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Department of Labor Issues Final Regulations Regarding FLSA Exemptions

On May 18, 2016, the Department of Labor (Department) announced that it will publish a final rule to update regulations (final regulations) under the Fair Labor Standards Act (FLSA). The final regulations will take effect on December 1, 2016. Because of this impending deadline, municipalities will want to take immediate action to comply with the final regulations. This article will summarize the changes to the FLSA regulations made by the final rule and discuss the impact on municipal positions.

Background / Current Regulations

The FLSA is a federal law that sets minimum wage, overtime, equal pay, record-keeping, and child labor standards for employees who are covered by the Act. State and local governments, including municipalities, must comply fully with the FLSA. Employees who are covered by the Act fall into two categories: nonexempt and exempt. Non-exempt employees are subject to all of the FLSA requirements. Exempt employees are generally not subject to the minimum wage and overtime provisions but are still subject to the other FLSA requirements. It is the employer's burden to prove that an employee is exempt.

Exemptions are identified by different categories, including bona fide executive, administrative, professional, and computer employees. The FLSA regulations define the requirements for each of these exemptions. Each exemption generally includes three basic requirements: (1) a salary basis requirement; (2) a salary level requirement; and (3) a primary duty requirement.

- *Salary Basis.* An employee must be paid on a salary, rather than an hourly, basis. In other words, each pay period, the employee must regularly receive a predetermined amount constituting all or part of his or her compensation, without regard to the quality or quantity of the work performed. Some exempt employees (administrative, professional, and computer) may also be paid on a fee basis.

- *Salary Level.* An employee must earn a minimum weekly salary. Under the current rules, the minimum salary requirement is generally $455 per week (equivalent to $23,660 annually).

- *Primary Duty.* An employee's primary duty must be the performance of exempt work. Although an exempt employee may perform some nonexempt duties, the primary duty of the employee must be exempt in nature. Employees who spend more than 50 percent of their work time on nonexempt duties may still have exempt work as their primary duty. Each exemption identifies the duties that an employee must perform to meet that exemption.

Below is a brief summary of each of the exemptions and the positions within municipalities that generally fall within these exemptions.

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- *Executive Employees.* These employees generally include those who engage in the management of the municipality or a department within the municipality, which generally involves oversight of employees and control over the work involved. Employees who may qualify include the Director of Public Works and the Director of Operations.
- *Administrative Employees.* These employees are generally those who engage in running or servicing the municipality or a department within the municipality. Administrative duties include work in such areas as finance, accounting, budgeting, procurement, safety and health, personnel management, human resources, labor relations, and computer systems. Employees who may qualify include the Human Resources Manager and the Finance Director.
- *Professional Employees*. Professional employees are generally those whose work requires specialized knowledge in a particular field. Employees who may qualify include the Water Quality Manager and the City Attorney.
- *Computer Employees*. Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals. Computer employees may also be paid on an hourly basis of not less than $27.63 per hour.

The current regulations also contain a relaxed duties test for certain "highly compensated" employees who receive total annual compensation of $100,000 or more and are paid at least $455 per week.

Final Regulations

In 2014, President Obama issued an Executive Order directing the Secretary of Labor to "update and modernize" the overtime exemption rules under the FLSA. In 2015, the Department issued proposed regulations based on this directive and a request for comments. Based on those comments, the Department has issued its final regulations, which include the changes below.

Changes to Salary Amounts. The final regulations significantly increase the salary threshold for applicable exemptions, setting the minimum salary level for applicable exemptions at the 40th percentile of weekly earnings for full-time salaried employees in the lowest wage Census Region (currently the South), which is equal to $913 per week ($47,476 for a full-year worker).

Sallary Amounts Updated Every Three Years. The final regulations also do not identify a specific amount that would remain stable over time. Instead, the final regulations establish a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the applicable percentile. Future automatic updates to these thresholds will occur beginning in January 1, 2020.

Highly Compensated Employees. The final regulations also raise the compensation requirement needed to qualify for the highly compensated employee exemption. To meet this exemption, an employee must receive total annual compensation of at least the annualized earnings amount of the 90th percentile of full-time non-hourly workers nationally, or $134,004 annually. This amount will also be updated every three years, beginning January 1, 2020.

