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December "Payroll Surprise" Waiting for Some Employers in 2010

Employers paying their salaried exempt workers on a bi-weekly basis – and for whom January 1, 2010 was a pay date – may be surprised to learn that, due to a quirk of the Gregorian calendar, there are 27 pay dates in the year 2010, rather than the typical 26.

This fact may result in administrative headaches concerning benefit accruals and voluntary pay check deductions that are typically calculated on an annualized basis. In addition, the 27th pay date is rife with potential employee relations problems, given that affected employers will need to decide either to pay the "extra" pay date or to reduce the amount of their employees' biweekly pay checks in order to keep their annual compensation constant.

Typically, employers who pay their salaried exempt workers on a bi-weekly basis calculate pay checks by taking an individual's annualized salary and dividing by 26 pay periods. Thus, an employee paid $52,000 per year will have a pre-tax pay check of $2,000. The mathematical quirk hiding in the Gregorian calendar, however, is the fact that 26 pay periods of 14 days in length equate to only 364 days, while a calendar year contains 365 days. Between the annual accrual of this "missing" day and the quadrennial appearance of a leap year, the 27th pay date appears approximately every eleven to twelve years. Most importantly, there are no years in which only 25 pay dates appear; thus, the "extra" pay date issue does not self-correct over time.

Returning to the hypothetical of the employee earning $52,000, assuming the employee's pay is held constant from January 1, 2010 to the final pay date on December 31, 2010, the employee will receive $54,000 in pre-tax wages in 2010.

No.	Pay Date	Pay	No.	Pay Date	Pay
1	1/1/2010	$2,000.00	14	7/2/2010	$2,000.00
2	1/15/2010	$2,000.00	15	7/16/2010	$2,000.00
3	1/29/2010	$2,000.00	16	7/30/2010	$2,000.00
4	2/12/2010	$2,000.00	17	8/13/2010	$2,000.00
5	2/26/2010	$2,000.00	18	8/27/2010	$2,000.00
6	3/12/2010	$2,000.00	19	9/10/2010	$2,000.00
7	3/26/2010	$2,000.00	20	9/24/2010	$2,000.00
8	4/9/2010	$2,000.00	21	10/8/2010	$2,000.00
9	4/23/2010	$2,000.00	22	10/22/2010	$2,000.00
10	5/7/2010	$2,000.00	23	11/5/2010	$2,000.00
11	5/21/2010	$2,000.00	24	11/19/2010	$2,000.00
12	6/4/2010	$2,000.00	25	12/3/2010	$2,000.00
13	6/18/2010	$2,000.00	26	12/17/2010	$2,000.00
			27	12/31/2010	$2,000.00
				Total Wages	$54,000.00

Multiplied over entire management workforces and given the likely challenging economic conditions in 2010, this hidden near 4% increase in salaried payroll expense may catch unsuspecting affected employers short of budgeted funds at the end of the year.

The analysis of a given employee's legal entitlement to this "extra" pay is driven by contract law. If the employee's agreed upon salary was stated in her offer letter or contract as "$52,000 per year", the 2010 calendar arguably results in an overpayment of $2,000 of salary. However, if the employee's salary was stated as a bi-weekly sum, she arguably is entitled to the full $54,000. Resolution of this question may require affected employers to review offer letters and employment contracts – and potentially verbal agreements – to determine how the employee's compensation was stated or understood. Given that many offer letters and contracts state ***both*** a bi-weekly sum and an annualized amount, the exercise may not be a simple one.

Where employers wish to avoid the 2010 "overpayment" in December, they ***should not*** remedy this issue by unilaterally declining to make the 27th payment. Doing so – without first coming to agreement with the affected employee – could violate the Fair Labor Standards Act ("FLSA"). Looking week-to-week, failing to pay the 27th pay date arguably results in the employee receiving no compensation for the workweeks associated with that pay date, which would be a violation of the FLSA's minimum wage requirements.

One option for affected employers who wish to avoid the "extra" payment in 2010 is to divide the annual salary by 27 and reduce the size of employees' paychecks to account for the additional pay date. Any such adjustments should be made on a prospective basis to avoid the potential argument that the employer has not paid agreed upon compensation for time already worked. In addition, employers should be ready to address the employee relations issue inherent in "reducing" employee's bi-weekly take home pay – e.g., our hypothetical employee's bi-weekly pre-tax earnings would fall from $2,000 to $1,925 – even where, as here, annualized pay will remain constant.

Regardless of how affected employers seek to remedy this quirk of calendar, both the issue and the employer's remedial measures should be clearly explained to affected employees, and employers' payroll vendors or internal resources should be apprised of this issue to minimize the likelihood of potential legal challenges, excess deductions for benefit purposes and other administrative and employee relations headaches.