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Employers Should Not Go Overboard On Proposed Changes to Overtime

Legal Alert

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Despite last weeks alarmist press reports, employers can hold off on calling their payroll providers and authorizing overtime for previously exempt managers. When President Barak Obama disrupted the news cycle by proposing changes to the overtime rules under the Fair Labor Standards Act, as is too often the case when the press reports on legal developments, many of the press reports covering the topic glossed over important details even suggesting that the President had changed the rules. The Presidents proposed rules have a number of hurdles to overcome before they transform overtime and there is significant opposition that may in fact limit or refine the proposed rules changes.

What is proposed?

Since 2004, federal law treated salaried workers who earn at least $23,660 and meet certain white collar exemption requirements as exempt from overtime. Salaried employees who meet the white collar exemption need not be paid overtime, or even minimum wage, no matter how many hours they work. For employees to be exempt from overtime, they must meet both the salary and the duties test, which means workers whose annual salary is less than $23,660 do not qualify for the white collar exemption and must be paid both minimum wage and overtime, even if they are otherwise white collar workers.

Under new rules proposed by President Obama, the threshold will move to $50,440 as early as 2016 and be adjusted annually based on the pay of the 40th percentile of full-time U.S. workers, although alternate methods of computing an ongoing adjustment are also being considered. If this rule is implemented in 2016, it would mean salaried employees whose annual earnings are less than $50,440 would not qualify for the white collar exemption even if they otherwise met the criteria for white collar employees. Additionally, under the proposal rule changes, those classified as highly compensated employees must earn at least $122,148 (rather than the current $100,000) in total annual compensation to be automatically exempt from overtime. This sweeping change is being touted as an income equality measure to combat employers practices of using the white collar exemption to avoid paying overtime to low level managers. In essence, if adopted, the new rule will mean employees who earn between $23,660-$50,440 and were not overtime eligible will have to be paid for overtime if they work more than 40 hours in a workweek.

What is next?

The proposal is not ready to be adopted by the Department of Labor. The Department of Labor is accepting comments from interested parties, including employers, for 60 days and considering additional changes which may materially affect which employees must be paid overtime. For instance, the Department of Labor may refine other non-salary aspects of the white collar exemption tests. Additionally, business groups and elected officials who oppose this change are vowing to fight it with legislation and litigation, which may

delay its implementation.

What should employers do now?

First, employers should be sure that they are properly using the white collar exemption even for employees with salaries above the current threshold. Employers need to remember that a salary that meets the threshold does not in and of itself make an employee exempt from overtime. There are specific tests for executive, administrative, professional, computer, outside sales and highly compensated employee exemptions that depend on the duties these employees perform and recent court rulings have refined and narrowed the application of these tests. Employers who have questions or concerns about compliance should consult with their counsel and consider a wage and hour audit to determine if they are currently in compliance with applicable federal and state laws regarding overtime pay.

Second, employers should plan for an increase in the salary threshold. Even if this rule change is not fully implemented, employers should expect that the threshold will increase from its current level. Employers, with the guidance of counsel, should begin to analyze how to best structure their workforces in light of coming changes. For example, employers should be evaluating whether it makes more business sense to start paying more employees overtime or hire more staff or restructure certain aspects of their workforces.

Third, employers should be careful not to forget about compliance with applicable state wage laws, which differ from the federal law and will not automatically change, even if the federal law does.

In sum, employers should expect that, one way or the other, the white collar exemption will be narrowed and more employees will be eligible for overtime. Now is the time for employers to ensure their current payroll practices and policies comply with the Fair Labor Standards Act and state law, but they can hold off on making any sweeping payroll changes until the new regulations are finalized and adopted, and the nuances of the new rules are ironed out.

If you have any questions, please feel free to contact Adam Gersh at adam.gersh@flastergreenberg.com.

For more information on the proposed changes to overtime rules, including news, updates and links to important information pertaining to legal developments that affect businesses ranging from cyber security liability arising from electronically-stored information to evolving issues with employees, subscribe to Adams blog, or twitter handle @AdamGersh.