

Overtime exempt?

The state's new minimum wage law may cause employers to fret a bit

INTERVIEWED BY DENNIS SEEDS

On July 1, California's minimum wage increased to \$9 per hour — but there are some related issues that could have a larger impact on businesses than the increase in wages.

The minimum wage increase not only raises regular and overtime wages, it also affects the classification standards of “overtime exempt” employees. In most cases, exempt employees must be paid a monthly salary that exceeds at least twice the minimum wage.

“The concern is that employers will not take that into account. Because exempt employees are not hourly, employers may not go back and see whether that salary translates to at least the minimum wage per hour,” says Wendy E. Lane, a partner at Greenberg Glusker.

Smart Business spoke with Lane about how the new wage law is affecting California employers.

What possible hazards should employers be aware of with the new wage law?

The law carries a huge potential for class action liability. The minimum base salary for employees to be exempt of overtime, meal and rest period obligations under three of the major exemptions — administrative, executive and professional — has now been raised because the minimum salary for those exemptions is based on a factor of two times the minimum wage.

As of July 1, in order to qualify for these exemptions, an employee must earn \$3,120 per month, which is \$37,440 annually. Employees must also meet certain ‘duties’ criteria in addition to being paid a salary of at least double the minimum wage.

The liability is that bigger companies with a large number of exempt employees all in the same boat likely could have

a potentially sizeable class action suit.

How should employers examine their exempt employee situation?

While there are many factors that go into determining if an employee is exempt, including their level of expertise, training, and discretion, if they don't meet the minimum salary requirement everything else is irrelevant.

A high-ranking employee could be in charge of other employees and make key company decisions. But if he or she is not meeting the minimum salary test, the employee cannot be classified as exempt.

Then, if the employee you had treated as exempt worked more than eight hours in a day or more than 40 hours in the week, they were working overtime, but you hadn't been paying them overtime. They probably worked through at least some of their meal breaks.

There are considerable penalties for having not properly paid overtime or provided the meal breaks because, in effect, you have been treating a nonexempt employee as exempt.

These cases are even harder to defend because most employers may say, ‘If they are exempt, we don't need to track their time.’ Well, how do you prove there was or was not overtime if you don't have timesheets? It suddenly becomes much more difficult,



WENDY E. LANE
Partner
Greenberg Glusker

(310) 785-6870
WLane@greenbergglusker.com



WEBSITE: For more information on the state's new minimum wage law, visit http://bit.ly/GG_wage_law.

Insights Legal Affairs is brought to you by **Greenberg Glusker**

and the presumption is against the employer under California law.

What impact could the new law have on a company's bottom line?

Obviously, the additional cost is a concern to employers, but it needs to be weighed against the cost of retraining a person. Let's say that some employees were let go in order to pay for this raise at the lower level. Retraining somebody also carries costs.

There are also arguments that as people make more, they may no longer have to choose between food, rent or medicine — and may have more cash to contribute toward prevention and health care — which may improve the employee's status with respect to attendance issues and sick time.

Employers must find ways to use the minimum wage increase to their benefit as this may be just the first of several minimum wage increases that will be going into effect.

Employers should consult with counsel as they make difficult decisions, such as lowering salaries of employees or terminating employees to be able to afford this change in the minimum wage.

Companies need to ensure they don't make personnel decisions that will inadvertently expose them to greater liability (such as for claims of discrimination or retaliation) because they are not looking at the big picture as to whom they are selecting. ●