

Department of Labor Significantly Expanding Overtime Eligibility

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The Department of Labor (DOL) recently issued proposed new rules that seek to expand overtime wage coverage to more than 4.6 million workers. These proposed rules are not yet final, and the DOL seeks comments. However, now is the time to begin considering how employees are classified, and whether they may continue to be exempt from overtime wages in the future.

As background, the Fair Labor Standards Act (FLSA) mandates both a federal minimum wage and payment of overtime wages. The FLSA's requirements are further outlined in Department of Labor's (DOL) regulations, which define the types of employees who are exempt from overtime and minimum wage requirements. In March 2014, President Obama directed the Department of Labor to update these regulations (found at 29 C.F.R. Part 541). The regulations were last revised in 2004. President Obama unveiled the changes on June 29, 2015, and they were formally published on July 6, 2015 in the Federal Register.

The revisions are currently in the "Notice of Proposed Rule Making" stage, meaning the DOL is seeking comments on the proposed changes for the next sixty days. The comment period closes on September 4, 2015. Now is the time to comment in order to influence these significant regulations!

Overtime Exemptions

Overtime wages consist of paying an employee one and one-half times the employee's regular rate for hours the employee works over 40 hours in a workweek. While these protections extend to most workers, the FLSA does provide a number of exemptions.

The most commonly used exemption is the "white collar exemption." Currently, in order to qualify, an employee must be paid on a salary basis of at least \$455 a week and must meet a duties test. The duties are generally categorized as executive, administrative, professional, outside sales, and computer employees. For example, if an employee performs those duties, but is not paid above the threshold, he is not exempt from overtime wages.

Proposed Changes

The proposed rules make three broad revisions: significantly raising the salary basis, “simplifying” the identification of exempt and nonexempt employees, and providing for automatic updates of the salary basis.

First, the proposed rules more than double the salary basis from \$455 a week to \$970, or the 40th percentile of full-time salaried workers nationwide (currently approximately 3 times full-time minimum wage earnings). In annual pay terms, this means an employee must make \$50,440 a year in order to qualify as exempt, even when the employee otherwise qualifies as exempt because of her duties. Previously, the amount was \$23,660 per year.

Second, while there are no changes to the duties tests, the expansion of the salary basis means that it will be easier for employers to determine whether their employees are exempt. For instance, previously, if an employee made more than \$455 weekly the employer had to analyze the duties of the employee to determine whether the employee was exempt. Now, a significant number of employees will be clearly nonexempt. While this greatly expands the number of employees who will be entitled to overtime wages, it will remove some uncertainty inherent with applying the duties tests. Overall, despite the proposed rules not containing duties test changes, the DOL seeks input on whether the tests should be modified in light of the salary basis increase.

Third, the Administration expressed concern that the previous salary threshold had not kept up with inflation. The DOL proposes automatic annual updates to the salary basis by either indexing the basis at a fixed percentage of earnings of full-time salaried workers or by indexing the basis to the Consumer Price Index. The DOL seeks comments on which methodology would be most appropriate.

Impact

Overall, the potential added costs to employers are significant, as reflected in this Oxford Economics analysis and by the DOL, which estimates annual transfers of approximately \$1.2 billion from employers to employees. The DOL also estimates that in the first year of its proposed rules, an additional 4.6 million currently exempt workers will become entitled to minimum wage and overtime protection under the FLSA.

These proposed rules are not yet final. However, they clearly indicate the direction the DOL is headed. Now is the time for two important actions. First, to begin to reevaluate your employee classifications, and, second, to consider submitting comments and proposals to the DOL in order to influence the final rules.

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