

DOL Issues Proposed Rule That Would Require Employers to Pay Overtime to Currently-Exempt Salaried White-Collar Employees Who Earn \$50,440 Per Year or Less – Regardless of Their Duties.

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On June 30, 2015, the U.S. Department of Labor (“DOL”) announced a long-awaited Proposed Rule which will, if/when finalized, dramatically raise the minimum salary threshold for salaried exempt employees under the Fair Labor Standards Act (“FLSA”) from the current \$455 per week (\$23,660 annualized) to \$970 per week (\$50,440 annualized).

What would this mean? Approximately 5 million employees who are currently salaried exempt employees (because they qualify as “Executive,” “Administrative” and “Learned Professionals” under the FLSA and earn \$455 per week or more) would become “non-exempt because they earn \$970 per week or less. This estimated 5 million employees constitute 25% of the entire current exempt workforce in the U.S.

Requiring employers to reclassify currently exempt employees as non-exempt would significantly increase costs and administrative burdens for employers who currently employ lower paid exempt managers making under \$50,000. Employers will have to accurately track these employees’ actual work hours and then pay time-and-a-half for all hours worked in excess of 40 in any given workweek. The DOL has already acknowledged that employers may react by reducing the working hours or pay rates of currently exempt employees.

Why is this happening? Although President Obama has long asked Congress to “give America a raise,” by increasing the federal minimum wage, Congress has not acted. Citing his desire to advance his agenda without Congress, the President has looked to areas where the executive branch has been given authority to act alone. One such area is the setting of the salary threshold described above, which is set by the DOL through a rule-making process. In March of 2014, the President directed the DOL to beef up overtime rules and this week’s announcement was the result. According to the Department of Labor, this proposed increase in the weekly salary level is commensurate with and reflects increases in inflation since the FLSA’s exempt regulations were implemented in 1975.

Is there a chance this Proposed Rule will not become final? Yes, although most commentators believe that the Proposed Rule will largely survive intact. When controversial rules were proposed by the National Labor Relations Board in recent years, they became final with some changes but then faced legal and other challenges, some of which were successful in delaying or defeating the Final Rule.

What’s next? While most employers are primarily concerned with the Proposed Rule’s salary increase, a few additional notable changes to the white collar exemptions could also result. These include: increasing the annual compensation threshold for exempt “highly compensated employees” from the present level of \$100,000 to a proposed \$122,148 and, for the first time, providing for annual updates/increases in the wage thresholds. The formal rule-making process will now commence, which allows various industry and other groups to submit comments about the rule for the next 60 days. The DOL is seeking comments to the Proposed Rule on topics which include whether bonuses and commissions can be included in the weekly salary minimum, if there should be a cap on the inclusion of any bonuses and commissions and how they would be factored into such a weekly salary calculation. While the Proposed Rule does not suggest any changes in the duties tests for white collar exemptions, the DOL is also seeking comments on that topic.

Who will be affected and what does this proposed rule mean for employers? To tell whether and how much such a rule would affect your company or organization, ask these questions: (1) how many of the salaried employees who are now considered “exempt” from overtime make \$50,440 or less per year; and (2) how many of those employees regularly work more than 40 hours per week. If the answers to both of these questions are “many” or “a lot,” it is advisable to dig deeper. Also, if the answer to question 2 is, “I don’t know, because I don’t track exempt employees’ time,” it would be wise to begin to gather information regarding these employees’ work hours in order to best evaluate your next course of action, including budgeting for salary and overtime increases or planning for additional staff to avoid overtime costs.

Also, because this development will bring more attention to your classification of employees, it is more important than ever to make sure that your current classifications are correct.

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