

FLSA 2015: Employee Classification and Revised Exemptions

Change is coming to the Wage and Hour landscape and employers should take time now to analyze the classification of each exempt employee to avoid large headaches and penalties later in the year.

The federal Fair Labor Standards Act (“FLSA”) requires covered employers to pay nonexempt employees at least the federal minimum wage (currently \$7.25 per hour) for all hours worked and overtime pay at a rate of not less than “one and one-half times the regular rate” the employee customarily earns for hours worked over 40 in a 168 hour workweek. The FLSA defines the term “employ” to include the words “suffer or permit to work.” Generally, “hours worked” includes all time an employee must be on duty, on the employer premises, or at any other prescribed place of work, but also includes any additional time the employee is “suffered or permitted” to work. Employees must be paid for work “suffered or permitted” by the employer even when the employer does not specifically authorize the work performed by the employee. If the employer knows or has reason to believe that the employee is continuing to work, the time is considered hours worked.

Generally speaking, employees must be paid overtime for hours worked in excess of forty (40) per week. However, this general position is limited by several exceptions.

Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay requirements for employees employed as bona fide executive, administrative, professional, and outside sales employees. The exemptions identified in Section 13(a)(1) are typically referred to as the “white-collar exemptions” and most of the regulations affecting the exemptions have not been revised since 2004. Other potential exemptions can be found in Sections 13(a)(1) and 13(a)(17) which exempt certain computer employees, and in Section 213(b)(1) which exempts certain motor carrier employees. To qualify for exemption from overtime, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455 per week, free and clear (i.e. without deductions for fluctuations in the number of hours worked or the quality of performance). In order to be exempt, an employee must be paid on a salary basis. The salary basis upon which an employee is paid must be predetermined and must be the same amount each pay period. In other words, job titles alone do not determine exempt status. In order for an exemption to apply, an employee’s specific job duties and salary must meet all the requirements of the Department’s regulations. Where these requirements are satisfied, the employee is not entitled to be paid overtime pay, irrespective of the number of hours the employee works in a workweek. These exemptions, however, do not apply to manual laborers or other “blue collar” workers who perform work involving repetitive operations with their hands, physical skill, and energy. The employer has the burden of establishing by a preponderance of the evidence that it is entitled to the benefit of an exemption under the FLSA and that the employee is not entitled to overtime.

On March 13, 2014, President Barack Obama issued a Memorandum to the U.S. Secretary of Labor, Thomas E. Perez, to modernize and streamline existing overtime regulations for executive, administrative, and professional employees. President Obama determined that the regulations

regarding exemptions for white-collar workers had not kept up with our modern economy with the result that these regulations were outdated and “millions of Americans lack[ed] the protections of overtime and even the right to the minimum wage.” Following the issuance of the Memorandum, the U.S. Department of Labor conducted several “listening sessions” and solicited comments and input on how best to revise the exemptions to address the President’s concerns. It had been widely anticipated that the U.S. Department of Labor (the “Department”) would issue proposed new exemption rules in November 2014. Then, following the issuance of the proposed new rule, the Department would accept comments for a definite period of time (usually 30 to 60 days) receive testimony on the proposed regulatory revisions, and issue the final rule in late winter or early spring of 2015. However, in early October, the Department confirmed that it was “months away from a proposed regulation.” It is now expected that the proposed new rule will be issued in the spring of 2015.

Expected Revisions

The goal of the administration’s new rule will be to reduce the number of people classified as exempt, entitling more people to overtime compensation (keep in mind that these anticipated changes are in addition to the administration’s efforts to raise the minimum wage to \$10.10 per hour). There are two (2) areas that the revised regulations will likely address: 1) increasing the minimum salary threshold for exemption; and 2) revising the definition of “primary duty”.

Many anticipate that the minimum threshold of the salary test will see a rather significant increase, with some suggestions of an immediate increase from \$455 per week to \$970 per week and other suggestions of a gradual increase over a two (2) to three (3) year period up to \$1,000 per week.

Revision of the definition of an employee’s “primary duty” will also likely limit the number of employees who qualify for the executive employee exemption. The term “primary duty” has been defined as the “principal, main, major, or most important duty that the employee performs.” Determination of an employee’s primary duty must be “based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.” The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee, but time alone is not necessarily the sole test. A number of factors are considered in determining an employee’s “primary duty” including:

- The relative importance of the exempt duties as compared with other types of duties;
- The amount of time spent performing exempt work; and
- The employee’s relative freedom from direct supervision.

Restricting the definition of “primary duty” will have a profound impact on a large number of employers in a variety of industries. It is anticipated that the revision will require that exempt employees perform yet to be identified “exempt duties” during more than 50% of their time spent in employ. Additionally, the new rule will likely remove the “concurrent duties” language found in the present regulations, which permits an exemption for managers who perform the same or similar duties as those they manage.

Penalties

Should the Department determine that an employer improperly classified an employee as exempt, the employee would be entitled to compensation for back wages and overtime owed for a period of either two (2) or three (3) years, a variety of penalties, and in most cases, attorney fees. Additionally, the employer could face taxes, FICA, FUTA, benefit contributions or the value of lost benefits, plus penalties, interest, and other damages. In short, the failure to properly classify an employee may prove very costly to the employer

What to do NOW?

In expectation of eventual implementation of revised exemptions, employers should plan now for an increase in wage and hour audits by the Department. Employers should begin to analyze each individual currently classified as exempt to determine the current salary and number of hours worked, and to perform a detailed analysis of the job description in comparison to the actual duties performed. This analysis should allow an employer to determine which employees will need to be reclassified or what changes the employer will need to make to maintain the exempt status of an employee when the revised regulations are released.



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