Changes Related to Nondiscretionary Bonuses. The final regulations also made an important change related to nondiscretionary bonuses and the inclusion of such bonuses within the calculation of weekly salary. In particular, the final regulations now specifically permit municipalities to count nondiscretionary bonuses, incentives, and commissions toward up to ten percent of the required salary level. However, municipalities must pay those amounts on a quarterly, or more frequent, basis. The final regulations also allow municipalities to make a "catch-up" payment at the end of each quarter in order for employees to meet the salary level test.

Certain Salary Provisions Did Not Change. A few important things did not change under the final regulations with respect to salary basis and salary level. In particular, computer employees may still be paid on an hourly basis at a rate of not less than $27.63 per hour. In addition, some exemptions may also continue to be paid on a fee basis.

No Changes to Provisions Related to Type and Amount of Exempt Duties. Prior to the final regulations being released, many observers believed that the final regulations would tighten the rules regarding which "duties" an exempt employee may undertake. Some observers believed the FLSA rules would be reworked to require that a certain percentage of an employee's time be spent on exempt tasks. The Department, however, decided not to revise the duties test at this time.

Considerations for Municipalities

The current regulations will remain in place until the final regulations take effect on December 1, 2016. The time period between now and December 1 gives municipalities an opportunity to address any positions that may be impacted by the final regulations (in particular, those positions that may not meet the new salary level requirements). One approach may be to increase the salary for that employee or to reclassify the employee as nonexempt and pay overtime for any hours worked over forty in a work week. Previously exempt employees will need to be instructed and trained about their recordkeeping obligations. Municipalities may also decide to limit the hours of these reclassified nonexempt employees to avoid having to pay overtime.

It is advisable to identify now any impact that the regulations may have on certain positions and the potential impact on future budgeting or hiring. Municipal officials should also review any handbook provisions, ordinances, collective bargaining agreements, and contracts that may be impacted by these regulatory changes, and they should consider any relevant state law and its impact. Municipalities should pay particular attention to employees labeled "director" or "manager." Even if these positions pass the primary duty test, the municipality must ensure that salaries for these positions meet the minimum salary level established by the final regulations.

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Wisconsin Attorney General Opines that Legislature Limited WDNR's Authority to Protect Wisconsin Waters

In a May 10, 2016 opinion, the Wisconsin Attorney General concluded that in 2011 the Wisconsin Legislature limited the Department of Natural Resource's public trust authority and its authority to review proposed high capacity wells. The AG more specifically concluded that the WDNR does not have the authority to perform a cumulative impacts review of proposed high capacity wells or to impose monitoring well conditions on proposed wells. The WDNR is currently evaluating the AG's opinion to determine how it will address its current backlog of high capacity well applications going forward.

The AG's opinion involves an interpretation of 2011 Wisconsin Act 21. Act 21 included the creation of Wis. Stat. § 227.10(2m), which broadly provides that:

> No agency may implement or enforce any standard, requirement, or threshold, including as a term or a condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by rule that has been promulgated in accordance with this subchapter except as provided in s. 186.118(2)(c) and (3)(b).

The Wisconsin State Assembly asked the AG how Wis. Stat. § 227.10(2m) applies to the issuance of high capacity well approvals and what impact § 227.10(2m) has on the Wisconsin Supreme Court's decision in *Lake Beulah Management District v. Department of Natural Resources*, 2011 WI 54.

Lake Beulah involved a challenge to the WDNR's review of a proposed high capacity well for the Village of East Troy. Challengers argued that the new well would negatively impact a nearby lake. WDNR initially took the position that it did not have the statutory authority to consider whether the proposed well would have a negative impact on the lake. The Supreme Court disagreed and held that the WDNR has a duty -- and broad authority -- to consider the impact of a proposed high capacity well on State waters. The Court stated that the WDNR's duty and broad authority is found in Wis. Stat. §§ 281.11 and 281.12, which reflect the legislature's delegation of the State's public trust duties to the WDNR. The Court found that these duties were not limited by specific high capacity well statutes.

