Shumaker

APRIL 25, 2019 | PUBLICATION

Client Alert: Here We Go Again! Employers Should Begin Preparing For New Overtime Regulations

SERVICE LINE

Labor & Employment

RELATED PROFESSIONALS

W. Jan Pietruszka

MEDIA CONTACT

Wendy M. Byrne
wbyrne@shumaker.com

Download Client Alert: Here We Go Again! Employers Should Begin Preparing For New Overtime Regulations

On May 18, 2016, the Department of Labor ("DOL") issued its final regulations updating the Fair Labor Standards Act's ("FLSA") overtime provisions for the executive, administrative, professional, and highly-compensated exemptions. The 2016 regulations would have increased the minimum annual salary for these exemptions to $47,476.00. Employers obtained a last minute reprieve when a federal court blocked the regulations days before their implementation. Since the court's final decision, the Trump administration has been seeking public comments on new proposed regulation. On March 7, 2019, the DOL issued the new proposed overtime regulations.

Existing Law Under the FLSA

The FLSA, first enacted in 1938 and amended several times since then, provides for a federal minimum wage, a standard 40-hour workweek, and pay at time-and-a-half for all overtime hours, among other requirements. However, the law also includes several exemptions from its provisions for certain classes of workers, the most common of which are the so-called, "white collar" exemptions. These exemptions include three subcategories of workers: (1) executive (supervisory/management employees); (2) administrative (HR professionals, insurance adjusters, and other employees exercising substantial discretion as to important matters); and (3) professional (doctors, lawyers, accountants, teachers, and other learned professionals with advanced degrees). Unlike non-exempt employees, none of the aforementioned classes of employees are entitled to premium pay for overtime hours.

To qualify for these exemptions, the employer must satisfy a two-part test. First, the employee's actual job duties must be of a particular nature for each of the exemptions. Second, the employee must meet the "salary basis" test, which currently requires that the employee be paid a set salary of no less than $455.00 per week ($23,600.00 annually).

What is Changing and What is Not (We Think)

By far the most significant change to the FLSA under the 2019 proposed overtime regulations is a sizeable increase in the required salary basis. Although employers will need to await publication of the final regulations to know the exact amount, the proposed regulations set the new minimum salary at no less than $679.00 per week ($35,308.00 per year). While this is a significant increase for employers, it is significantly less than that $47,476.00 proposed in 2016.

The proposed regulations also increase the minimum total compensation for the highly-compensated employee exemption. This exemption applies to employees who meet some, but not all, of the required duties for other exemptions and currently are paid at least $100,000.00 annually. The proposed regulations set the new minimum total compensation for the highly-compensated employee exemption to $147,414.00 per year. Interestingly, this proposed amount is significantly higher than the $134,004.00 amount proposed in 2016.

Like the 2016 regulations, the proposed regulations will again allow employers to satisfy up to 10 percent of the minimum salary required for the executive, administrative, and professional exemptions with the payment of non-discretionary bonuses, incentives, and commissions. However, unlike the 2016 regulations, the 2019 regulations will allow employers to pay such incentive compensation annually instead of quarterly.

Finally, while the 2016 regulations provided that the minimum salary would increase automatically every three years, the proposed regulations do not include any automatic updating. However, in its commentary explaining the proposed regulations, the DOL committed to increasing the minimum salary amount every four years, but only after seeking public comment.

What Employers Need to Do to Prepare

Employers need to begin preparing now for implementation of the new overtime regulations. As the above changes are merely proposed regulations, employers should not change employees' exempt status or increase salaries until such time as the final regulation is published. It is expected that the final regulation will not become effective until 60-90 days after its publication, likely sometime in early 2020.

As it pertains to employees who are currently exempt but are not paid at least $35,308.00, there are really only two options for employers under the new regulations: increase their employees' salaries above the new threshold, or treat such employees as non-exempt. The first option will come at an increased cost, and the DOL estimates that as many as 1.3 million currently exempt employees will become non-exempt unless their salaries are increased. The second option requires that an employer track the employee's hours and pay him or her the overtime premium for all hours over 40 in a workweek.

We recommend that employers begin working now to analyze their workforce to determine how they will manage the new overtime regulations. Employers should begin by identifying those employees most likely to be affected by the proposed changes. For employees who make far less than the proposed new salary minimum, the decision is likely an easy one – it will almost certainly be more beneficial to treat such employees as non-exempt than to increase their current salary. For exempt employees who are closer to the new salary minimum, employers should begin requiring them to track their hours on an interim basis, which will allow the employer to accurately determine the relative costs to the company of reclassifying versus raising the salary of a particular employee. Many employers have no more than a general idea as to how many hours their exempt employees actually work—this is not surprising since it previously had not mattered. During the interim timekeeping period, exempt employees should be required not only to clock in and out at the beginning and end of a shift, but also for lunch breaks lasting at least 30 minutes. Employers should also require exempt employees to track time spent outside of work engaged in work tasks—checking emails, answering phone calls, and similar tasks. All of this work is compensable for non-exempt employees

and contributes to the 40-hour-per-week overtime threshold. This timekeeping need not utilize fancy machinery or software—a notepad and pen will work just fine.

The employer should closely monitor its exempt employees' hours over a period of several weeks and determine the best course of action. For employees who are already near the proposed salary basis and work a high number of hours, the math will likely dictate that increasing their salaries makes the most financial sense. For those who work close to 40 hours and rarely work overtime, it may be more sensible to treat them as non-exempt and simply pay overtime when applicable. Paying non-exempt employees a salary is also an option. There are a number of ways to ensure compliance with the new overtime regulations, but it is imperative that all employers begin the necessary analysis so that the appropriate decisions can be made.

One final consideration is employee morale, and employers should begin developing appropriate messaging to address these changes. Many employees may not appreciate the perceived loss in status which accompanies a switch from a salaried to an hourly role. The key message to employees should be that these changes should not result in a decrease in pay. Rather, the goal is to maintain pay at roughly the same level, which may take a bit of adjustment during the first few months to ensure that the hourly wage being paid and the amount of overtime being worked match their current salary. A silver lining to these changes is that they also give employers some cover to reclassify employees whose duties perhaps already made their exemption suspect – now employers have a built in reason to reclassify such employees as non-exempt without raising red flags. Developing consistent, positive messaging well before the new regulations take effect will go a long way towards maintaining a happy and productive workforce.

Clearly, the impending changes to the FLSA's overtime regulations represent a significant challenge to employers. However, with careful thought and advance planning, employers can navigate this new landscape with minimal cost and disruption. If you have any questions regarding the new overtime regulations, or any other general employment compliance concerns, please contact Jan Pietruszka at jpietruszka@shumaker.com or 813.227.2245.

© 2026 Shumaker, Loop & Kendrick, LLP. All Rights Reserved. Privacy Policy/Disclaimer

Shumaker