U.S. DOL ANNOUNCES THAT IT WILL PUBLISH FINAL RULE TO UPDATE OVERTIME REGULATIONS

Today, the U.S. Department of Labor announced that it will publish on May 23, 2016 its Final Rule to update the federal regulations defining the overtime exemption for executive, administrative, and professional employees or otherwise known as ”white-collar” employees. The pre-publication version of the Final Rule is, however, available now. The final rule will become effective December 1, 2016.

The Final Rule focuses primarily on updating the salary level requirement for white-collar employees, increasing the salary level requirement from $455 per week ($23,660 annually) to $913 per week or $47,476 annually for a full-year employee. The Final Rule amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level. The Final Rule also sets the total annual compensation requirement for highly compensated employees (HCE) subject to minimal duties test to $134,004 up from the current $100,000 salary threshold.

The initial increases to the standard salary level from $455 to $913 per week and HCE total annual compensation requirement (from $100,000 to $134,004 per year) will be effective on December 1, 2016. Future automatic updates to those salary level thresholds will be automatically updated every three years beginning on January 1, 2020.

Currently, for an employee to be exempt from the minimum wage and overtime requirements under the Fair Labor Standards Act (FLSA), an employee must be paid on a salary basis meaning that the employee must receive a predetermined amount of at least $455 per week which cannot be subject to a reduction because of variations in the quality or quantity of the work performed. In addition, the employee’s job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (“duties test”).

The Final Rule is not changing any of the existing job duty requirements for employees to qualify for the white collar overtime exemption. The Final Rule is also not changing the HCE duties test. The DOL expects that the standard salary level set in the Final Rule and automatic updating will work effectively with the duties test to distinguish between overtime-eligible workers and those who may be exempt.

The effect of the increase in the salary level test from $455 per week to $913 per week will result in certain employees who are now considered exempt under the current regulations to lose their overtime exemption effective December 1, 2016 unless their employers increase

their salary level to the new salary level requirement. The DOL estimates that the change in the salary level requirement will permit approximately 4.2 million more employees who are not currently eligible for overtime under the FLSA to be entitled to overtime once the Final Rule becomes effective on December 1, 2016.

O'Neil Cannon will be hosting a seminar on June 8, 2016 at the Country Springs Hotel in Pewaukee, Wisconsin providing important information and insight for employers on the new overtime rules. Please visit our firm website for more information.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN SUPREME COURT ISSUES DONNING AND DOFFING DECISION

On March 1, 2016, the Wisconsin Supreme Court issued a decision in *United Food and Commercial Workers Union, Local 1473 et al. v. Hormel Foods Corporation*. The majority determined that the time employees spent putting on and taking off clothes and equipment for their jobs was "work" under the Wisconsin statutes and that employees should, therefore, be compensated for that time.

The Court took into consideration the fact that the employer's work rules required that such clothing and equipment be worn so that the company met food and work safety regulations. Because the Court's majority determined that the employees' "principal activity" was producing food products and that the clothing and equipment was necessary for that production, the Court's majority held that the putting on and taking off of these items was "integral and indispensable" to the work and should, therefore, be compensated. The dissent disagreed, based, in part, on the U.S. Supreme Court's decision in *Integrity Staffing v. Busk*, stating that putting on and taking off the clothing was not a part of safely cleaning and canning food and, therefore, did not need to be compensated.

The Court also rejected the employer's arguments that such time was "*de minimis*" because the case involved more than $500 in unpaid wages per year for each employee. Additionally, the majority noted that, although the "*de minimis*" defense is frequently used under the federal Fair Labor Standards Act, no Wisconsin court has ever applied to it Wisconsin wage and hour laws.

Employers must carefully consider what pre- and post-shift activities must be compensated. Although this decision helps clarify requirements related to donning and doffing for Wisconsin

employers, our advice to employers remains the same—time spent performing activities related to an employee's duties, which includes donning and doffing protective gear that is necessary for performing an employee's job duties, should generally be compensated.

