HR Contacts Meeting
June 22, 2016 – 1:30 to 3:30 p.m.
ITD Building, Room 425

Welcome and Introduction of New HRMS Staff and AG's Office Employment Attorneys ..... Becky Sicble

Fair Labor Standards Act (FLSA) ..... Troy Seibel, ND Labor Commissioner

- Overview of upcoming salary test changes
- Review of other exemption criteria
- Question & Answer session

US Department of Labor issued new overtime rule effective December 1, 2016:

- Current federal regulations require "administrative", "executive", and "professional" employees receive at least $455 per week ($23,660 per year).
- New rule increase this floor to $913 per week ($47,476 per year)

Exempt employees must be paid a salary. If you pay an employee on an hourly basis, their position is considered non-exempt.

Most common exemptions include:

- Administrative Exemption - This exemption includes positions that are running a division and relating to management policies, or general business operations; decisions are made without set criteria.
- Executive Exemption - This exemption includes employees who are managing two or more employees and running a division. These employees have the authority to hire/fire/promote other employees. Exemption can also include positions that influence hire/fire/promotion decisions.
- Professional Exemption – This is the least used exemption. This exemption includes someone who is doing work with advanced knowledge in a field of science (e.g., Forensic Scientist). These employees generate work that is not easily reproduced. Employees in this exemption typically have a degree or certification beyond a bachelor's degree.
    - Example: Engineer is not typically a professional exempt employee until he/she receives PE certificate. Professional licensure does not necessarily qualify for professional exemption (e.g., a social worker with license is not exempt). Teachers are exempt.

It is a good idea to have exempt employees fill out timesheets if there is ever a challenge to their exempt status. This does not jeopardize their exempt status.

Question & Answer Session:

Q. If an agency is finding that a large number of employees who are currently classified as exempt are going to fall below the new salary test, is it better to reclassify them as non-exempt rather than try to adjust pay to above the salary test cutoff?

A. The answer will be based on agency budget. DOL advises agencies to review the effects of each situation. One option is to have a comp time policy or agreement instead of paying out overtime at the time it is accrued.

Q. Can an agency require an employee to receive comp time?

A. Yes, agencies can require employees to receive comp time in lieu of overtime pay at the time earned. Agencies should have a policy that clearly states the comp time requirement. (Follow-up clarification: Based on court decisions, the employee's agreement to a comp time arrangement instead of cash

payment for overtime hours, as required under the FLSA, is demonstrated when the employee performs work as covered by that policy.)

Q. Can an agency require an employee to use comp time before any other leave?

A. Yes, agencies can require an employee to use comp time before any other leave options. This should be stated in your comp time policy/agreement.

Q. Can agencies limit comp time accruals?

A. Yes, agencies can place a limit to the amount of comp time that can be accrued. After the maximum accrual of comp time, agencies will be required to pay overtime as a cash payment. (Note: Just as overtime pay must be provided at 1.5 times the regular pay rate, comp time must be provided at a rate of 1.5 hours for each overtime hour worked.)

Q. Can agencies require employees to use comp time within a specific period (i.e. within 30 days of accrual)?

A. Yes. However, if an employee does not take their comp time within the timeframe specified, the agency will need to provide a cash overtime payment for any unused comp time. Employers cannot run comp time as a "use it or lose it" program. Agencies should also have a policy that states this comp time requirement.

Q. FLSA indicates that state or local government agencies may arrange for their employees to earn comp time instead of cash payment for overtime hours. Is having a comp time policy a sufficient agreement or arrangement?

A. The comp time agreement can be a policy that explains the agency's comp time program. All employees should review this policy.

Q. FLSA states that it does not cover state and local government employees that are elected officials, their policy making appointees, and their personal staff and legal advisors. Can you elaborate on this? Would an employee who is a secretary for an elected official possibly be exempt?

A. This statement is under Federal law and not State law. Due to the duties usually associated with a secretary, ND DOL does not feel that this type of position would be exempt. (Follow-up clarification: Since the Federal and ND State laws differ; the regulation that is more beneficial to the employee would prevail. In this case, ND State law is more beneficial to the employee because the employee would be eligible for overtime pay.)

Q. The requirement in the Administrative Exemption includes the statement "customarily and regularly exercise discretion and independent judgement". Can you elaborate on what this means?

A. Positions in this exemption are making decisions on their own without set criteria. Positions that are making decisions based on set criteria are not considered using independent thinking and judgement and would not be exempt.

Q. Does ND DOL recommend a worksheet or checklist that can be used when determining the exemption of a position?

A. ND DOL might be working with the Attorney General's office to create a worksheet. However, this should just be used as a tool.

Q. If a state agency is not certain a particular position meets the duties tests for exemption, would you or your staff be willing to review a job description?

A. Yes, ND DOL may end up reviewing it anyway if a complaint is received.

Q. Given the change in the FLSA regulations, is this a good time for an agency to correct classifications that are currently questionable for exemption?

A. Absolutely, yes.

Compensation Increase Considerations for Remainder of the Current Biennium…….Becky Sicble & Lynn Hart

- The Legislature approved performance based increases (LGP) from 2-4% for each year of the biennium (3% per year appropriation). Ranges are also adjusted 3% for each year of the biennium. Those guidelines have not changed.
- Due to the recent budget allotment, agencies have flexibility to determine what and when dollars are available for the general legislative increase.

Overview of Employee Separation Programs ..... Kim Wassim

There are two types of employee separation programs: voluntary and involuntary.

- A voluntary employee separation program is used to provide a financial incentive to employees to voluntarily separate from employment in order to generate budget savings. This type of program was used recently by Job Service. Typically includes an application and separation agreement and release.
- An involuntary employee separation program is more commonly known as a RIF or reduction-in-force. NDAC Chapter 4-07-11 provides guidance for implementing a reduction-in-force although agencies should also have a RIF policy.

Several agencies have contacted HRMS recently about both voluntary separation incentive programs and reductions-in-force. We encourage you to contact us for assistance with employee separation programs. We can provide guidance as well as sample policies, letters, program guidelines, applications and agreements, and help you review, update, and draft your policies and programs.

Agencies are considering employee separation programs due to the allotment and as they are drafting their budgets for the 2017-19 biennium. If your agency is considering any type of employee separation program, please contact HRMS for assistance.

Recruiting Solutions Users Group Update ..... Lynn Hart

A trial meeting of a Recruiting Solutions Users Group was held on April 15, 2016. The meeting proved to be very fruitful, and there was some lively discussion. Topics covered included the following:

- Panel discussion on different agencies' approaches to using the system in screening applications (Jason Sutheimer NDDOT), Dirk Wilke (ND Health Dept.) and Amy Erickson (NDHS). The three agencies had a variety of approaches to this process.
- Issues with the growing number of qualification questions were discussed. There are now over 7,000 preferred qualification questions in the database. However, the prospect of trimming the current questions has hit a roadblock since we now know that any editing or deletion of questions will impact history.
- Other topics were also covered briefly, including current recruitment challenges, veterans' preference, etc.
- All attendees were asked to response to a survey to gauge interest in an on-going Recruiting Solutions Users Group.