased to \$4.90. One month later, President Obama signed a Presidential Memorandum dated March 13, 2014, directing the Secretary of Labor to update and modernize the FLSA. The President's Memorandum does not provide specifics as to what he expects the "modernized" FLSA to look like, but based on the President's prior Executive Order and his comments in the memorandum related to "outdated" white-collar exemptions, we can assume there will be a review of the minimum wage as well as a possible increase in the \$455 per week salary level for the white-collar exemptions and possibly a narrowing of the positions eligible for the white-collar exemptions.

Although we do not anticipate seeing significant changes in the short-term, as the rule making process for such changes takes time, employers would be prudent to review their current policies and practices to ensure they are compliant with the current FLSA. The DOL's focus on enforcement and the increase in FLSA litigation is not likely to change and is likely to increase. An employer's internal FLSA audit should focus on policies and procedures; classification of employees (*i.e.*, exempt vs. non-exempt, employee vs. independent contractor); and recordkeeping to make sure employees are being compensated properly for all hours worked. Our Employment, Labor and Benefits Practice Group has significant experience assisting clients with voluntary internal FLSA audits, as well as assisting with the defense of unplanned DOL audits.