

Resources

The New Overtime Regulations Are Now Official

May 18, 2016

There's no longer a basis to speculate or read or ignore the rumors. The Department of Labor (DOL) has finalized its changes to the regulations governing who may be exempt from being paid overtime. The changes will still be dramatic in terms of the number of employees impacted, but employers' worst fears as to what they might contain did not quite materialize.

Last Summer's Proposed Regulations

Early last summer, the DOL published its proposed changes to the overtime regulations. In a nutshell, they called for an increase to the minimum salary most executive, professional and administrative employees would have to be paid in order to retain their exempt status, an increase from \$455 per week (or \$23,660 per year) to \$970 per week (or \$50,440 per year). This change alone was estimated to jeopardize the exempt status of nearly 5 million employees.

The DOL also proposed modifying the salary threshold for the "highly compensated employee" rule from \$100,000 to roughly \$125,000. In addition, the DOL expressed an interest in annually adjusting the minimum salary level by indexing it to the CPI, the 40th percentile of all salaried workers in the U.S., or some other basis. The DOL also indicated that it was considering changing the duties tests for the white collar exemptions and perhaps allowing bonuses to factor into the salary level calculation.

After the proposed regulations were published, and as required by the Administrative Procedures Act, the DOL accepted comments on the proposal from the business community, unions and the general public. Nearly 300,000 comments were provided during the 60-day comment period, and those had to be considered by the DOL as it worked on finalizing the regulations. This took time. It was also anticipated that the new regulations would take effect about 60 days after their publication, per the process typically followed by this agency.

The Final Rule

Today, the DOL completed the required process and published the final version of the regulations. The most significant elements are:

- The new minimum salary level will be \$913 per week (or \$47,476 per year);
- The minimum salary level will be adjusted every three years, based on the 40th percentile of the lowest census region of salaried employees and is expected to increase to at least \$51,000 starting January 1, 2020;
- The highly compensated worker test will start at \$134,004, and also will be adjusted every three years to the 90th percentile of all U.S. salaried workers;
- Up to 10 percent of the salary requirement may be satisfied by the payment of non-discretionary bonuses or commissions paid quarterly or more frequently; and
- These new rules will go into effect on December 1, 2016, thereby providing employers with a 200-day period to make adjustments and become compliant.

Thus, the magnitude of the salary level increase, while not quite as large as proposed, is still slightly more than double what it has been since 2004, and large enough so that over 4.2 million employees will be impacted. The frequency of the indexing is less than contemplated, but it will still potentially result in major rushes of reclassifications of employees every three years.

What Employers Must Do Now

Now that the regulations are finalized, employers must examine their compensation programs and determine which positions and employees are vulnerable to losing their exempt status. As to those jobs, employers may choose to increase salaries to protect the exempt status of some employees, but they also will have to address the salary compression impact of those increases and the likelihood that employees may still lose their exempt status in three years. As to those positions and employees whose exempt status cannot be salvaged, employers will have to reclassify them as non-exempt and develop policies and training programs regarding the new pay structures, time and attendance policies, benefit and bonus programs, etc.

What's Next?

There is a bill pending in Congress which would negate and override these regulations, and Congress also may attempt to pass resolutions to bar them from going into effect. These efforts are not likely to be successful under the current Administration. Lawsuits may be filed, as well. These would likely focus on the DOL's authority to have periodic automatic adjustments which side-step the rulemaking process many believe is required by the FLSA for making any change to those regulations. Other political pressure may also ensue.

In any event, employers should proceed as if the new rules will take effect on December 1, 2016. Dykema will be holding a series of seminars in Southeast Michigan, Chicago, San Antonio, Dallas and Los Angeles in mid-June, and we will announce the exact locations, dates and times for the seminars in the coming week.

For those wishing to consult with an attorney regarding options and best practices in the meantime, please contact the author of this alert, Rob Boonin, at rboonin@dykema.com or (313) 568-6707, or any attorney in Dykema's national labor and employment law practice.

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