In the AG's opinion, the AG concluded that much of the Court's reasoning in *Lake Beulah*, including the breadth of WDNR's public trust authority, was no longer controlling because of Wis. Stat.§ 227.10(2m). The AG stated that the *Lake Beulah* Court did not apply or consider the recently adopted Wis. Stat. § 227.10(2m) because the statute did not apply retroactively to a permit issued seven years before § 227.10(2m) was adopted.

The AG concluded that, with the enactment of Act 21, the Legislature withdrew WDNR's ability to implement or enforce any standard, requirement, or threshold, including as a term or condition of a permit issued by the agency, unless explicitly permitted in statute or rule. According to the AG, this included a withdrawal of any public trust authority deemed to have been previously granted to the WDNR in the statement of policy and purpose and general departmental power and duties sections of Wis. Stat. §§ 281.11 and 281.12. The AG ended his opinion with the following statements about the state of the public trust doctrine in Wisconsin:

> The constitution vested in the state a duty to keep navigable waters in trust for the citizens of the state. Nowhere in the constitution is there language delegating that duty to the DNR. Rather, the Legislature maintains the duty of trustee and can choose to delegate that duty in whole or in part to an administrative agency, or to maintain control and carry out the duty itself.
>
> Since the *Lake Beulah* decision, the Legislature has clearly limited the public trust duty for which the DNR is responsible. Act 21 was not intended to remove power from agencies; instead, it defines the authority with which they are allowed to act. The Legislature has defined the parameters in which DNR can act to protect the state's navigable waters, and additionally clarified the ways in which DNR can regulate non-navigable waters, specifically in the context of high capacity wells.
>
> Through these changes to the law, the public trust duty does not cease to exist. Rather, it reverts back to the Legislature, which is responsible for making rules and statutes necessary to protect the waters of the state. The Legislature is free to grant the authority to DNR to impose any conditions the Legislature finds necessary. However, the DNR has only the level of public trust duty assigned to it by the Legislature, and no more.

The AG's opinion does not address what happens if the Legislature fails to act to protect the public interest in navigable water of Wisconsin. This will undoubtedly be a question that the courts are asked to consider in the future.

In the meantime, with regard to the permitting of high capacity wells, the AG opined that the WDNR's authority to regulate high capacity wells is limited to the authority explicitly granted in Wis. Stat. § 281.34. This statute does not authorize the WDNR to conduct a cumulative impact analysis of a proposed well or to require the installation of monitoring wells as a condition of a high capacity well approval on the installation.

— *Lawrie Kobza*

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Conclusion

The changes to the regulations are important. However, the Department did not revise the primary duty tests for these exemptions, which would have made things even more challenging for municipal officials. While there could be legal challenges to the new regulations, the changes will be the law in December 2016. Municipalities should take action now and decide how to address these changes.

— *Richard Verstegen*

New Wisconsin Law Provides Bone Marrow and Organ Donor Leave

On April 1, 2016, the governor signed a new law providing qualifying employees with the right to take leave from work for purposes of serving as a bone marrow or organ donor. The law takes effect on July 1, 2016.

Like the Wisconsin FMLA, the law applies to employers in Wisconsin who employ at least 50 individuals on a "permanent basis," which includes private sector employers, as well as school districts and municipalities that employ 50 or more employees.

Under the new law, employees who have worked for the employer for 52 consecutive weeks and worked at least 1,000 hours in the last 52 weeks are eligible for leave to serve as a bone marrow or organ donor. The employee may take up to 6 weeks of leave in a 12-month period for the purpose of serving as a bone marrow or organ donor, and may only take leave for the period necessary for the employee to undergo the donation procedure and to recover from the procedure. The right to take donor leave is in addition to an employee's right to take leave under the FMLA laws. The donor leave is unpaid, but the employee may substitute paid or unpaid leave of any other type provided by the employer.

An employee who wishes to request donor leave must make a reasonable effort to schedule the bone marrow or organ donation so as to not unduly disrupt the employer's operations, subject to the approval of the donee's health care provider and must give the employer advance notice of the need for the leave in a reasonable and practicable manner.

