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HH&K

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ATTORNEYS

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United States Department of Labor Proposes Increase to Minimum Salary Threshold for Exempt Employees

Currently, the federal minimum weekly salary for exempt employees is $455 per week. New York State has a higher minimum threshold, as it requires that exempt employees be paid $656.25 per week. That could change soon.

On July 6, 2015, the United States Department of Labor published proposed regulations updating the requirements for the exempt status classification. The DOL proposes changing the minimum salary threshold for exempt employees to the 40th percentile of weekly earnings for full-time salaried workers (currently $921 per week). The DOL also proposes to increase the total annual compensation requirement for the highly compensated employees' exemption (HCE) to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers (currently $122,148 annually). Finally, the DOL proposes to automatically adjust the amount for each exemption on an annual basis.

The DOL solicited comments on the newly proposed rule through September 4, 2015. Over 200,000 comments were received. The DOL also requested comments from employers regarding the current duties test for exempt classification and whether nondiscretionary bonuses may be used to satisfy a portion of the salary requirements.

It is anticipated that the DOL will review the comments and will publish revised rules (or keep the existing proposed rules) in the next few months. Any changes will be effective next year.

Article written by John C. Fish, Esq. For more information, contact Mr. Fish at (607) 231-6712 or via email at jfish@hhk.com.

This Issue Features

Thank You!

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ATTORNEYS

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***Press & Sun Bulletin Readers' Choice Awards* For Best Law Firm**

Having Fun at "En-Joie the Day on HH&K"!

Ryan Mead, Gary Tyler and Jeremy Sedelmeyer (left photo)
Gary Tyler with Channel 12 WBNG (middle photo) Tina Fernandez and Stacey Axtell (right photo) at "En-Joie the Day on HH&K"

The following is a summary of important pension and benefits developments that have occurred in the past three months. Please feel free to call us for more information about any of these developments and let us help you determine what steps you should implement to take advantage of favorable developments, and to minimize the impact of those that are unfavorable.

Supreme Court Upholds Subsidies For Health Care Purchased On Federal Health Care Exchanges. The Supreme Court, by a 6-3 vote, determined that premium tax credits (also known as health insurance subsidies) under the Affordable Care Act (ACA) are not limited to taxpayers who live in states that have established their own health insurance exchange, but are also available to taxpayers living in states that rely on a federal exchange. While acknowledging that the challengers' arguments were strong, the Supreme Court found that the language of the law was ambiguous in light of the context and structure of the premium tax credit provisions, as well as the role of the subsidies in the ACA as a whole. With these considerations in mind, the Supreme Court concluded that allowing the subsidies for insurance purchased on any exchange was consistent with the purpose of the ACA.

Supreme Court Declares Nationwide Right to Same-Sex Marriage. The Supreme Court, in a 5-4 decision, struck down four state-wide bans on same-sex marriage, holding that the Fourteenth Amendment requires all states to license a marriage between two people of the same sex. And, since same-sex couples may now exercise the fundamental right to marry in all states, the Court ruled that there is no lawful basis for a state to refuse to recognize a lawful same-sex marriage performed in another state. You may need to revise your employee benefits plans or insurance contracts to recognize same-sex marriages.

New Trade Laws Include Wide Variety of Tax Provisions. On June 29, President Obama signed into law two major trade bills: (1) the Trade Preference Extension (TPE) Act of 2015; and (2) and the Trade Priorities and Accountability (TPA) Act of 2015. These new laws contain a variety of tax provisions including the following:

- The refundable health coverage tax credit (HCTC) makes health insurance more affordable for certain trade -affected workers, Pension Benefit Guaranty Corporation (PBGC) payees, and their families, by paying part of their health insurance premiums. The HCTC had expired at the end of 2013. The TPE Act provides that the HCTC applies before January 1, 2020. Thus, the credit is generally retroactively extended six years through 2019. The TPE Act also makes certain changes to the HCTC, including how the health coverage tax credit interacts with the ACA's premium tax credit. This change will also impact your COBRA administration. We expect the United States Department of Labor to issue revised model COBRA forms to address these changes, but in the meantime employer should refer to their pre-2014 COBRA administration practices with regard to the impact of the HCTC.
- The TPE significantly increases penalties for failing to file correct information returns or provide correct payee statements. Among other things, these increased penalties will apply to Forms W-2 and the 1099-series, as well as ACA-required employer shared responsibility and minimum essential coverage reporting forms:

