3.6 Million Reasons Employers Should Monitor the DOL's Proposed Overtime Rule

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On August 30, 2023, the U.S. Department of Labor ("DOL") announced a proposed rule intended to "restore and extend overtime protections to 3.6 million salaried employees." If finalized, the proposed rule would raise the salary levels that must be paid to certain employees for them to be exempt from overtime pay requirements under the federal Fair Labor Standards Act ("FLSA").

Specifics of Proposed Rule

The proposed rule, if finalized, would raise the guaranteed weekly salary that must be paid to "white collar" exempt employees who meet the executive, professional or administrative duties test, requiring a guaranteed gross weekly salary of at least $1,059 per week. This equates to $55,068 gross annual salary per year and would be a sharp increase from the current "white collar" weekly salary threshold of $684 per week (which is $35,568 a year). The increase in the threshold would not eliminate but would decrease the significance of the "duties" test used to determine whether a worker is exempt from overtime eligibility based on the work they perform. Additionally, these salary thresholds would automatically increase every three years to the 35th percentile of weekly earnings of full-time non-hourly employees in the lowest-wage Census Region.

The proposed rule would also increase the annual gross salary threshold for the "highly compensated employee" exemption from $107,432 per year to $143.988 per year.

The "highly compensated employees" exemption would automatically increase every three years to the 85th percentile of full-time non-hourly employees nationally. These increases, however, would be subject to a comment period, and could be delayed where "economic or other conditions merit."

The proposed rule would not affect workers who are paid hourly who would remain non-exempt. Exempt employees must be paid on a salaried, not hourly, basis.

Purposes of Proposed Rule

The proposed rule has four stated purposes:

1. Restore and extend overtime protections to low paid salaried workers who often work alongside hourly employees but are not similarly and equally compensated for working over 40 hours a week;
2. Give valuable time back to salaried workers who are not otherwise exempt by disincentivizing employers from scheduling such workers for more than 40 hours a week;
3. Prevent future erosion of overtime protections and ensure greater predictability by automatically updating the salary threshold every three years to keep pace and reflect current earnings data; and
4. Restore overtime protections for U.S. territories by reinstating overtime protections that existed in U.S. territories between 2004 to 2019.

Effects of the Rule:

The DOL believes the proposed rule would transfer $1.2 billion in wages from employers to employees from new overtime premiums or projected pay raises aimed at preserving the exempt status of certain affected employees.

The Economic Policy Institute has estimated that the rule would almost double the current percentage of full-time salaried workers that are entitled to overtime pay from 15% to 30%.

It is estimated that 300,000 manufacturing workers, 300,000 retail workers, 180,000 hospitality workers, and 6000,00 health and social service workers would become eligible for overtime under the new rule.

Certain employers have already raised concerns relating to the increased costs for certain industries. For example, the National Restaurant Association warned that the rule would increase costs for affected restaurants by 2.5% when the average small restaurant runs on margins of only 3% to 5%.

What's Next

Once published, the proposed rule will be open for public comment for 60 days. The DOL will then consider all comments before publishing a final rule.

The proposed rule is expected to become final around the end of 2023 and is expected to be challenged by business groups and states alike. In 2016, President Obama attempted to raise the weekly salary threshold for "white collar" exempt employees to $913 a week (which is about $47,500 a year). This prompted lawsuits from 21 states and business groups and an injunction from a federal judge in Texas in 2017. After Trump entered office, the Trump administration decided not to defend the Obama era-rule, effectively ending the rule. It is likely that the 2017 court decision will be relied upon by challengers once the new proposed rule is finalized.

Nevertheless, employers should consider analyzing how the rule, under their current scheduling practices and salaries, would affect them and explore any necessary changes to either or both to ensure sustainability and profitability under the new requirements, should the proposed rule not be struck down. Options for addressing the new rule, should it become final, include raising salaries as needed to keep employees exempt from overtime pay requirements or converting employees to non-exempt employees entitled to overtime pay. There are a variety of factors that might make one of these options better than the other and employers are encouraged to consult their legal counsel.