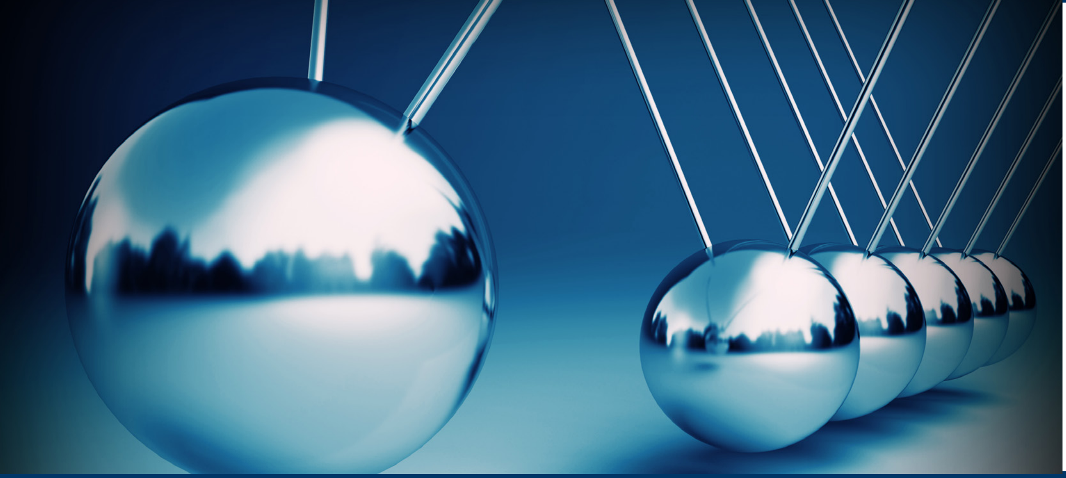

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INDUSTRY INSIGHT

LABOR AND EMPLOYMENT NEWS

July 2015

NEW OVERTIME REGULATIONS: DEPARTMENT OF LABOR PROPOSES TO INCREASE SALARY LEVEL FOR EXEMPT EMPLOYEES

The Obama Administration announced new rules that are likely to both greatly increase the number of employees who are eligible for overtime pay and greatly reduce the number of lawsuits alleging violations of overtime law. If the proposed regulations go into effect as expected in January, 2016, only employees who earn a salary of around $50,000 per year will be eligible for one of the "white collar" overtime exemptions

Since the 1930s, the federal Fair Labor Standards Act (FLSA) has required that employers pay most employees one and one half times the employee's regular hourly rate for each hour worked in excess of 40 hours in a work week. An employer need not pay this overtime premium if it can show that the employee falls within one of the FLSA's exemptions from overtime. The most common exemptions are so-called "white collar" exemptions for Executive, Administrative, and Professional employees.

In order to fit within one of these exemptions, an employee must perform certain duties that relate to each category (the "duties test") and must also be paid a minimum salary (the "salary test"). Litigation over misclassification of employees for purposes of paying overtime has skyrocketed in the last decade, with most of the issues being over whether the employee meets the relevant duties test. That litigation is likely to be greatly reduced in the next decade, not because the duties tests are going to be changed – they likely will not be – but because the minimum salary level will be more than doubled.

Since 2004, the minimum salary level for the white collar exemptions has been $455 per week – or a little less than $24,000 per year. The proposed regulations set the new minimum at the 40th percentile of average weekly salaried earnings – currently $921.00 per week and expected to be $970.00 per week by the time the regulations go into effect. Moreover, the proposed regulations would contain an automatic annual escalator so that the minimum salary would continue to track the 40th percentile of average weekly earnings as that number changed.

In addition, the proposed rule raises the salary used for "Highly Compensated Employees" from its current $100,000 to the 90th percentile of average weekly salaried earnings – currently around $122,000 but expected to increase by the time of implementation.

Much can happen to regulations between proposal and finalization, so no one knows for certain what the final rules will say. It is almost certain, however, that there will be a substantial increase in the salary level required for the most common exemptions, along with an annual escalator. If that happens, employers will have a bright line salary test to apply in many cases before even getting to an analysis of the duties test. While it will remain important to regularly review exempt employees for compliance with the duties tests, there will almost certainly be far fewer close calls, for the simple reason that the significantly higher salary

If you have any questions about the issues addressed here, or any other matters involving Labor and Employment issues, please feel free to contact:

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basis will weed out many of the close calls. Employers will need to be far more vigilant at recording hours for all employees, and will need to become creative at limiting overtime costs, likely by hiring some extra employees.

For now, employers who are creating budgets that include 2016 should start to take these probable new rules into account. Employers should also start planning how they will transition currently exempt employees to non-exempt status. That may include converting them to purely hourly employees, or maintaining some salary component with a premium for hours worked over forty in a work week.

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