EMPLOYMENT LAWSCENE ALERT: DOL MEMO STATES THAT MOST WORKERS ARE EMPLOYEES UNDER THE FLSA

Today, July 15, 2015, the U.S. Department of Labor (DOL) issued a memo regarding the classification of workers as either employees or independent contractors, which stated that most workers qualify as employees under the Fair Labor Standards Act (FLSA). The DOL noted that the FLSA has an expansive definition of employment and that workers who are misclassified may miss out on many protections that they should be given, including minimum wage, overtime, unemployment compensation, and workers' compensation.

Under the FLSA, a worker is an independent contractor if he is genuinely in business for himself; if a worker is economically dependent on the employer, however, the worker is an employee. To determine if the worker is economically dependent on the employer, the DOL looks at the six-factor economic realities test, which must be applied consistently with the broad scope of the FLSA. These factors are 1) the extent to which the work performed is an integral part of the employer's business; 2) the worker's opportunity for profit or loss depending on his or her managerial skill; 3) the extent of the relative investments of the employer and the worker; 4) whether the work performed requires special skills and initiative; 5) the permanency of the relationship; and 6) the degree of control exercised or retained by the employer. None of the six-factors is determinative; instead, the DOL states that they are indicators of the broader concept of economic dependence, which is the ultimate determination. Importantly, neither an employee's job title or an agreement between the worker and the employer factor into the analysis of whether a worker is an employee or an independent contractor. It is the reality of the working relationship that is determinative of an individual's employee or independent contractor status.

The DOL's conclusion is that most workers are employees under the FLSA and are thus entitled to all of the protections afforded employees. Therefore, employers need to be proactive and regularly revisit and reassess their use and classification of independent contractors to avoid liability for misclassification. If an individual is being treated like an employee, he or she needs to be classified as an employee. Employers who do otherwise are likely to find themselves facing litigation.

EMPLOYMENT LAWSCENE ALERT: DOL ISSUES PROPOSED RULE CHANGES TO OVERTIME REGULATIONS

On March 13, 2014, President Obama signed a memorandum that launched the U.S. Department of Labor's (DOL) efforts to update the Fair Labor Standards Act's (FLSA) overtime rules for executive, administrative, professional, outside sales, and computer employees, commonly referred to as the "white collar" exemptions. To be exempt from the overtime regulations, employees must meet both a salary basis test and a job duties test. On Tuesday, June 30, 2015, the U.S. Department of Labor (DOL) released the long-awaited proposed rule regarding the expansion of overtime regulations under the Fair Labor Standards Act (FLSA). It is anticipated that, if these rules are imposed, nearly 5 million additional workers would be eligible for overtime under the FLSA's regulations.

The most drastic difference in the proposed regulations is the raise of the minimum salary requirement to qualify for the white collar exemption. Currently, the minimum salary requirement is $455 per week ($23,660 per year), a number that was set in 2004. The proposed rule would increase the minimum salary requirement to $970 per week ($50,440 per year). This figure is equal to the 40th percentile of weekly earnings for full-time, salaried employees. The proposed rule also includes an automatic adjustment to the salary threshold so that the minimum salary requirement does not become outdated. The DOL is also seeking comment on whether nondiscretionary bonuses can be included to satisfy the salary requirement.

Although the proposed rule does not specifically change any of the job duties requirements, the DOL did invite comment on whether or not these tests are working as intended or should be changed. One suggestion is that the federal job duties test would mirror the job duties test from California in which employees have to spend at least 50 percent of their time on exempt duties to qualify as exempt. The current federal test simply looks at a worker's "primary duty" and whether the employee's primary duty meets the requirements of the particular exemption classification. A change in the duties test could also significantly decrease the number of employees who qualify for the overtime exemption.

Once the proposed rule is published, likely in the next few days, there will be a sixty-day public comment period. Only after that will the DOL be able to issue a final rule. Although employers do not have to do anything at this time and cannot know exactly how these proposed rule changes will impact them until they become final, they should be staying aware of these changes. Once a final rule is published, employers will likely need to

reevaluate their exempt and non-exempt classifications for their employees to make sure that they are in compliance with the final DOL rules.