As a condition of approving the leave, the employer may require medical certification that states the following: (1) the donee has a serious health condition that necessitates a bone marrow or organ transplant; (2) the employee is eligible and has agreed to be a bone marrow or organ donor for the donee; and (3) the amount of time expected to be necessary for the employee to recover from the donation procedure.

As with the Wisconsin FMLA, an employee who takes donor leave must be returned to his or her former position, or if that position is not vacant, the employee must be returned to a position with equivalent pay, benefits, working shift, hours and other terms and conditions of employment. If the employee wishes to return to work prior to the end of the scheduled leave, the employer must return the employee to work within a reasonable time.

Employees who take donor leave are not entitled to any right, employment benefit or position to which they would not otherwise have been entitled had leave not been taken. Employees are also not entitled to the accrual of any seniority or employment benefit during a donor leave. On the other hand, employers may not

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Utility of the Future a Key Focus at Midwest Energy Bar Annual Meeting

Members of the Midwest Energy Bar Association assembled in Indianapolis in March for their annual meeting to discuss a range of hot energy topics, including inefficiencies in the organized trading markets; the uncertain legal status of the Clean Power Plan; and gas pipeline safety issues.

One topic that promises to garner increasing attention is the so-called "Utility of the Future." At a session focused on new business models for "Tomorrow's Utility," panelists highlighted several multilateral initiatives in the Midwest and elsewhere designed to examine potential industry responses to the challenges brought on by advances in distributive generation technology and downward-trending electricity demand curves.

The "e21 Initiative, for example," is a collaborative effort convened in 2014 and comprised of a disparate stakeholder group in Minnesota that included investor-owned utilities, ratepayer interests, municipalities, NGOs, clean energy companies, and business interests. Regulators were invited to participate as observers.

Phase I of the Initiative was premised on the notion that there is a fundamental misalignment between the traditional utility business model (and the regulatory structures that support it) and the contemporary marketplace. The goal was on finding ways to shift toward a utility business model that offers customers more alternatives in how energy is produced and used, and to develop a regulatory system that rewards utilities for achieving a variety of performance-based objectives, rather than on selling electricity and building large, capital-intensive power plants.

After agreeing on a core set of principles around affordability, reliability, innovation, and economic viability, the collaborators developed policy recommendations on a new regulatory framework falling into four main categories: performance-based compensation of utilities; enhancement of customer options and rate design reform; planning reform; and regulatory process reform, including use of multi-year, phased-in rate cases.

A Phase 1 Report was issued in December 2014, followed by promulgation of enabling legislation in 2015. Phase II of the Initiative, focused on implementation, is expected to be completed in June, 2016.

A key component of the e21 report – and one that should become an area of special interest to municipal utilities and municipalities more generally -- is the evolving question of how best to modernize the distribution grid to accommodate new technologies such as solar, energy storage and plug-in electric vehicles. The report recommends development of a comprehensive distribution system modernization strategy utilizing a collaborative stakeholder initiative like e21 itself. Such an initiative was developed in 2013 in Massachusetts (the "Grid Modernization Working Group").

Similar ideas about the importance of modernizing the distribution grid were also shared at the Midwest Energy Bar "Tomorrow's Utility" panel, including the notion of designing a distribution system platform that would resemble the bulk power transmission markets, in order to facilitate dispatch of flexible demand response and distributed generation resources based on market-based price discovery mechanisms.

We will continue tracking "Utility of the Future" issues as they develop, with an eye toward responses from Wisconsin regulators, legislators, and stakeholders.

— *Richard A. Heinemann*

Municipality May Levy Special Assessments to Build Roads in Subdivision After Developer Defaults

From time to time, municipalities have to deal with the consequences when a developer of a new subdivision becomes insolvent. Typically, municipalities enter into development agreements with developers at the time a subdivision plat is approved. Such agreements commonly require the developer to construct roads, utilities and other public improvements at the developer's expense and dedicate them to the municipality. A developer may become insolvent before such improvements are completed, leaving the project unfinished. A recent appellate decision holds that, in the event of a default, municipalities may construct the improvements and levy special assessments against the properties that are specially benefitted notwithstanding the terms of a development agreement. *First State Bank v. Town of Omro*, 2015 WI App 99, 366 Wis. 2d 219, 873 N.W.2d 247.

