

Practice Spotlight: Top 10 Questions Employers Have About the Newly Proposed Overtime Regulations

September 1, 2015

Employers across the country are trying to get their arms around the implications of the Department of Labor's (DOL) proposed changes to the overtime regulations. These proposed changes, which were published on June 30, 2015, have the potential to impact millions of employees if the final rule becomes effective next year.

The bottom line for employers is that any salaried "exempt" employee (i.e., ineligible for overtime pay) currently making less than \$24.25 per hour, \$970 per week, or \$50,440 annually will be eligible for overtime pay beginning in 2016. The following are FAQ by employers about this proposed change in the overtime law:

1. What is the difference between an "exempt" and "non-exempt" employee? Is this the same as salaried versus hourly?

Short answer: An exempt employee is ineligible for overtime, a non-exempt employee is eligible. Exempt/non-exempt is not the same as salaried/hourly. The Fair Labor Standards Act (FLSA, the federal law governing wage and hour issues) has three basic requirements: payment of the federal minimum wage (\$7.25/hour), overtime pay for time worked more than 40 hours in a work week and record keeping.

The FLSA, however, "exempts" certain employees from the minimum wage and overtime pay requirements. There is a common misperception that paying an employee a salary means they are "exempt" from overtime. This is not true. Payment of a salary is only one of the requirements for exemption. To qualify for the exemption, employees must:

1. Be paid on a salary basis (employers cannot reduce the salary because of quality/quantity of work or when employee works less than a full day).
2. Be paid a certain minimum salary level (right now it is \$455/week or \$23,660 annually).
3. Meet a designated job duties test¹ (that shows the employee primarily performs certain "white collar" duties).

These requirements are set forth in detail in the DOL overtime regulations. If all three of these requirements are not met, the employee is non-exempt. Job titles do not determine exempt status. Employers are required to pay non-exempt employees overtime and to maintain certain records of hours of work.

2. Under the proposed new rule, which employees will be exempt from overtime?

Short answer: Salaried employees who make at least \$50,440 annually and perform primarily "white collar" duties. The new proposed DOL overtime regulations increase the salary level (test #2 above) from \$455/week (\$23,660 annually) to \$970/week (\$50,440 annually). To maintain the exemption, the employees will still need to be paid on a salary basis and meet the job duties test (which, at this point, the DOL did not touch).

3. Do we need to have a certain number of employees for the overtime regulations to apply to us?

Short answer: Yes, two employees, but that is not the only requirement for coverage under the Act. Most civil rights statutes depend on the number of employees. For example, an employer is subject to Title VII when it has 15 or more employees. The FLSA is different. While it requires two or more employees, coverage under the FLSA is determined by whether the business is engaged in interstate commerce and has an annual gross income of \$500,000. The FLSA applies to employers in the private sector and in federal, state and local governments.

4. Will commissions or bonuses be counted as part of the \$50,440/year salary level test?

Short answer: Bonuses? Probably (but to a limited extent). Commissions? Doubtful. The DOL is "considering" whether to allow nondiscretionary bonuses that are tied to productivity, profitability and/or specified performance metrics to satisfy some portion of the salary level requirement. DOL suggests limiting bonus payments to satisfy only 10 percent of the weekly salary level and that "employees would need to receive the bonus payments monthly or more frequently."

At this point, the DOL is rejecting the idea of counting commissions toward the salary level requirement. The DOL is seeking comments on the appropriateness of including commissions as part of the nondiscretionary bonus and other incentives that could partially satisfy the salary level test. It also appears that the DOL is not considering counting any other paid benefits toward satisfaction of the salary level test.

The DOL has also proposed including a mechanism to automatically update the salary level annually using a fixed percentile of wages or the Consumer Price Index.

5. If this rule goes into effect, will we have to convert all of our salaried exempt employees making less than \$50,440/year to hourly employees?

Short answer: No. Hourly is not the same as non-exempt. An employee can be non-exempt and still be paid a salary. The FLSA does not require that non-exempt employees be paid hourly. When properly done, it is perfectly legal to have a salaried non-exempt employee. A non-exempt salaried arrangement is simply when an employer pays a non-exempt employee a fixed salary for the week instead of paying the employee by the hour. It is common to see the terms "hourly employee" and "non-exempt employee" used interchangeably, although they are not entirely synonymous.