EMPLOYMENT LAWSCENE ALERT: SUPREME COURT DECIDES SECURITY CHECK TIME DOESN'T NEED TO BE PAID TIME

On December 9, 2014, the Supreme Court of the United States issued its decision in *Integrity Staffing Solutions, Inc. v. Busk et al.*, ruling that time spent waiting to undergo and undergoing security screenings after work each day is not compensable time under the Fair Labor Standards Act ("FLSA"). This case involved a collective claim by employees of a temporary staffing agency who worked at Amazon warehouses in Nevada retrieving products from shelves and packaging those products for delivery. These employees were required to pass through a security check after the end of their shift to make sure that they had not pilfered any product from the warehouse. At times, employees were required to wait as long as 25 minutes in line before they could leave the premises.

In overruling the Ninth Circuit Court of Appeals, the Supreme Court held that the activity of waiting in a security line, after work, was not a "principal activity or activities which the employee is employed to perform" because they were hired to retrieve products from warehouse shelves and package them, not to go through security screenings. Pursuant to the Portal-to-Portal Act, an employer is not required to pay minimum wage or overtime compensation for activities which are preliminary or postliminary to an employee's principal activities. The U.S. Department of Labor deems that the term "principal activities" encompasses "all activities which are an integral part of the principal activity," including those related activities which are "indispensable to its performance."

The Court concluded that the security screenings were not "integral and indispensable" to the employees' duties because it was not an intrinsic element of retrieving products from shelves and packaging them for shipment and could have been eliminated if the employer so desired. The Court found that the Ninth Circuit had erred in focusing on whether the employer required an activity because that was too broad of an interpretation and the focus under the FLSA and Portal-to-Portal Act is whether the activities are "integral and indispensable" to the productive work that the employee is employed to perform.

Employers should take note of this decision in determining what pre- and post-shift activities must be compensated. Time spent performing activities related to an employee's duties,

such as donning and doffing protective gear that is necessary for performing an employee's job duties, should generally be compensated. However, not all activities, such as waiting at a security check and waiting in line to receive pay checks, are compensable.

EMPLOYMENT LAWSCENE ALERT: CAN AN EMPLOYER DEDUCT AN EXEMPT EMPLOYEE'S SALARY WHEN THE EMPLOYER CLOSES ITS BUSINESS DUE TO EITHER INCLEMENT WEATHER OR A POWER OUTAGE?

The Fair Labor Standards Act ("FLSA") provides an employer an exemption for minimum wage and overtime payments for any employee employed in a bona fide executive, administrative, or professional capacity. An employee may qualify for exemption if the employee meets all of the pertinent tests relating to duties and receives compensation on a "salary basis" at not less than the minimum amounts as described in the appropriate section of the regulations. The FLSA regulations provide that, for an exempt employee to be paid on a "salary basis," the employee must receive his or her full salary for any week in which the employee performs any work without regard to the number of days or hours worked. An employee will not be considered to be paid on a "salary basis" for any week if deductions are made to an employee's salary for any absence occasioned by the employer or by the operating requirements of the business. However, a deduction may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability.

Oftentimes, the question arises whether an employer can deduct a day's wage from an exempt employee's salary when the employer closes its business due to inclement weather (e.g., a snowstorm) or a power outage. In other words, does an employer need to pay an exempt employee for that day when no work was performed by the employee because of the employer's decision to close its business? It is the U.S. Department of Labor's ("DOL") position that an employer must pay an exempt employee his or her full salary if the employer closes its operations due to a weather-related emergency or other emergency, such as a power outage. The DOL's position is based, in part, on the FLSA's regulations that provide that deductions may not be made for time when work is not available. When it is the employer's decision to close its business because of some emergency, whether it is due to severe weather or a simple loss of power, the DOL presumes that employees remain ready, willing, and able to work. Under such circumstances, deductions may not be made from an

exempt employee's salary when work is not available. If deductions are made under such circumstances, the employer risks losing the exemption, thus subjecting it to potential overtime liability.

