MORE ON

- LABOR AND EMPLOYMENT
- COMMERCIAL/FINANCIAL

# Changes are on the way for employee overtime classifications

BY KATHRYN BARCROFT MAY 4, 2016

It is only a matter of time before the U.S. Department of Labor (DOL) announces the revised white-collar exemption regulations with respect to the reclassification of employees entitled to overtime pay in the workplace under the Fair Labor Standards Act (the "FLSA"). An article in the *National Law Review* reported that the white-collar exemptions should be announced soon, and that the DOL anticipates publishing the revised regulations by late spring or summer 2016. The DOL submitted the final rule regarding these regulations on March 14, 2016. There is a 90-day window, set by executive order, to review the regulations though the review period may be extended on a one-time basis for 30 days by the Director of the Office of Management and Budget. However, commentators opine that the amendments may be published in advance of the deadline. Employers should prepare for these imminent changes.

By way of background, the FLSA was first passed in 1938 to guarantee a minimum wage and to limit the number of hours an employee can work without receiving additional compensation. The proposed changes to the Act, drafted at the direction of President Obama pursuant to a March 13, 2014 Presidential Memorandum, address the statutory exemptions applicable to "white collar" workers, or those workers classified as executive, administrative, and professional employees. The amendments to the so-called "white collar" exemptions will increase salary and compensation thresholds so as to provide a larger number of employees entitled to overtime pay. The DOL predicts that proposed revisions will impact millions of workers and the companies that employ them.

Under the current version of FLSA, covered employees are guaranteed a minimum wage of $7.25 and are entitled to overtime pay for hours worked over 40 in a workweek at a rate not less than one and one-half times their regular rates of pay. Although most states have minimum wages well-above the federal rate (e.g. Governor Cuomo announced that the New York state minimum wage is being raised from $9 per hour to $15 per hour incrementally in the coming years), the current federal rate remains $7.25 per hour. Currently, under the FLSA, in order for an employee to qualify for the white collar exemption, the employee must be paid a fixed salary of $455 per week, or $23,660 per year, and primarily perform executive, administrative, or

professional duties as provided in the regulations. The "duties" component to the analysis analyzes the types of activities that the white collar employee engages in in order to determine whether their work duties qualify for exemption.

In June 2015, the DOL publicized proposed changes to FLSA's minimum wage and overtime standards which would raise the salary threshold to $970 per week, or $50,440 annually, for an employee to qualify for an exemption to overtime pay. As reported in the *National Law Review* article, at a February 2016 American Bar Association Meeting, the DOL Solicitor confirmed that the salary test would be "approximately $50,000" per year. The Solicitor commented that the amendments should also include a mechanism to provide for subsequent annual increases to the salary requirement. While the DOL solicited comments to the duties test, it did not propose any regulatory changes, so the final regulations will need to be reviewed closely to determine whether the test has been revised.

In anticipation of the announcement of a new compensation threshold and the required reclassification of certain employees, employers should consider conducting a "self-audit" to prepare for the changes. Any type of improper classification of employees for purposes of FLSA could result in hefty payouts by employers if they are not in compliance with the law. For example, as reported in a DOL news release, after a DOL investigation, Haliburton agreed to pay out approximately $18.3 million in overtime to 1,000 workers as a result its miscategorization of certain workers as exempt.

It is important for employers not to wait to implement an action plan until the final DOL rules are issued. Employers should implement an action plan now—a preemptory audit will provide for a seamless transition.

Employers should identify which employees will meet the new annual salary thresholds and determine whether any currently exempt workers will be reclassified from exempt to non-exempt and become entitled to overtime. The audit should focus not only on the new FLSA regulations but also on state wage and hour laws, which may be more restrictive, because an employer must comply with the law that provides the greatest benefit to the worker.

A company should also consult with counsel concerning how to document the reclassification and the proper means of communicating their new status to employees affected by the change. A company's newly classified employee will undoubtedly have questions and/or concerns about the new classification and how it will impact his or her compensation, position within the company, work duties, method of time reporting, and person to whom to report at the office.

Given the imminent changes to FLSA and the potential liability that can result from the denial of overtime pay to newly reclassified employees, a company should consult with an attorney that specializes in wage and hour law to properly assess how its employees will be classified under the new amendments. Companies should also stay abreast of the timing of the notification by the DOL, so that they can act promptly implement the required changes.