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New Overtime Rules: Employers Need to be Ready

by Robert C. Hinton

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The U.S. Department of Labor (DOL) recently released its much-anticipated proposed changes to the rules that govern overtime for salaried workers under the Fair Labor Standards Act (FLSA). If adopted, the new rules would extend overtime protections to nearly five million white-collar workers within the first year of their implementation. The proposed rule changes were issued in response to President Obama's 2014 presidential memorandum directing DOL to update the regulations defining which white-collar workers are protected by FLSA's minimum wage and overtime standards. Notwithstanding a strong push by, among others, Republican lawmakers, for a longer comment period on the proposed revisions, DOL refused to extend the sixty-day public comment period, which closed on September 4, 2015. DOL is now currently in the process of reviewing the comments it received and making any final changes to the proposed rules that it deems necessary. DOL will then re-release the rules in final form, and announce an effective date, which is anticipated to be early 2016.

Currently, employers are required to pay overtime to all employees at one and one-half times their normal hourly rates, unless they are exempt from FLSA's overtime requirements. The most common of these exemptions are the "white-collar" exemptions, which exclude certain executive, administrative and professional employees from overtime protections based on the employee's salary level and duties. Under the current rules, employees who earn $455 per week (or $23,660 per year) and perform certain "white-collar" duties (specifically defined in the regulations) are exempt from overtime requirements. Under the newly proposed rules, however, the DOL would, among other things, raise the white-collar salary threshold to the 40th percentile of weekly earnings for full-time salaried workers. The DOL projects that in 2016 this will be $50,440 per year -- more than doubling the current salary requirement. Additionally, the proposed rules would provide a mechanism to automatically update the threshold salary level annually, either by keeping it at the 40th percentile of weekly earnings for full-time salaried workers, or by adjusting it for inflation based on the Consumer Price Index.

According to DOL, raising the salary threshold will help reduce overtime work and its detrimental effect on workers' health and wellbeing, and will also incentivize employers to hire more employees rather than having existing employees work longer hours. The DOL also contends that raising pay for affected workers will reduce employee turnover and increase employee productivity. According to President Obama, the change will also benefit "business owners who are already paying their employees what they deserve – since those who are doing right by their employees are undercut by competitors who aren't."

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The proposed new rules, however, are not without their critics. Randel Johnson, Senior Vice President of Labor, Immigration and Employee Benefits for the U.S. Chamber of Commerce, issued the following statement:

"Making more employees eligible for overtime by severely restricting the exemptions will not guarantee more income, but instead will negatively impact small businesses and drastically limit employment opportunities. Additionally, many reclassified employees will lose benefits, flexibility, status, and opportunities for advancement. This change is another example of the administration being completely divorced from reality and adding more burdens to employers and expecting them to just absorb the impact."

The reaction from the National Restaurant Association was swift, issuing a statement that "these proposed rules have the potential to radically change industry standards and negatively impact our workforce." Similarly, the American Hotel and Lodging Association issued a statement that "the proposed changes to overtime rules will hurt our employees and severely impact small-business owners, who will be unable to continue the pace of job growth that has been so vital to boosting the economy." In a study conducted on behalf of the National Retail Federation, Oxford Economics concluded that the proposed overtime regulation would cost the restaurant and retail industries alone $8.4 billion per year if fully implemented.

Regardless of personal opinion about the proposed new rules, employers need to determine now how these rule changes will impact their workforces. Specifically, employers should identify those white-collar positions that do not meet the proposed salary threshold, and determine what would have the greater financial impact: increasing the employee's salary to the new salary threshold, or allowing the employee to be eligible for overtime and closely monitoring his or her hours. Employers may also want to consider whether adopting "fluctuating workweek" agreements for certain positions may be most cost-effective.

Employers should also be aware that the DOL is considering changes to the "duties tests" for the white-collar exemptions. These tests define what types of job duties are exempt and which are not, and limit the proportion of an exempt employee's time that may be spent doing non-exempt work. Until the DOL announces what, if any, changes it will make to the current duties tests, employers cannot be certain whether it will even be possible to classify some positions as exempt, regardless of salary level.

In short, employers need to be prepared to restructure their workforces to accommodate the increased costs resulting from the new overtime rules, but should not rush to implement changes until the final rules are issued. Given that these rule changes come at a time when FLSA is already fertile ground for litigation, employers should consult with legal counsel to ensure that they are prepared to achieve compliance quickly.

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