

Important Next Steps To Prepare For The New Overtime Rules

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Last week, the U.S. Department of Labor (DOL) issued highly anticipated changes to certain exemptions from the overtime requirements of the Fair Labor Standards Act (FLSA), which will significantly increase the number of employees who are eligible for overtime pay if they work more than forty hours in a workweek.

The changes, announced on May 18, 2016, will take effect on December 1, 2016. Given the significant impact they will have on many employers' business operations, employers should take immediate steps to familiarize themselves with the new rules and understand the requirements for compliance.

Legal Background

Under federal and New Jersey law, an employee who is classified as "exempt" is not entitled to be paid overtime, at a rate of one and one-half times his or her normal rate of pay, for hours worked in excess of forty in a workweek. Although numerous special rules and exceptions apply, to be classified as exempt an employee generally must be compensated on a salary basis at or above a minimum specified rate of pay, and the employee's job duties must primarily involve the performance of exempt functions as defined in DOL regulations. To be paid on a salary basis, an employee generally must be paid his or her predetermined, fixed salary, regardless of the hours actually worked.

The New Rules

The new rules more than double the minimum salary required under federal law for exempt "executive," "administrative" and "professional" employees – from \$455 per week or \$23,660 per year, to \$913 per week or \$47,476 per year. Under the "highly compensated employee" exemption, the minimum salary threshold is to increase from \$100,000 per year to \$134,004 per year. This exemption would not be relevant to an executive,

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administrative or professional employee who, on December 1, 2016, has an annual salary in excess of \$47,476.

Beginning on January 1, 2020, the minimum salary requirements for exempt employees will automatically be adjusted every three years, based on earnings data for full-time salaried employees. As New Jersey law generally adopts the federal law tests for classifying exempt employees, the changes to the federal minimum salary thresholds for exempt employees will also apply under state overtime law, absent any contrary action by New Jersey lawmakers.

According to the DOL, once the new rules take effect on December 1, over 4 million employees nationwide who are currently treated as exempt employees will be reclassified as non-exempt employees entitled to overtime pay for hours worked in excess of forty in a workweek. The DOL also expects the new rules to strengthen overtime protections for an additional 8.9 million employees who, although currently eligible for overtime because their job duties do not fit within an exemption, have annual salaries between \$23,660 and \$47,476, above the current threshold for exempt employees. Under the new rules, however, these employees definitively will be classified as overtime eligible, solely because their annual salaries are below the new \$47,476 threshold for exempt employees, and without the need to undertake the often counterintuitive and difficult analysis of whether their job duties are exempt.

In view of the anticipated broad impact of the new rules, absent any changes in its work schedules, an employer should be aware that there could be a material increase in its payroll expenses as a result of the reclassification of certain employees as non-exempt employees. Also, we expect that when the new rules are finalized, the New Jersey Department of Labor will continue to ramp up its already robust audit activities in this area. In addition to an employer being charged additional payroll taxes in certain instances, these increased audit activities are likely to involve a close review of the 1099 Forms issued by the employer to individuals who performed services for it, to determine if any of these individuals should be reclassified as W-2 employees.

What Should Be Done Today

Employers would be well advised to review the classification of all workers who are currently classified as independent contractors, treated as leased employees, or who otherwise render services in a capacity other than as an employee, to determine if they should appropriately be reclassified as W-2 employees. This issue serves as the starting point to determine if a worker may be entitled to overtime pay, however reclassification as an employee could also entitle the worker to retirement and health benefits and certain other employer- provided benefits that are not provided to independent contractors. Also, if a worker is reclassified as an employee, his or her employer would then be responsible for determining if that employee has the documentation necessary to be legally employed by it.

After reviewing its workforce to identify all employees, the next step would be to consider whether certain individuals would be reclassified as non-exempt employees under the new rules. An employer should

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then determine what additional payroll expenses would be incurred as a result of such reclassifications.

After an employer has determined the additional payroll expenses it may be subject to under the new rules, there are various steps that may be considered to better control those expenses, including:

- Review relationships with all non-employee workers, including independent contractors and leased employees, and consider how these relationships could potentially be restructured to better ensure that their classification as non-employees will be respected.
- Consider the steps that can be taken to manage overtime expenses, including potentially hiring additional employees and spreading the additional hours among those employees who typically work fewer than forty hours per week, to help keep more employees below the threshold for receiving overtime pay.
- Review and revise retirement plans, group health plans and other benefit arrangements, to the extent appropriate, to preclude from participation any workers who are reclassified as employees.

To learn more about the new overtime rules, or if you have questions regarding their potential impact on your business operations, please contact the authors of this Alert, **Thomas C. Senter** and **Lisa J. Clapp**