On the other hand, when an emergency causes an employee to choose not to report to work for the day, even though the employer remains open for business, the DOL treats such an absence as an absence for personal reasons. This type of absence does not constitute an absence due to sickness or disability. Consequently, an employer that remains open for business during a weather emergency may lawfully deduct one full day's wages from an exempt employee's salary if that person does not report for work for the day due to adverse weather conditions. Such a deduction will not violate the "salary basis" rule or otherwise affect the employee's exempt status. If, however, the employee works only a partial day because of weather-related issues, the employer may not make deductions from the employee's salary for the lost time because an exempt employee must receive a full day's pay for the partial day worked in order for the employer to meet the "salary basis" rule.

EMPLOYMENT LAWSCENE ALERT: HOW TO AVOID BECOMING A WAGE AND HOUR MISCLASSIFICATION HEADLINE

Employers who label their employees as overtime exempt should be cautioned by a recent settlement out of a Florida federal court. The case, *Lytle et al. v. Lowe's Home Centers Inc. et al.,* 12-CV-01848 (M.D. Fla.), was premised on the allegation that plaintiff Lizeth Lytle and a class of similarly situated employees were improperly classified as exempt from the Fair Labor Standards Act ("FLSA") overtime requirements.

The FLSA requires that employees must be paid overtime for all hours worked in excess of forty hours per workweek, unless the employee is exempt. Exempt employees include those who qualify as a bona fide executive, administrative, or professional. Simply being paid on a salary basis does not, by itself, determine the exempt status of an employee. Rather, beyond the requirement that an employee be paid on a salary basis of not less than $455 per week, an employee's job duties must satisfy the criteria to qualify under either the executive, administrative, or professional exemption. Importantly, job titles do not determine exempt status.

In the *Lytle* case, the class alleged that, although classified by their employer as exempt, their duties did not rise to the level required by the FLSA duties tests. The plaintiffs argued

that, despite their managerial description as “Human Resource Manager,” none had the ability to make meaningful decisions, nor did they supervise employees; instead, their job duties included tasks such as operating cash registers, cleaning bathrooms, greeting customers, and sweeping floors. The employer denied that it violated any laws; however, it agreed to, and the Court approved, a $3.5 million class settlement and a $1.3 million attorney fee award.

Employers who have classified their employees as “exempt” from overtime pay should not simply rely on the fact that an employee is being paid on a salary basis or that his or her job title may imply executive or administrative job responsibilities. Instead, employers should make sure that the actual job duties of each employee claimed as exempt meet the particular job duties of an executive, administrative, or professional employee. Drafting and keeping up-to-date written job descriptions that accurately describe an employee’s actual job responsibilities is an important step in making sure that employees are properly classified as “exempt” or “non-exempt” and helping your company avoid becoming another wage and hour collective action headline.

EMPLOYMENT LAWSCENE ALERT: IS YOUR BUSINESS EXPOSED TO LIABILITY FOR YOUR COMPANY’S LEASED EMPLOYEES/TEMPORARY WORKERS?

EMPLOYMENT LAWSCENE ALERT: COLLEGE FOOTBALL PLAYERS ARE “EMPLOYEES” UNDER THE NLRA

The National Labor Relations Board (“NLRB”) Regional Director for Region 13 issued a decision on March 26, 2014, finding that college football players receiving grant-in-aid scholarships from Northwestern University who have not exhausted their playing eligibility are “employees” under Section 2(3) of the National Labor Relations Act (“NLRA”). What does this mean for Northwestern football players? It means that those football players who meet the definition of an “employee” of the University can vote for whether they want to be represented by a union and collectively bargain over the terms and conditions of their

relationship with the University. In fact, in his March 26th decision, the Regional Director ordered that an immediate secret ballot election be held among the eligible employees in the unit to determine whether they should be represented by the College Athletes Players Association ("CAPA") in collective bargaining with Northwestern.

In finding that the Northwestern football players receiving grant-in-aid scholarships are employees under the NLRA, the Regional Director relied on the broad definition of "employee" under Section 2(3) of the NLRA, which provides, in relevant part, that the term "employee" shall include "any employee . . . ." The Regional Director also relied on the U.S. Supreme Court's holding in *NLRB v. Town and Country Electric*, 516, U.S. 85 (1995), that in applying the broad definition of "employee" under the NLRA, it is necessary to consider the common law definition of "employee." The Regional Director noted that, "[u]nder the common law definition, an employee is a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment."