Penalty Category	New Penalty Amount
Failure to file or furnish, generally	$250 per occurrence
Annual cap on penalties	$3,000,000
Failure to file/furnish & corrected within 30 days	$50 per occurrence
Annual cap on penalties if corrected within 30 days	$100,000
Failure to file/furnish if corrected by August 1	$100 per occurrence
Annual cap on penalties if corrected by August 1	$1,500,000
Lesser caps for employers with gross receipts if not more than $5,000,000	$1,000,000
Lesser caps for employers with gross receipts if not more than $5,000,000 if corrected within 30 days	$175,000
Lesser caps for employers with gross receipts if not more than $5,000,000 if corrected by August 1	$500,000
Penalty in case of intentional disregard (no cap applies)	$500 per occurrence

- Pre-age-59-1/2 withdrawals from retirement plans generally are subject to a 10% penalty tax unless one of several exceptions applies. Under one of these exceptions, distributions from a government pension-type plan are not subject to the penalty tax if made upon separation from service after age 50 to state or local police, firefighters, or emergency medical services personnel. Effective for distributions made after December 31, 2015, the TPA Act broadens the category of eligible governmental workers who can qualify for the penalty tax exception to include specified federal law enforcement officers, customs and border protection officers, federal firefighters, and air traffic controllers who reach age 50 and separate from service. Additionally, the TPA Act expands the types of plans from which distributions eligible for the exception can be made.

Next year's inflation adjustments for health savings accounts (HSAs). Eligible individuals may, subject to statutory limits, make deductible contributions to an HSA. Employers, as well as other persons (e.g., family members), also may contribute on behalf of an eligible individual. A person is an "eligible individual" if he is covered under a high deductible health plan

(Continued on page 3)

Employee Benefits Second Quarter Update (continued)

(Continued from page 2)

(HDHP) and is not covered under any other health plan that is not an HDHP, unless the other coverage is permitted insurance (e.g., for worker's compensation, a specified disease or illness, or providing a fixed payment for hospitalization).

The IRS provided the annual inflation-adjusted contribution, deductible, and out-of-pocket expense limits for 2016 for HSAs. For calendar year 2016, the limitation on deductions is $3,350 (no change from 2015) for an individual with self-only coverage. For an individual with family coverage under an HDHP, the limit is $6,750 (up from $6,650 for 2015). Each of these amounts is increased by $1,000 if the eligible individual is age 55 or older. For calendar year 2016, an HDHP is a health plan with an annual deductible that is not less than $1,300 (no change from 2015) for self-only coverage, or $2,600 (no change from 2015) for family coverage, and with respect to which the annual out-of-pocket expenses (deductibles, co-payments, and other amounts, but not premiums) do not exceed $6,550 (up from $6,450 for 2015) for self-only coverage, or $13,100 for family coverage (up from $12,900 for 2015).

Article written by Thomas A. Conlon, Esq. For more information, contact Mr. Conlon at (607) 231-6744 or via email at tconlon@hhk.com.

EEOC Continues to Extend its Reach to LGBT Employees' Claims

The Equal Employment Opportunity Commission is the federal agency responsible for enforcing federal anti-discrimination law. Currently, federal law does not explicitly prohibit discrimination against Gay, Lesbian, Bi-Sexual or Transgendered employees. Despite this gap, data published by the EEOC shows the agency has accepted an increasing number of charges filed on behalf of individuals claiming discrimination on the basis of gender identity or sexual orientation, and that the Commission itself has filed a number of claims.

From January through September 2013, the EEOC received 643 charges that included allegations related to sexual orientation and 147 charges that included allegations based on gender identity/transgender status. In 2014, the EEOC received 918 charges that included allegations related to sexual orientation and 202 charges that included allegations based on gender identity/transgender status. For the first two quarters of 2015, the EEOC reports that it received 505 charges that included allegations of discrimination related to sexual orientation and 112 charges that included allegations of sex discrimination based on gender identity/transgender status. It seems likely that this trend of increasing charges will continue for the foreseeable future.

In addition to processing charges submitted by individuals, the EEOC has brought a number of lawsuits alleging discrimination on the basis of gender identity and/or sexual orientation. The Commission has also weighed in by submitting amicus briefs in support of such claims in private lawsuits. The suits range from claims over an employer's refusal to allow a transgendered woman to use the women's restroom at work to claims of pervasive harassment in the workplace.

All of the EEOC's activity is consistent with its Strategic Enforcement Plan currently in effect which identified "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions" as an enforcement priority.

The EEOC's report comes as a reminder to employers to update your handbooks and training to include sexual orientation and gender identity as protected classes. A little prevention can go a long way to avoiding an expensive lawsuit down the road.

The complete EEOC compilation of statistics and information on cases is available at: http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

Article written by Dawn J. Lanouette, Esq. For more information, contact Ms. Lanouette at (607) 231-6917 or via email at dlanouette@hhk.com.

