CROWLEY | FLECK PLLP
ATTORNEYS



# Employment Law Quarterly Update Newsletter

Issue 10 - May 2020

John Semmens, Editor

**Form I-9 and Employment Authorization Updates**

**By: Carina Wilmot and Gregory F. Dorrington**

I-9 Updates

Every employer is required by federal law to verify the identity of, and employment authorization for, all employees hired after November 6, 1986, including both U.S. citizens and noncitizens. The Form I-9 must be completed by new hires and employers, or authorized representatives of the employer, upon hire. The U.S. Department of Homeland Security (DHS) periodically updates Form I-9, and it is important for employers to use the most up-to-date version. As of January 31, 2020, employers should be using this new version (edition dated 10/21/2019). The current Form I-9 and updated instructions are available online at: https://www.uscis.gov/i-9. An updated handbook for employers on how to complete the Form I-9 is also available at https://www.uscis.gov/i-9-central/handbook-employers-m-274.

Although the form and handbook have been updated with new guidance and clarification on how to complete the form, compliance rules have remained the same. Specifically, after acceptance of a job offer, employees are required to complete Section 1 of the form no later than the first day of employment. Within three days of employment, the employee must show the employer—in person—proof of identity and proof of work authorization. There is no requirement that the employer keep a copy of their employees' identity and work authorization documents, but if the employer chooses to do so, it must treat all employees the same (i.e., keep a copy of all employees' identity and work authorization documents). The employer must complete Section 2, and if applicable Section 3, no

later than the third day of employment. Employers are required to keep completed I-9 forms for the later of three years from date of hire, or for one year after employment ends.

Impact of COVID-19 on I-9 Requirements

For employers who have a fully remote work environment, DHS has temporarily deferred the requirement for employers to review, in person, the Form I-9 identity and work authorization documents provided by employees, until the employer's normal operations resume. However, employers who have **any** employees physically present at a work location must still review the required documents in person. Requirements and more details are available here: https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance.

Employers who terminated employees and are now rehiring employees back are required to complete a new I-9 and review employee identity and work authorization documents once again. This requirement does not apply to employees who were still employed or considered "job attached," even if they were not scheduled to work, were furloughed, or otherwise were not actively working.

I-9 Best Practices

DHS has significantly increased their number of I-9 audits nationwide in the past two years, and it is important for employers to ensure they are following best practice for I-9 compliance. Best practice for Form I-9 compliance is to retain all I-9 forms in a separate file apart from personnel files, and in a secure space such as a locked drawer. If selected for an audit, employers have three days to present Form I-9s. For employees who have an end date for work authorization (e.g., employment authorization cards or I-94s), employers should calendar a reminder around 90 days in advance of the expiration and follow up with that employee to reverify employment authorization. When employees separate from employment, employers should also calendar a reminder to remove and destroy Form I-9s that no longer need to be retained for those employees (again, the later of three years from date of hire, or for one year after employment ends). We recommend that employers conduct a self-audit of their I-9 files regularly to ensure compliance. DHS generally views self-audits favorably in audit situations, and a documented history of employer self-audits can be a factor considered in mitigating penalties.

For Employers with Additional Questions

Crowley Fleck PLLP has an experienced team of attorneys who can assist with all manner of employment-based immigration needs, including completing Form I-9s, I-9 audits, planning I-9 self-audits, applications for work authorization for foreign nationals, or identifying exceptions that may need to be made to an employer's policies based on federal regulations specific to foreign nationals and their work authorization. If you would like more information on complying with employment-based immigration regulations, including Form I-9, please contact Crowley Fleck's Employment Practices Group.

———

**New FLSA Guidance on Payment by Project Gives Employers Options for Employee Compensation**

**By: Mark R. Feddes**

In January 2020, the United States Department of Labor, Wage and Hour Division ("DOL") issued guidance addressing the ways in which employers may compensate certain exempt employees on a payment-per-project basis, while still meeting the salary or fee-based compensation requirements of the Fair Labor Standards Act ("FLSA")*. Typically, discussions of payment by project occur in the context of independent contractors. Nevertheless, the recent DOL letter provides employers with helpful guidance for implementing payment-by-project arrangements for bona fide administrative and professional employees.