In finding that Northwestern University football players receiving grant-in-aid scholarships to perform football-related services for the University fall within this definition of "employee," the Regional Director emphasized the significant amount of revenue the football program generates for the University, the amount of time the players spend on football-related activities, the fact that the players who receive scholarships are required to sign a "tender," which the Regional Director compares to an employment contract, that the scholarships the players receive are in exchange for the athletic services being performed, and the amount of control the University and the football coaches have over the players and their daily lives.

Although this decision is just one Region's decision, it is noteworthy, as it is the first case in which the NLRB has ruled that student-athletes at a private university qualify as employees under the NLRA and are therefore allowed to unionize. Northwestern has already released a statement confirming its plan to appeal the Regional Director's decision. We are likely a long way from the ultimate conclusion in the Northwestern case. However, this decision may open the door for student-athletes at other private universities and colleges to argue that they, too, are considered employees under the NLRA.

Including student athletes within the definition of "employees" under the NLRA may present a whole host of unexpected issues. For example, if student athletes on scholarship are "employees" of their college or university, should their scholarships be considered taxable income? Are these athletes also covered by other labor and employment statutes like the Fair Labor Standards Act, which requires employees to be paid minimum wage and overtime for all hours worked over forty in a given workweek? These are just some of the issues that may be raised with the recent decision issued by Region 13. The ultimate consequences of this decision out of Region 13, and their significance and reach, remain to be seen.

EMPLOYMENT LAWSCENE ALERT: U.S. SUPREME COURT AFFIRMS TIME SPENT CHANGING CLOTHES NOT COMPENSABLE WORK TIME

On October 14, 2013, the Employment LawScene™ brought you an article explaining that the Supreme Court would hear oral arguments in *Sandifer v. U.S. Steel Corp.*, a case out of the Seventh Circuit, to resolve disagreement among other circuit courts as to what constitutes "changing clothes" within the meaning of the Fair Labor Standards Act ("FLSA") for purposes of determining whether time spent "changing clothes" at the beginning and end of each workday is compensable work time.

The *Sandifer* case specifically focused on Section 203(o) of the FLSA, which allows employers and unions to collectively bargain over whether employees must be paid for time spent "changing clothes" at the beginning and end of each workday. The Seventh Circuit held that time spent putting on certain articles of protective gear fell within the definition of "changing clothes" under the FLSA and, accordingly, was not work time that employees had to be paid for pursuant to the parties' collective bargaining agreement.

On January 27, 2014, the U.S. Supreme Court unanimously affirmed the Seventh Circuit's holding that the time employees spent "donning" and "doffing" protective gear was not compensable under the FLSA when, "on the whole", the vast majority of the time was spent "changing clothes" and the employer and employees agreed that time was non-compensable under a collective bargaining agreement.

The U.S. Supreme Court noted that employees in *Sandifer v. U.S. Steel Corp.* were required to don and doff twelve (12) items of protective gear, nine of which fell within the definition of "clothes" under the FLSA (flame-retardant jacket, pants, hood, hard hat, "snood," "wristlets," work gloves, leggings, and steel-toed boots) and, therefore, were not compensable. Although the Court did not consider the other three items—safety glasses, earplugs, and a respirator—to fall within its definition of "clothes," it found that, "on the whole", a vast majority of the time was spent donning and doffing the other items that did fall within the definition and, accordingly, the time was not compensable. The Court instructed that in determining whether time spent donning and doffing certain protective gear is compensable under the Act, other courts should examine the time period at issue "on the whole" and determine whether the vast majority of donning and doffing time involves clothing items or non-clothing items as defined by the Court. If a vast majority of the time is spent on items that are "clothes," then the entire period should qualify as time spent "changing clothes" and

should not constitute compensable work time under the FLSA pursuant to an applicable collective bargaining agreement.

The U.S. Supreme Court's decision in *Sandifer* makes clear that unionized employees are not entitled to compensation for time spent donning and doffing protective gear under the FLSA where a vast majority of time is spent "changing clothes" and where a collective bargaining agreement excludes such time from working time.

Click here to read the U.S. Supreme Court's complete decision in *Sandifer v. U.S. Steel Corp*.