

## CUT AND PASTE POST SUMMER, 2016

### Reforming “White Collar Reform” Legislation

Earlier this year, the U.S. Department of Labor (DOL) issued a final rule which raises the “white collar” salary threshold level from \$23,660 to \$47,476 per year effective January 1, 2017. The rule also implemented automatic increases every 3 years, beginning December 1, 2016.

Several Democratic members of the U.S. House of Representatives have proposed a bill to phase in the DOL’s increased salary thresholds. [HR 5813](#), otherwise known as the *Overtime Reform and Enhancement Act*, would raise the salary threshold to the amount set by the DOL in incremental phases. The Act proposes the following increases:

- \$39,814 on December 1, 2017;
- \$43,645 on December 1, 2018; and
- \$47,476 on December 1, 2019.

The Act would also eliminate the automatic increases that have been set by the DOL.

The bill has been referred to the Committee on House Education and the Workforce. *We’ll keep you updated!*

### OSHA Penalties Increasing by 78 Percent After August 1, 2016

Section 701 of the Bipartisan Budget Act of 2015 contains the *Federal Civil Penalties Inflation Adjustment Improvements Act of 2015*, which requires the Occupational Safety and Health Administration (OSHA) and most other federal agencies to implement inflation-adjusted civil penalty increases. The Act also allows a one time “catch-up adjustment” to adjust for inflation since 1990 (the last time penalties were adjusted) along with annual adjustments for inflation based on the Consumer Price Index.

The adjusted OSHA penalty levels, which will take effect after August 1, 2016, are shown below. Any citations issued by OSHA after August 1, 2016 will be subject to the new penalties if the related violations occurred after November 2, 2015. States, like Montana, that operate their own occupational safety and health programs are required to raise their maximum penalty amounts to align with the new federal OSHA levels.

***Inside this Issue:***

- *Reforming “White Collar Reform”*
- *OSHA Penalties to Increase*
- *Treatment of Cash Payments Made in Lieu of Health Benefits*

LEVEL	CURRENT MAXIMUM PENALTY	NEW MAXIMUM PENALTY
Serious, other than posting requirements	\$7,000 per violation`	\$12,471 per violation
Failure to Abate	\$7,000 per day beyond abatement date	\$12,471 per day beyond abatement date
Willful/Repeated	\$70,000 per violation	\$124,709 per violation

**Professional Pointer:** Employers should perform internal audits to ensure compliance with OSHA Standards and avoid exposure to the new penalties.

## Treatment of Cash Payments Made in Lieu of Health Benefits for Overtime Purposes

In June, 2016, the Ninth Circuit Court of Appeals held that the City of San Gabriel, California violated the Fair Labor Standards Act by failing to include cash payments to police officers for unused medical benefits allowances when calculating their regular rate of pay.

In [\*Flores v. City of San Gabriel\*](#), the City’s flexible benefits plan provided each employee with a set amount of money to be used to purchase medical, vision, and dental benefits. While employees were required to use a portion of these funds to purchase vision and dental insurance, employees with access to other medical coverage (for example, through a parent or spouse) could opt out of the remaining benefits and receive a cash payment instead. The cash payment was added to the employee’s regular paycheck but was not included when calculating the employee’s overtime rate of pay. A group of current and former officers sued, claiming they were underpaid for overtime because the cash provided to employees in lieu of health benefits should have been included in the overtime rate calculation.

The City argued that the cash-in-lieu payments were not payments made as compensation for hours of employment and were not tied to the amount of work performed for the employer and were, therefore, excludable under 29 U.S.C. § 207(e)(2) from the regular rate of pay, as are payments for leave, travel expenses, and other reimbursable expenses. The Ninth Circuit disagreed, finding the payments were “compensation for work” even if the payments were not specifically tied to time worked and, therefore, the payments should be included in the hourly “regular rate” used to compensate employees for overtime hours worked.

The City also argued that the payments were properly excluded pursuant to § 207(e)(4) because the payments were paid directly to employees. Section 207(e)(4) excludes from the regular rate of pay “contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old age, retirement, life, accident, or health insurance or similar benefits for employees.” The Ninth Circuit also rejected this argument and found the City had willfully violated the FLSA by failing to exclude the cash payments in the calculation of the overtime rate.

This decision only affects employers located in the Ninth Circuit, which includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and Guam.

