



ALERT

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THE PROPOSED OVERTIME REGULATIONS: SUBSTANTIAL CHANGES ON THE HORIZON

By Eileen Oakes Muskett

Overtime regulations were implemented as part of the original Fair Labor Standards Act (FLSA) in 1938 and touted as providing minimum protections to individual workers, ensuring that covered employees would receive a fair day's pay for a fair day's work and protecting them from the "evil" of overwork as well as underpay.¹ Most employers have traditionally sought to avoid overtime pay due to its significant impact upon the company's profitability. However, a new day is dawning in the world of overtime regulations. The avoidance of overtime payments may be more difficult if the amendments (Amendments) proposed by the Obama Administration for the Department of Labor (DOL) regulations issued under the FLSA come to fruition. The primary focus of the Amendments are an increase to the minimum salary and compensation level needed for executive, administrative and professional employees (EAP) to be exempt from overtime payment which would be accomplished as follows:

1. Increase to the minimum salary level for fulltime salaried employees to be exempt from overtime pay.
2. Increase the total compensation requirement needed for highly compensated employees to be exempt from overtime pay.

3. Implementation of an automatic mechanism for increases to the standard minimum salary levels required to qualify for overtime exemption.

Under the FLSA, any employee that works more than 40 hours in a seven day period is entitled to payment of time and a half for hours worked over 40, as long as they are not subject to a statutory exemption. The FLSA requires that for an employee to be exempt from overtime payment the employee must meet the "salary level test," "salary basis test" and the "duties test."² The "salary level" exemption is the current focus of these Amendments, and currently states that an EAP employee may qualify for overtime exemption if the employee is paid at least \$455 per week and they met the minimum "duties test." There is no salary level test for certain professionals including doctors, lawyers and teachers.

Minimum Salary Level

The current salary level threshold of \$455 per week or \$23,660 annually for the minimum salary level was set in 2004. The newly proposed minimum is currently estimated at \$970 per week or \$50,440 annually beginning January 2016. The potential impact upon the current United States workforce is staggering. An estimated 4.6 million workers exempt under the current regulations who earn at least \$455

per week but less than the proposed estimated weekly salary of \$970 will become entitled to overtime payment if they work more than 40 hours per week.

Highly Compensated Employees

In 2004, the DOL established a new highly compensated employee (HCE) exemption for EAP employees. The applicable regulation provided that such employees were exempt if they earned at least \$100,000 per year and customarily performed one or more of the exempt duties and responsibilities of an executive, administrative or professional employee. The proposed Amendments seek to increase the current HCE threshold of \$100,000 annually to \$125,000 annually for the minimum salary level for overtime exemption. The DOL states that the increase is necessary to ensure that the threshold remains a meaningful and appropriate standard when matched with the minimal duties test and provides exemption of only bona fide exempt employees. In setting the increase, the DOL relied upon salary data that demonstrated that the percentage of employees earning greater than \$100,000 annually had increased to approximately 17 percent of salaried employees. The DOL intends to establish a threshold at the 90th percentile of fulltime salaried workers, currently estimated at \$122,148.

Automated Increases to Exemption Salary Levels

The proposed Amendments include an automated increase for both the minimum salary level and HCE thresholds, based upon Bureau of Labor Statistics data. The minimum salary level exemption would be set to perpetually increase to remain at the 40th percentile of weekly earnings for fulltime salaried workers and the 90th percentile of all fulltime salaried employees for the HCE threshold. Alternatively the Amendments seek to utilize the Consumer Price Index for Urban Consumers to provide the basis for annual increases to these standards.

Strategic Planning

With appropriate planning, these proposed Amendments can have minimal impact upon your business.

1. Analyze your current workforce.

Immediately analyze your workforce and identify those employees who were previously exempt from overtime payment and will now be nonexempt under the proposed salary level changes. If you are not already doing so, have these employees begin to clock their hours so you can perform an appropriate analysis of their compensation options. Consider whether to:

- Increase their salary to maintain the exemption.
- Reduce their salary to balance the overtime payments that will likely be incurred.
- Maintain their salary and delegate some of their responsibilities to an existing or new employee to ensure that the previously exempt employee does not work in excess of 40 hours.
- Do nothing and begin paying overtime when incurred by the newly nonexempt employees.

2. Potential tools to minimize negative impact.

Once you have conducted the analysis suggested above, settle on an approach for managing the wage costs associated with the now potentially nonexempt employees. This may include hiring additional employees to cover work previously performed by this now nonexempt employee.

Consider reassignment of duties previously performed by the now nonexempt employee to help ensure that they are able to complete their job duties during a 40-hour work week. Revise employee job descriptions to remove nonexempt duties from EAP employees and ensure that the EAP employee follows the revised job duties in practice.

Keep precise records concerning the hours worked by salaried employees, including managers,

who receive a base salary lower than the minimum salary level for overtime payment exemption. In the past employers likely did not have managers clocking in and out, but accurate records will now be critical to establish whether or not the employee would be entitled to overtime compensation.

Consider eliminating flexible work arrangements that permit exempt employees, previously in the exempt salary level range, to work from home or after normal business hours to complete projects or assignments. Such hours worked are difficult to track and could result in overtime hours, unrecorded and then unpaid and wage related claims under the FLSA.

Get a Plan

Don't bury your head in the sand. The proposed Amendments are not likely going away. The Amendments may be effective as scheduled in January 2016. As Ben Franklin aptly stated: "by failing to prepare, you are preparing to fail." Get started.

For more information about this alert, please contact Eileen Oakes Muskett at 609.572.2355 or emuskett@foxrothschild.com or any member of the firm's Labor & Employment Department.

¹ *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981).

² Most employees must also satisfy the, "salary basis test," which requires employees to be paid a guaranteed minimum amount at least biweekly, with no deduction based upon productivity or hours worked, unless a permitted decution. Some employees may be paid on a fee basis for a unique assignment, such as an artist or computer specialist. The "duties test" requires the employee to primarily perform executive, administrative duties as provided by the DOL regulations.



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