Congratulations!

Brian R. Wright, Esq.

HH&K congratulates Attorney Brian R. Wright on his appointment by Community Bank N.A. to serve on its Central Region Advisory Board

Announcement

Dawn J. Lanouette, Esq.

Partner Dawn Lanouette spoke at the New York State Human Resources Conference held last month (Sept. 20-22) at Turning Stone Resort in Verona, NY. Dawn presented on drug and alcohol use in the workplace with an emphasis on New York's new medical marijuana statute and the EEOC's lawsuits relating to prescription drug use. She also presented on Social Media in the Workplace, including recent NLRB decisions affecting employers. More information on the conference is available at: http://nys.shrm.org/nys-annual-conference.

New York State SHRM is an affiliate of the Society for Human Resource Management, the world's largest HR membership organization devoted to human resources management.

Can Regulators Compel Banks To Disclose Privileged Documents?

The examiners are in your bank conducting a compliance exam. They have focused on your overdraft program and your Regulation O reports on insider transactions. Now they are asking you to produce all of your materials pertaining to these matters, including bank counsel's legal analyses and opinions. Bank files on both matters contain your attorney's written legal analyses, including advice that some of the bank's practices are non-compliant. The bank has not yet corrected these practices, but the failure to correct is explainable —the bank has finite resources and had to prioritize its Dodd-Frank compliance efforts. Still, you are pretty certain the examiners will not sympathize.

You remember that communications from bank counsel are confidential and protected by the attorney-client privilege from disclosure to third parties without the client's consent. What do you do? Will you turn over counsel's memoranda pointing out that the bank cannot process checks in high-low order to maximize fee income, or the advice pointing out that a loan to a director's affiliate should have been reported? *Must you* deliver it? Can you invoke the attorney-client privilege to resist disclosure?

Bankers routinely comply with regulators' demands for counsel's opinions. They may believe the privilege does not apply to regulators or they may not want to risk the possible consequences of refusing the request. Invoking the attorney-client privilege poses a real dilemma—the privilege may shield a smoking gun from scrutiny, but what is the cost? Is the benefit of protection worth souring the relationship with the regulators, a rating downgrade, or worse?

Must You Disclose Your Lawyer's Advice?

The attorney-client privilege is a pillar of our legal system. It serves to safeguard the bond of trust between lawyer and client and promote the candid communication between them vital to effective legal representation. Without the protection of the privilege, disclosure might be compelled, exposing the client to embarrassment, possible civil liability or even criminal prosecution. Those threats could shade the content and reduce the value of a lawyer's advice and thereby jeopardize the client. Does the regulator's need for access to the bank's books and records, in the service of safety and soundness and regulatory compliance, trump the attorney-client privilege? The regulators think it does.

In 1991 guidance, the Deputy Chief Counsel for the Office of the Comptroller of the Currency (OCC), citing the agency's congressionally mandated mission to thoroughly examine national banks, opined that national banks must comply with the OCC's requests for privileged materials. In 2012 testimony before the House of Representatives Committee on Financial Services, the Federal Reserve's General Counsel stated that the Federal Reserve "has complete and unfettered access to an institution's most sensitive information and processes, *including information that would otherwise be privileged and not subject to public disclosure.*" Also in 2012, the Consumer Financial Protection Bureau directly addressed the subject in its rule entitled "Confidential Treatment of Privileged Information." In this rule, the CFPB stated flatly that "The Bureau continues to adhere to the position that it can compel privileged information pursuant to its supervisory authority."

This position may reflect regulatory policy, but as commentators have noted[1], no statute or judicial decision supports it. There is simply no legal basis for the notion that the regulators' need to know supersedes the attorney-client privilege and its protection of client confidences. Regulators may have other persuasive tools—like long memories—but, at this writing, they cannot use the courts to compel disclosure of bank counsel's memoranda.

What If You Do Disclose To Your Regulator?

Ordinarily, a client's disclosure of privileged material to third parties waives the attorney-client privilege. Once the privilege is waived, the client cannot regain its protection. So, if you decide to furnish bank counsel's opinions to your regulator, has the bank waived the privilege and opened the door to compulsory disclosure to plaintiffs in civil litigation and other potentially adverse third parties? Thankfully, the answer is no.

Section 18 of the Federal Deposit Insurance Act provides "The submission by any person of any information to the Bureau of Consumer Financial Protection, any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such Bureau, agency, supervisor, or authority *shall not be construed as waiving, destroying, or otherwise affecting any privilege* such person may claim with respect to such information under Federal or State law as to any person or entity other than such Bureau, agency, supervisor, or authority."