The recent DOL guidance addresses two specific examples for proposed payment by project. The first involves an employee assigned to develop a new education curriculum for a school district client over the course of 40 weeks ("Project One"). The employee in this example would be paid $80,000 in 20 bi-weekly installments of $4,000, regardless of the number of hours actually worked on Project One. The second example involves the same employee who, while working on Project One, accepts an additional assignment ("Project Two"). Project Two consists of an eight-week period in which the employee designs and conducts five teacher workshops. For Project Two, the employee will be paid a total of $6,000 in four bi-weekly payments of $1,500, regardless of the number of hours actually expended. The DOL ultimately found both examples to be compliant with FLSA compensation requirements.

By way of legal background, an employer may properly claim FLSA exemption for administrative and professional employees who satisfy the duties tests applicable to those exemptions, so long as the employees are paid "on a salary or fee basis." The salary or fee basis, as applied to the specific examples, is the central focus of the DOL guidance. An employee is paid on a salary basis if she receives a predetermined amount each pay period constituting all or part of her compensation that is not subject to reduction (outside of some exceptions) and meets the minimum amount ($684 per week). The fee basis requires the employee receive an agreed-upon amount for a single job regardless of the time required for its completion—resembling something like piecework payments.

The DOL found that both examples meet FLSA regulations for the salary or fee-based compensation requirement. With respect to Project One, the employee would receive a predetermined amount that meets or exceeds the $684 per week minimum. Additionally, the fixed bi-weekly payments would not vary based on the number of hours worked or quality of the work. Consequently, the DOL concluded the arrangement meets FLSA's definitional requirements of payment on a salary basis.

The second example also was found to comply with FLSA compensation requirements. The payments for Project Two constitute "extra" compensation under the FLSA, which allow an employer to provide an exempt employee with additional compensation without violating the salary basis. So long as there is a non-deductible minimum, additional compensation on top of the requisite salary is permissible.

When it comes to providing exempt employees extra compensation, employers should realize they have a number of options. Extra compensation may be paid on any basis, such as a flat sum, bonus, or hourly amount, and may be paid for hours worked beyond the normal workweek. With respect to Project Two, the additional compensation took the form of a weekly lump sum on top of the minimum payments for Project One. The DOL noted the fact that the total compensation might change throughout the year depending on the assigned projects does not necessarily alter its conclusion, so long as salary-basis and minimum amounts are met.

The recent DOL guidance provides employers newfound flexibility for payment arrangements consistent with the requirements for bona fide administrative and professional employees.

Employers should work with their attorneys to ensure any proposed changes to payment arrangements meet FLSA and other regulatory requirements. For example, one hypothetical issue flagged by the DOL opinion letter, using the example above, is renegotiation of agreements for services between the school district and the employer if those revisions affect the employee's compensation. Standing alone, contract changes affecting the employee's compensation may not necessarily defeat the salary-basis if the revised payments continue to meet the minimum threshold. However, employers in that situation should be wary of circumstances in which contracts are so frequently revised that an employee's bi-weekly pay frequently changes and suggests the rate of pay is, in fact, dependent on the quantity and quality of work performed.

The DOL guidance offers employers a new way of thinking about salary or fee-based compensation for their employees. The payment-by-project option will be better suited for certain employers and industries than others. Employers who want to pursue alternative payment arrangements like those addressed in the new guidance should consult with their attorney to avoid FLSA and other regulatory pitfalls.

_____

*U.S. Department of Labor, Opinion Letter FLSA2020-2, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2020_01_07_02_FLSA.pdf (January 7, 2020).

_____

Len Smith
Employment Practice Group
(406) 252-3441
lsmith@crowleyfleck.com

Scott Hagel
Employment Practice Group
(406) 752-6644
shagel@crowleyfleck.com

John Semmens
Employment Practice Group
(406) 449-4165
jsemmens@crowleyfleck.com