FLSA Exemption Changes: The Proposed Rules Are Coming

Squire Patton Boggs Webinar Series
Introduction

- Employers must pay employees at least the federal minimum wage (currently $7.25/hour) and overtime at a rate of at least 1.5 times the employee’s regular rate for any hours worked over 40 in a week, unless exempt.

- The most common exemptions are the executive, administrative, professional, outside sales exemptions > “white collar” exemptions.

- President Obama issued a directive to the Secretary of Labor last March to modernize and streamline the existing white collar exemptions. Regulations have not been updated since 2004.

- First in a series of webinars to educate and assist employers in familiarizing themselves with and preparing for the impact of the upcoming rule changes.
The Rule-Making Process in Washington

- After Proposed Rules > 30-day public comment period.
- DOL drafts final regulation, taking into account public comments.
- DOL will hear testimony regarding the proposed changes before issuing a final version to the Office of Information and Regulatory Affairs ("OIRA").
- OIRA will then conduct a review of the proposed regulations and publish the final text of the regulation in the Federal Register.
Background -- Refresher

- The current “white-collar” exemption tests
  - Salary
  - Primary Duties
Current Salary Test

- Predetermined Minimum $455/week ($23,660/year)
- No Docking Except
  - Full sick days if sick policy
  - Full personal days
  - First and last week employment
  - Full weeks
  - Violation of written work rules
  - FMLA leave
Current Duties Tests

- **Executive Exemption**
  - Managing – Enterprise or Department
  - Primary Duty
  - Supervising two or more full-time employees
    - Hiring or firing authority or
    - Recommendations given weight

- **Administrative Exemption**
  - Office or non-manual Work
  - Primary Duty: management policies or general business operations
  - Discretion and independent judgment regarding matters of significance

- **Outside Sales Exemption**
  - Primary duty making sales/orders
  - Customarily and regularly away from employer’s place of biz
Current Duties Test

- **Professional Exemption**
  - Teaching
  - Advanced Knowledge
    - Field of science
    - Long course of specialized study
  - Original and Creative

- **Computer Employees Exemption**
  - Primary Duty Consists of:
    - Systems analysis or
    - Designing or modifying computer systems or programs based upon user or system specifications or
    - A combination of these duties
Anticipated Changes

- DOL expected to change the FLSA’s overtime rules in two significant respects:
  
  1. raising the minimum salary threshold for overtime exemption significantly; and
  
  2. modification/ elimination of the current “primary duty” test used to determine whether an employee qualifies under a white collar exemption.
Anticipated Changes – Salary Test

- **Raising salary threshold**
  - Anticipate raise from $455/week to $800-1000/week
    - Several noted economists, former Secretary of Labor wrote to the DOL recently advocating a threshold of “about $50,000” (~$960/week)
    - Former Economic Policy Institute economist Heidi Shierholtz (now Labor Secretary Perez’s CE) advocated last fall for $984/week ($51,168/year)
    - Jan. 29, 2015 letter from 26 senators advocated $1,090/week ($56,680/year)
  - Two states already higher (CA - $720/week; NY - $600/week)
Anticipated Changes – Duties Test

- Modifying/eliminating “primary duty” standard
  - DOL may adopt a strict “division of labor” test > spend at least 50 percent of their working hours performing “executive, administrative or professional duties”
  - E.g., assistant manager at a restaurant is responsible for hiring, firing, promoting and evaluating employees, but spends only 25% of her time performing those functions and the majority of her remaining time engaged in customer service activities, the assistant manager would likely be classified as non-exempt
  - Currently used in California
Impact of Anticipated Changes

- Raising salary increase number of employees classed as non-exempt and raise payroll costs
- Changing to “division of labor” test or other modified “primary duties” test will likely increase timekeeping/recordkeeping burden
  - Time tracking by/of exempt employees?
  - Task tracking by/or exempt employees?
- Other administrative changes
  - Reviewing/revising employee handbooks/policies
  - Reviewing/changing job functions of “grey area” employees
Preparing For The Rule Changes

- **Review and evaluate:**
  - Current workforce composition
  - Current workforce classification
  - Current time/task-keeping procedures/capabilities

- **Assess potential impact of rule changes:**
  - Increased direct payroll costs
  - Increased administrative costs
  - Need for reclassification?
Preparing For The Rule Changes

- Get Creative
  - Fluctuating workweek agreement -- nonexempt
    - hours must fluctuate and must have a mutual understanding
      salary covers straight time for all hours actually worked –
      whether over or under 40 hours per week.
    - RR is calculated by dividing salary by actual hours worked in a
      given workweek. Need only pay an additional one-half time for
      hours worked in excess of 40 hours. RR will fluctuate from
      week to week depending upon hours worked; more hours
      worked, the lower the regular rate.
    - While poses difficulties in administration, can result in greater
      cost savings to the employer
    - Watch for deduction and add-on issues; NOT YOUR 541
      RULES!
    - But some states (like PA) do no permit
Preparing For The Rule Changes

- **Example**: EE receives salary of $500 per week and works 45 hours, would be paid at $5.56 extra per overtime hour. The same employee working 50 hours would be paid at only $5.00 extra per overtime hour.

  - **45 hours**
    - $500 ÷ 45 hours = $11.11 regular rate
    - $11.11 ÷ 2 = $5.56 half-time rate
    - $5.56 x 5 overtime hours = $27.80 overtime pay
    - **Total payment** = $527.80

  - **50 hours**
    - $500 ÷ 50 hours = $10 regular rate
    - $10 ÷ 2 = $5 half-time rate
    - $5 x 10 overtime hours = $50.00 overtime pay
    - **Total payment** = $550.00
Preparing For The Rule Changes

• If not FW method, pay $12.50 for each overtime hour ($500 ÷ 40) and would receive $93.75 in overtime for working 45 hours (total of $593.75 or an additional $65.95) and $187.50 pay for working 50 hours (total of $687.50 or an additional $137.50)

• Or, if still qualify as exempt, pay $50,000 annually (or new min salary level) but entitled to salary deduction rules.
- Get Creative (continued)
  - Belo Agreement
    - similar to FW requirement
    - allows payment of guaranteed salary compensating for overtime for an agreed-upon number of hours up to 60 per week
    - Hours must necessarily vary between over 40 and under 40 hours
    - office employees generally not going to qualify
    - Irregular fixed schedules
Impacting the Final Rule

- Will hold another webinar shortly after the proposed rule is announced
- Join us, and tell us your comments
- Alternatively, send us your comments
  - jill.kirila@squirepb.com
- Subject: FLSA Proposed Rules
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