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DOL Overtime Rule Could Add Overtime Pay for Nearly 5 Million White Collar Employees

On July 6th, the federal Department of Labor initiated a rule-making process designed to significantly increase pay for white collar managers, administrators and professionals by more than doubling the salary an employer is required to pay to classify them as exempt from overtime requirements. Estimates are that the change could result in employers being required to pay overtime to some 4.6 million workers who are currently classified as exempt from the overtime rule. The rule, as proposed, would also mean that employers would have to re-examine the overtime exemption for these white collar workers every year.

Specifically, the DOLs proposed rule would raise the pay level required for an employer to qualify white collar employees for the exemption from \$455/week (\$23,660 annually) to \$921/week (\$47,892 annually). And the proposed rule would also change the exempt salary limits from being a fixed amount (which has not changed in over ten years) to a dynamic one that would be indexed annually to U.S. wage rates. If the rule is implemented as proposed employers who have a large number of lower-salaried managers, which tends to be especially true of the retail, service, and restaurant industries, may face substantial cost increases based on overtime expenses. Employers may be able to avoid or alleviate these increases, however, with proper planning and management. Additionally, employers will need to conduct annual monitoring of their employees wage and hour classification and exemption status due to the new indexing of the qualifying salary level.

To review the fundamentals that apply here: The white collar or EAP exemption to the Fair Labor Standards Act (FLSA) provides that employers may (but are never required to) treat certain employees as exempt from minimum hourly wage and overtime requirements, *provided that*: (1) their job duties are primarily executive, administrative, or professional; and (2) they are paid on a salary basis not less than an amount prescribed by the Department. That salary amount has been set at \$455/week (\$23,660 annually) since 2004. The FLSA also permits exempt treatment of outside sales employees and some computer-related positions if pay and duty requirements are satisfied, and for some Highly Compensated Employees (HCEs) who are office workers and who regularly perform at least one exempt duty, but are not otherwise white collar eligible. The HCE exemption amount has been set at \$100,000 annually since 2004 as well.

Related People

Mark Mathison

Partner

Minneapolis

612.632.3247

mark.mathison@lathropgpm.com



The Departments proposed rule would not alter the job duties test for these white collar exemptions; but would directly affect the salary test in two ways: (1) by increasing the salary level required for eligibility; and (2) by indexing that amount to salary rates paid nationally. The white collar exemption requirement would initially more than double and the HCE exemption would increase from \$100,000 to \$122,148 annually. The Departments rule proposes to adjust these amounts annually to keep pace with these wage percentiles—a paradigm shift from the previously static salary levels that were seldom adjusted.

These changes will potentially affect millions of workers. The Department estimates there are currently 144.2 million wage earners in the U.S. and 43 million of those are white collar employees under the FLSA duties test. Based on the current salary levels 21.4 million of those workers are classified as exempt. The Department estimates that employers would lose the overtime exemption for over 4.6 million workers as a result of the initial increase in the salary requirement and another 36,000 as a result of the HCE exemption increase. Because the proposed salary level increases are universal and not based on industry or geography, some labor markets may be severely impacted and others may be largely unaffected.

The Departments publication of the proposed rule on July 6th begins the formal rule-making process. Written comments on the proposed rule may be submitted through September 4, 2015. While the Departments initial version of the rule does not propose changes to the duties tests for the exemption, the published notice does request comment on potential changes to these tests. This suggests the final rule might contain some alteration to the duties test. Given the large number and scope of comments expected, the final rule will likely not be enacted for at least a year.

Regardless of the timetable, it is likely that some form of this rule will become law. Consequently, employers may want to begin preliminary planning for potential salary increases for exempt employees or the potential reclassification of employees as non-exempt from overtime. Employers who employ a number of high-hour, lower-compensated managers, such as in the restaurant industry, are particularly vulnerable and might consider a number of strategies to avoid dramatic increases in overtime expense.