In *First State Bank*, the town approved a final plat creating a 74-lot residential subdivision. The developer, Barony LLC, entered into an agreement with the town calling for Barony to construct roads within the subdivision in three phases. The first two phases were to be completed by July 30, 2006. As of 2009, few lots had been sold and none of the roads in the subdivision had been paved. First State Bank acquired the 65 unsold lots from Barony in lieu of foreclosure. Three of the lots acquired by the Bank fronted on existing paved roads outside of the subdivision.

The town's road development ordinance recites its purpose as establishing minimum construction standards for public roads. It provides that, unless the town engineer recommends otherwise and the town board agrees, the specifications in the ordinance apply. The specifications call for roads to be paved when 70% to 80% of lots in a subdivision have been developed. In addition, the ordinance provides that the cost of paving roads will be paid by the developer, through special assessment or another method approved by the town board and that the development agreement will dictate the method.

The town began receiving complaints from postal and busing services about accessing the subdivision on unpaved roads. In 2013, the town decided to pave the roads itself and to levy special assessments against the lots in the subdivision. The Bank appealed the assessments on multiple grounds, including that: (a) the development agreement required the developer to pay for the roads, (b) the road ordinance did not require paving until 70% to 80% of the lots had been developed and this condition had not been met, (c) at the time the special assessments were levied the roads in the subdivision were privately owned, and (d) the three lots fronting on other paved roads did not receive special benefits. The town and the bank both moved for summary judgment. The circuit court granted summary judgment to the town on all counts. The bank appealed.

The court of appeals affirmed the summary judgment except with respect to the three lots fronting on existing paved roads. The court found that there were disputed facts concerning whether these lots received special benefits and remanded the case to the circuit for further proceedings.

The court of appeals rejected the notion that the developer's default left the town with only two alternatives: abandon the roads or tax the general public for the paving costs. As long as the special assessments met the substantive requirements of section 66.0703(1), Stats., and the town followed the mandated statutory procedures, the town had the authority independent of the development agreement to levy the costs against the owners of the lots. Regarding the 70% to 80% provision, the court noted that the ordinance permitted exceptions when recommended by the town engineer and approved by the town board as occurred here. The court rejected the bank's argument that the roads were private and, therefore, that paving did not qualify as a public improvement for two reasons. First, the town's approval of the final plat constituted a dedication of the roads since they were not marked as private. Wis. Stats., §236.20(4)(c). Second, regardless of when the dedication was accepted, the roads were public when the paving was completed.

— *Mark J. Steichen*

New Wisconsin Law Provides Bone Marrow and Organ Donor Leave

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reduce or deny any benefit that accrued prior to the employee's leave.

Employers must maintain an employee's group health insurance benefits during the approved leave if the employee had coverage under the plan immediately before the leave.

The employer and employee may mutually agree that, during a period of recovery from a donation procedure, the employee will work in an alternative employment position. Any period of time that the employee works in alternative employment does not reduce the employee's leave entitlement.

Employees who claim a violation of the bone marrow or organ donor laws may file administrative actions similar to those authorized under the Wisconsin FMLA. As with the Wisconsin FMLA, employees have 30 days from the date of the alleged violation, or from the date the employee should reasonably have known of the violation, to file an action. A civil action for damages may also be commenced after the completion of an administrative action.

The new law states that employers must post, in one or more conspicuous places, a poster that will be issued by the Department of Workforce Development setting forth employee rights under the bone marrow and organ donor law. Employers who fail to do so may forfeit up to $100 per offense. When contacted, the Department of Workforce Development did not have a specific timeframe for when the applicable poster would be issued.

Employers should prepare for the new leave by updating their handbooks and obtaining and posting the required poster when it becomes available.

— *Jennifer S. Mirus*

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