Transitioning To The New "Highly Compensated" Threshold

Insights
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When the revised requirements for the federal Fair Labor Standards Act's "white collar" exemptions take effect on December 1, the total-annual-compensation threshold for the "highly compensated employee" (HCE) versions will increase from $100,000 to $134,004. This raises the question of what actual total annual dollar amount will be necessary for the transition period, that is, for the timeframe in which the change occurs.

The U.S. Labor Department has not yet provided authoritative guidance on this point. But the answer is likely to depend in part upon what period an employer has selected for measuring "total annual compensation".

"Annual" Means *What*, Exactly?
The HCE regulations permit the employer to select in advance "any 52-week period" as the relevant year, such as a calendar year, a fiscal year, or a hiring-anniversary year. A calendar year applies by default if the employer does not identify some other year. 29 C.F.R. § 541.601(b)(4).

However, one problem is that the HCE regulations are shot-through with terms like "annual", "year", "fiscal year", "other year period", and "52-week period" but do not state how these timeframes are to be applied in practice. For instance, it would be unusual for a calendar year to contain exactly 52 calendar weeks or exactly 52 workweeks (an FLSA term-of-art). As further examples, a calendar year almost always ends *within* a calendar week, *within* an FLSA workweek, and *within* a pay-period. And in the real world, a calendar year contains 365 or 366 days, whereas 52 calendar weeks or 52 FLSA workweeks span 364 days.

A Hypothetical
So what's an employer to do? For illustration's sake, assume that the "total annual compensation" period applying to a particular employee is calendar-year 2016. Had the increased HCE threshold taken effect on January 1, 2017, there would be no overlap.

As it is, the threshold will be $100,000 for eleven calendar months of 2016 and $134,004 for the twelfth. That is, the changed threshold will not apply retroactively, so there should be no requirement to pay at least a total of $134,004 for calendar-year 2016. Logic therefore suggests that the actual "total annual compensation" minimum for calendar-year 2016 should be increased by a *pro rata* amount to take into account the higher figure for December 2016.

While USDOL has published no approved formula, one way to compute the 2016 calendar-year equivalent threshold for this hypothetical employee might be:

$(^{11}/_{12} \times \$100{,}000) + (^{1}/_{12} \times \$134{,}004) \cong \$102{,}834$.

If the employee's total for calendar-year 2016 turns out to be less than that, then, to maintain the HCE exemption, his or her employer would have up to "one month" (presumably until January 31, 2017) to make one final payment in an amount sufficient to reach the threshold. 29 C.F.R. § 541.601(b)(2) and (b)(3). The payment would not apply towards the employee's HCE minimum for calendar-year 2017.

Of course, under this approach, the adjusted threshold would be even higher if the hypothetical employer had specified an HCE timeframe incorporating a longer period after the December 1 change. This would be so, for instance, if management had selected a fiscal-year timeframe running from June 1, 2016 through May 31, 2017. This period would include *six* months under the $134,004 level, rather than only one.

The Bottom Line

Employers who are currently relying upon the HCE version of the FLSA's white-collar exemptions should carefully consider the 2016/2017 transitional implications of the higher "total annual compensation" dollar amount that goes into effect on December 1.

Moreover, in an area of potential uncertainty, management might conclude that it is wise not to take a to-the-penny approach in computing an adjusted threshold or in determining whether an employee has reached it.

Finally, bear in mind that the HCE version of these exemptions imposes *other* requirements besides just "total annual compensation" (including the "salary basis" criterion, the dollar threshold for which is scheduled to increase to a rate of $913 per week on December 1).

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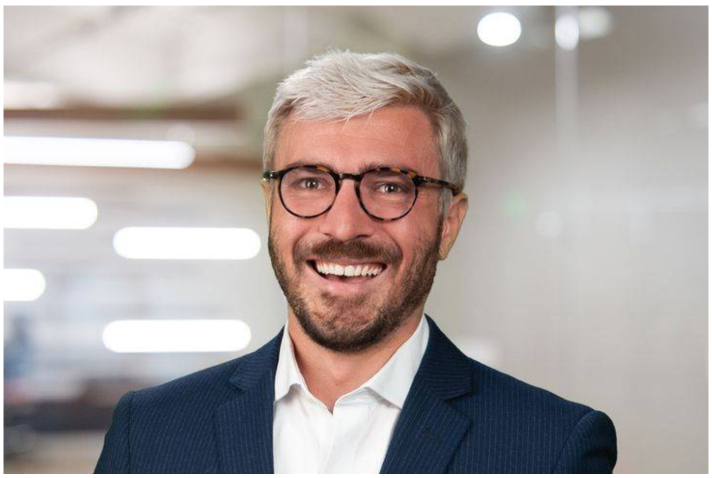

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