July 21, 2015

Impacting Millions and Costing Billions: New Proposed "White Collar" Overtime Rules Announced

On June 30, 2015, the Wage and Hour Division of the Department of Labor (the "Department") released a Notice of Proposed Rulemaking ("NPRM") that overhauls the Fair Labor Standards Act's ("FLSA") overtime regulations. The new changes are a result of a mandate from President Obama, who on March 13, 2014, signed a Presidential Memorandum directing the Department to update the regulations defining which white collar workers are protected by the FLSA's minimum wage and overtime standards. With changes that will likely result in over a billion dollars in extra overtime paid nationwide, this NPRM is extremely salient for employers, especially those in the financial services industry.

The FLSA guarantees a minimum wage and overtime pay at a rate of not less than one and one-half times the employee's regular rate for hours worked over 40 in a workweek, unless that employee fits into certain exempt categories. These exemptions, often referred to as "white-collar" exemptions, have largely been unaltered since 2004, when certain increases were made to the minimum salary requirements. The minimum salary requirement is often known as the "salary basis test."

This NPRM impacts six FLSA exemption categories: (i) highly compensated, (ii) executive, (iii) professional, (iv) administrative, (v) outside sales, and (vi) computer professionals. It remains unchanged that five[1] of the exemption categories require that an employee meet a two-part test: (i) a salary basis test, which sets forth the minimum salary an employee must earn to qualify and (ii) a duties test, which inquires about the primary duty of the employee and varies from exemption to exemption. The salary threshold for most exemptions is currently $455 a week ($23,660 for a full-year worker). The highly compensated exemption has an additional salary threshold of $100,000.

The Department focuses most of the new regulations on the salary basis test. The NPRM raises the standard salary level to the 40th percentile of earnings for full-time salaried workers, which functionally increases the weekly salary required under the salary basis test to $921 per week ($47,892 for a full-year worker).[2] In addition, the Department proposes to increase the highly compensated exemption's additional salary threshold to $122,148. Further, the Department has proposed using a mechanism that would automatically update the salary and compensation thresholds on an annual basis and which would necessitate reviewing employees for correct exemption status every year.

The Department has also opened the floor to comment regarding the respective duties tests for each exemption. The Department has explicitly asked for comment on whether it should require overtime-ineligible employees to spend a specified percentage of time performing their primary duty. This idea follows from California law, where exempt employees are required to spend more than 50% of their time performing primary exempt duties. Though the Department has merely asked for comment on the duties test, it is possible that the Department will include changes to the duties test in the final rule that are not in the NPRM. Thus, there could be additional changes that are not at present apparent.

Because the proposed rule more than doubles the amount of the salary basis test, the ramifications are significant. Conservative estimates predict more than 21.4 million workers in the United States will be affected by the new regulations, and the Department estimates there are approximately 4.6 million workers currently classified as exempt who may have to be re-classified because of the new regulations. The changes will likely result in an extra $1.2 billion to $1.3 billion in overtime paid nationwide. Impacted the most will be institutions in service sectors like the financial industry, which historically have large numbers of white-collar employees. Additionally, because many service sector positions cluster around $50,000 in annual salary, additional problems in attempting to classify similar positions may arise.

Although the NPRM has been released, the proposed rule still has a way to go before it becomes effective. After it is published in the Federal Register, there will be a 60-day comment period, where the public will have the opportunity to submit any comments or suggestions to the rule. Following this comment period, the rule will again be reviewed by the Department, and may be revised. If further revised, the rule will go through another internal review process until the rule is finalized. The Office of Management and Budget's Office of Information and Regulatory Affairs must then review the rule, after which it will be sent to be published in its final form. Once the final rule has been published, an agency usually must wait at least 30 days before implementing the reviewed final rule. Despite the lengthy review process, and despite the fact that Congressional approval is not required, a final rule could come into enforcement by early 2016.

With less than a year before new regulations could go into effect, it is imperative that businesses begin assessing their potential liability and pinpoint employees who may need to be reclassified.

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1 No salary basis test is required for the outside sales exemption.

2 The Department relied upon 2013 data in the development of the NPRM. The Department will update the data used in the final rule resulting from this proposal, which will change the dollar figures for both salary thresholds. If, after consideration of comments received, the final rule were to adopt the proposed salary level of the 40th percentile of weekly earnings, the Department would likely rely on data from the first quarter of 2016. The latest data currently available are for the first quarter of 2015, in which the 40th percentile of weekly earnings is $951, which translates into $49,452 for a full-year worker. Assuming two percent growth between the first quarter of 2015 and the first quarter of 2016, the Department projects that the 40th percentile weekly wage in the final rule would likely be $970, or $50,440 for a full-year worker.

For More Information

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