This "selective waiver" law is peculiar to depository institutions and non-bank financial service providers regulated by the CFPB. It enables banks to share privileged information with regulators without waiving the privilege vis-à-vis third parties, which would be the traditional result, absent the statute. Ironically, as one writer has asserted,[2] this statute may have emboldened regulators to demand protection of otherwise privileged materials because it strips banks of their concern regarding waiver with respect to third parties. Moreover, while the CFPB has announced a policy of "selective disclosure" of confidential materials to other regulators,[3] the extent of the privilege in the event of such disclosure is unclear.

Should You Disclose?

Like other important management decisions, considering whether to waive the attorney-client privilege in response to a regulatory demand involves balancing the risks and benefits of the available choices. In most situations, bankers will probably conclude that the risk of refusing a demand (damage to the regulatory relationship and possible related consequences) is not worth the rewards of maintaining confidentiality (uncensored legal advice), especially because the FDIC Act preserves the privilege as to third parties (except perhaps other regulators). But in some cases, resistance may be the better choice, not to vindicate an abstract legal principle, but because the unimpeded flow of candid legal advice is critically important. Like other tough decisions, the choice to resist disclosure may best serve the bank in the long run. At least for now, a regulator seeking to compel disclosure of communications shielded by the attorney-client privilege would face an uphill court battle.

1. Bruce A. Green, Professor Fordham University, "The Attorney Client Privilege—Selective Compulsion Waiver and Selective Disclosure: Is Bank Regulation Exceptional?", Journal of the Professional Lawyer (2013).

2. Thomas Vartanian, Esq., "Do Financial Institutions Have Any Attorney-Client Privilege Left", American Banker, 28 August 2015.

3. "[T]he Bureau will not routinely share confidential supervisory information with agencies that are not engaged in supervision. Except where required by law, the Bureau's policy is to share confidential supervisory information with law enforcement agencies, including State Attorneys General, only in very limited circumstances and upon review of all the relevant facts and considerations." CFPB Bulletin 12-01, at 5.

Article written by Clifford S. Weber, Esq. For more information, contact Mr. Weber at (914) 694-4102 or via email at cweber@hhk.com

2015 Upstate New York Super Lawyers

What is Super Lawyers? Super Lawyers is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high-degree of peer recognition and professional achievement. The selection process includes independent research, peer nominations and peer evaluations. Hinman, Howard & Kattell is happy to announce that sixteen firm attorneys have been named in the 2015 listing of Upstate New York Super Lawyers.

The following Hinman, Howard & Kattell, LLP attorneys have been selected and listed as 2015 New York Super Lawyers—Upstate Edition.

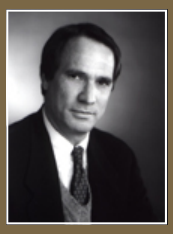
Family Law:
Katherine A. Fitzgerald, Esq.

Employment and Labor:
James S. Gleason, Esq.

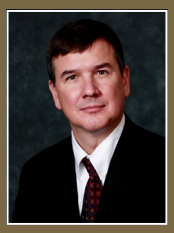
Business Litigation:
Linda B. Johnson, Esq.

Environmental Law:
Kenneth S. Kamlet, Esq.

Real Estate:
Lillian L. Levy, Esq.



Business Litigation:
Harvey D. Mervis, Esq.



Business Litigation:
Albert J. Millus, Jr., Esq.

Banking:
James W. Orband, Esq.

General Litigation:
Paul T. Sheppard, Esq.

"Rising Star"
Real Estate:
Megan E. Curinga, Esq.

"Rising Star"
General Litigation:
Tina Fernandez, Esq.

"Rising Star"
Business Litigation:
Daniel R. Norton, Esq.

"Rising Star"
Workers' Compensation:
Kelly O'Connor, Esq.

"Rising Star"
Tax:
Alexander D. Racketa, Esq.

"Rising Star"
Workers' Compensation:
Gary C. Tyler, Esq.

"Rising Star"
Workers' Compensation:
Brent M. Whiting, Esq.

Thank You for Another Successful "EnJoie the Day on HH&K"

A great big thank you to all of our distribution partners—Chemung Canal Trust Co., MaineSource Food & Party Warehouse, Manley's Mighty Mart, Mirabito Convenience Stores, NBT/Pennstar Bank and Wegmans —for helping us to make En-Joie the Day on HH&K a huge success once again! The weather was fantastic, the turnout was amazing and we were thrilled to hear people tell us how much fun they had! We are grateful for the opportunity to be able to share this event with our community and the deserving charity organizations it supports.

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