The basic premise under the FLSA is that while you can pay non-exempt employees any way you want (i.e., hourly, piece rate, salary, commission), at the end of each work week you must be able to show that the employees received at least the equivalent of minimum wage for every hour worked and received overtime pay for every hour worked over 40 during the week. In other words, the employer still has to track employees' work hours every week regardless of the method of payment. Employees who are currently exempt and who make less than the new salary level of \$50,440 will have to track their hours and be paid overtime for all hours worked in excess of 40 in a work week. The FLSA's record keeping requirements include keeping records of hours worked each day and total hours worked each work week.

6. Can we limit the number of overtime hours these non-exempt employees work?

Short answer: Definitely. No employer is required to guarantee overtime work. No employer is required to pay an employee more compensation as a non-exempt employee than what the employee was earning as an exempt employee. Employers should have an overtime policy stating when and if overtime is allowed (e.g., if an employee is required to get prior authorization of the overtime). If an employer knew or should have known an employee is working overtime, however, the employer may discipline the employee in accordance with the overtime policy, but they will still owe the employee the overtime pay.

7. What is one of the most important considerations for employers when analyzing these proposed changes?

Short answer: Hidden overtime. Most exempt employees do not track their hours. Therefore, many employers do not have adequate data on the number of hours their exempt employees are working. When these exempt employees are re-classified as non-exempt (because they no longer meet the salary level test), these hours will need to be tracked and any hours over 40 in a work week will be considered overtime. Many FLSA lawsuits allege employers failed to include time spent by non-exempt employees performing work activities outside of their normal shifts. Non-exempt employees may perform a variety of potentially compensable job-related activities during their "off-the-clock" time, such as: taking work home, making/receiving job-related telephone calls at home, working through lunch, working before or after regular shifts, taking care of work-related equipment or job-related "volunteer" work. This compensable time must be considered when re-classifying employees and working within the employer's payroll budget.

8. What is the process for finalizing these rules?

Short answer: There is a 60-day comment period, followed by consideration by DOL of the comments, then probably publication of the final rule. Federal agencies, like the DOL, have the right to promulgate legislative rules without Congressional approval. Agencies are required, however, to provide the public with adequate notice of the rule change followed by an opportunity to comment on the rule's content (i.e., "notice and comment rulemaking"). The 60-day comment period for the proposed new overtime regulations ends September 4, 2015.

After the comment period is closed, the DOL will review and analyze the comments received. The Department will then decide whether to proceed with the proposed changes, issue a new or modified proposal (i.e., start the process over with notice and comment) or take no action on the proposed rule. Changes may be made to the proposed rule based on the public comments, but those changes need to be of a type that could have been reasonably anticipated by the public – i.e., a logical outgrowth of the proposal. If a substantive change is made to the proposal after the comments, an agency is required to provide the public with further opportunity for comment (i.e., start the process over). If the DOL proceeds with the proposed rule, it will be published in the Federal Register and will become effective no less than 30 days after the rule is published.

9. When will this rule go into effect?

Short answer: Not sure, but anticipated in early 2016. Although we cannot definitively predict when the DOL will publish their final rule, we believe the final rule will be published in early 2016 and employers will have to be in compliance as of the effective date of the rule (which can range anywhere from 30 to 120 days after the final rule is published). The administration has been very vocal about its desire to see this change in the law implemented quickly, so we expect a short compliance period (i.e., less than 120 days).

10. What should we do now?

Short answer: Take advantage of the time before the final rule is issued. Now is the time to get your house in order. Employers should identify the affected employees and possible issues relating to the re-classification of those employees, such as budgetary effects, workforce effects (job/compensation restructuring), employee morale, etc. Does your time keeping mechanism work with the additional employees? Is it possible to get the same work hours under the employer's current payroll budget? How is the information going to be communicated to employees and what is the potential effect on morale and work performance?

It is also beneficial to have your outside employment counsel conduct a privileged audit and analysis of how the proposed regulation will affect your workplace. An attorney can help walk you through your options

regarding re-classification within the scope of FLSA regulations and the organization's culture, concerns and budgetary issues. Right now is also a golden opportunity to analyze and correct any misclassification. The changes in the law are being reported in mainstream news. Employees will be expecting changes of some type. "The law made me do it."

¹ There are three primary "white collar" exemptions – Executive, Administrative, Professional – and each has its own defined job duties test.