Set-Aside™ ALERT

Business intelligence for small business federal contractors

Vol. 27, No. 9 **setasidealert.com** **April 26, 2019**

Column: The Impact of New DOL Proposed Rules on Gov't Contractors

by Nichole Atallah, partner, PilieroMazza PLLC

In the last several weeks the U.S. Labor Dept. (DOL) issued three proposed rules which, if made final, would (1) change the salary basis test for determining which employees can be exempt from overtime; (2) relax the standard for determining when a joint employer relationship exists; and (3) clarify what compensation must be included when calculating an employee's regular rate of pay for overtime purposes. This article examines how these new proposed rules affect common considerations for government contractors.

Changes to the Salary Basis Test

Proposed changes to the salary basis test may have the most immediate and obvious impact. In order to designate an employee exempt from overtime under the Fair Labor Standards Act (FLSA), an employer must ensure that the employee meets both a salary basis test, which establishes a salary threshold, and a duties test, which establishes the types of responsibilities and knowledge required to be eligible for an exemption. The salary basis requirement is currently $455 per week, or $23,660 per year. The proposed rule aims to increase the threshold to $679 per week or $35,308 per year.

It also would allow employers to include up to 10% of the salary in nondiscretionary bonuses and incentive pay. One of the more significant changes proposed is to increase the compensation requirement for highly compensated employees, who are subject to minimal duties test requirements, from $100,000 to $147,414.

Like all employers, government contractors will face the prospect that some employees would be newly eligible for overtime under the new rule. In that case, the contractor may choose to convert them to hourly workers or raise their salaries, as an alternative to paying overtime.

Such a change could have a price impact on contracts bid before this rule is effective. If a government contractor is working on a contract covered by the Service Contract Act or Davis Bacon Act, designating an employee as non-exempt makes that employee eligible for the wages and fringe benefits required by those laws which could significantly impact cost of performance.

Employers with salaried employees under $35,308 annually should closely monitor the development of the rule and be prepared to adjust their pay practices.

A word of caution that employers should also take this opportunity to ensure they are compliant with the duties test. Although the test has not changed, many violations stem from misunderstanding this requirement.

Joint Employer Standard

Whether two companies can be considered joint employers under the FLSA is an important consideration when government contractors engage a staffing firm, lease employees or enter into a subcontract or joint venture. It can mean that one party might unintentionally become responsible for another entity's wage payment violations or risks.

In its first proposed change to the joint employer standard in over 60 years, DOL sought to make it clearer when a joint employer relationship exists. Under the current rule, a joint employer relationship depends on whether two entities are "completely disassociated" with respect to "employment of a particular employee." This includes when employers arrange to share serves, acts in the interest of the other employer or two employers share control over an employee.

Not only is the standard itself vague, but it has been interpreted by courts in different ways. Given the multiple jurisdictions in which government contractors operate and the complex nature of employment arrangements with the federal government, subcontractors, mentors, and joint venturers, the risk of a joint employer relationship is significant.

The proposed rule aims to clarify that to be a joint employer, a company has to exercise actual authority and control over a worker. The rule seeks to deemphasize the amount of economic dependence of a worker on a company as well as making it clear that a particular business model, such as a franchise or joint venture, would not bear weight on the ultimate analysis. Finally, the proposed rule clarifies that certain business practices, such as providing a handbook or forms to another employer or jointly participating in a benefit plan would not make a joint employer finding more or less likely.

The proposed rule is generally a positive move toward creating some transparency and assurance that companies can arrange cooperative business arrangements with clarity as to what might be more likely considered a joint employer risk.

Changes to the Regular Rate of Pay

The FLSA requires that non-exempt, hourly employees receive overtime for hours worked over 40 in a workweek. Overtime is calculated as one and one half the regular rate of pay for that employee. However, the regular rate of pay may be more than the employee's base hourly rate. It includes hourly wages, most bonuses, shift differentials, on-call pay, and commissions. Basically, an employer is supposed to add up all non-overtime payments made to an employee in a week and divide that number by the hours worked to get the regular rate of pay.

The regular rate guidance has not been updated in 50 years and during that time employers have implemented new incentive and benefit offerings that do not easily allow an employer to determine whether a benefit needs to be included in the regular rate. The proposed rule would exclude the (1) cost of wellness programs; (2) reimbursed expenses that do not exceed the maximum travel reimbursement under the Federal Travel Regulation system; (3) accident, unemployment and legal services, which the DOL considers to be benefits plans; (4) discretionary bonuses; or (5) spot bonuses.

Bonuses that track efficiency, are required by contract or require an employee to remain with the organization for a period of time are included in the overtime calculation.

However, government contractors should be aware that bonuses are generally not allowable if they are discretionary. Government contractors should evaluate current compensation and benefit offerings to balance overtime impact against allowability.

About the Author: *Nichole Atallah is a partner with PilieroMazza and chairs the Labor & Employment Law Group. For over 25 years, PilieroMazza has helped businesses to successfully navigate the complexity of doing business with the federal government as well as everyday business challenges. Visit www.pilieromazza. com.*