

COUNSEL'S CORNER

U.S. Department of Labor Publishes Final FLSA Overtime Rule Affecting the “Exempt” Status of Millions of Employees

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On May 18, 2016, the U.S. Department of Labor (DOL) announced the publication of its final Fair Labor Standards Act (FLSA) overtime rule, which, most notably, significantly increases the salary level threshold for the FLSA’s “white collar” exemptions from \$23,660 to \$47,476 annually (or from \$455 to \$913 per week). As a result, millions of executive, administrative, and professional employees who are paid less than the new salary threshold will be entitled to overtime pay under the FLSA when the rule takes effect on December 1, 2016. Moreover, in an effort to prevent the new threshold from becoming outdated, the DOL implemented a mechanism to automatically update the salary level every three years.

The DOL has also raised the annual compensation level for exempt status under the “highly compensated employee” test from \$100,000 to \$134,004, equal to the salary level of the 90th percentile of full-time salaried workers nationally. Similarly, this threshold is also subject to an automatic update every three years.

FLSA Tests for Exempt Status

As a general rule, the FLSA provides for exemptions from its minimum wage and overtime pay requirements for employees working in a bona fide executive, administrative, or professional capacity. While the FLSA has not defined these terms, the regulations have set forth tests – the salary basis and salary level test and the duties test – that generally must be met in order for the exemption to apply.

The salary basis test requires an employee to regularly receive a predetermined amount of compensation each pay period, which, subject to limited exceptions, cannot be reduced due to variations in the quality or quantity of the employee’s work – to be exempt, such employee must receive his or her full salary for weeks in which the employee works regardless of the number of hours worked in such week.

The salary level requirement sets forth the minimum amount of such predetermined compensation that staffing firms and other employers must pay to their employees in order to qualify as exempt under federal law, which, prior to the publication of the new rule, was \$455 per week. (For New York employers the current minimum weekly salary for most exempt “white collar” employees is \$675.) However, the DOL has dramatically increased this threshold to \$913 per week, or \$47,476 annually. For staffing firms with commissioned employees, etc., the new rule does allow employers to use compensation for nondiscretionary bonuses, commissions and

other incentive payments to account for up to ten percent of the new minimum salary level, provided such payments are made to employees on at least a quarterly basis.

The new rule also establishes a mechanism to automatically update the salary and compensation levels every three years to maintain a threshold equal to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census region, which is currently the South. These automatic updates will begin on January 1, 2020, when it is estimated that the salary threshold will increase to \$51,168. The DOL will publish the updated salary levels 150 days in advance of their effective dates, beginning on August 1, 2019 for the 2020 update.

The duties test (which also must be satisfied for an overtime exemption to apply) requires that the employee's job duties and tasks primarily involve executive, administrative, or professional tasks, as defined in the regulations, regardless of the employee's job title. This requirement remains unchanged. Internal recruiters and account managers and perhaps other personnel may meet the duties test.

Generally, an employee works in an exempt executive capacity if the employee regularly supervises at least two employees, management is a primary duty, and the employee has authority with regard to the job status of other employees (i.e., the ability to hire, fire, promote, or delegate work). The regulations provide that exempt administrative job duties involve office or non-manual work, which is directly related to running or servicing the business of the employer and involves the exercise of discretion and independent judgment on significant (usually financial) matters. Lastly, professional job duties generally require some advanced knowledge in a field of science or learning acquired through advanced education, or talent in a recognized artistic or creative field. "Learned professionals" such as doctors, lawyers, dentists, accountants, teachers, engineers and architects (among others) typically satisfy the duties test for professionals.

Please keep in mind that these are general requirements for satisfying the abovementioned duties tests. The regulations set forth more detailed guidelines that should be reviewed and analyzed when trying to determine an employee's exempt status.

Planning Ahead

Given the significant increase in the salary threshold from the new rule, countless employees who currently meet the executive, administrative, and professional duties tests will no longer be considered exempt as of December 1. These employees will now be entitled to FLSA overtime pay, creating numerous financial and legal implications for staffing firms to consider moving forward. It is crucial that staffing firms begin planning for the impacts of the new rule given the likely effect on their internal workforce.

Accordingly, staffing firms should analyze whether their exempt internal employees, particularly recruiters and account managers, who make less than the new salary threshold regularly work over 40 hours on a weekly basis. This tracking of hours will allow employers to assess whether it makes sense financially to either (i) raise an employee's salary or guaranteed draw above the new threshold in order to preserve the exemption, (ii) accept the employee's new

non-exempt status and begin paying the employee overtime, or (iii) limit the employee's weekly work hours to a maximum of 40. Staffing firms should further assess the impact of adjusting other forms of compensation such as commissions, bonuses and other benefits, while also considering the importance of attracting and maintaining talented and valuable recruiters and salespeople.

Given the increase in the numbers of non-exempt employees from the new rule, it would be wise for staffing firms to review their timekeeping methods and policies to assess what changes, if any, need to be made in order to ensure the accurate recording of employees' working and nonworking time. Timekeeping procedures should adequately track employees' work hours before and after regular business hours, including work performed on weekends or conducted from home or off-site in order to calculate any entitlement to overtime pay. Staffing firms should implement and strictly enforce timekeeping policies that, among other things, prohibit employees from working any "off the clock" hours, prohibits supervisors from requesting employees to work "off the clock" hours and requires employees to immediately notify the firm of any such request. Clearly stated timekeeping policies and procedures can help to mitigate the risk of wage and hour litigation, in particular claims for overtime pay.

Now is also a good opportunity for staffing firms to perform a self-audit to determine whether its exempt employees are properly classified in accordance with the duties tests mentioned above. It is possible that some employees will meet the salary level, even following the effective date of the new rule, but do not actually qualify as exempt because of shortcomings in satisfying the above-described duties tests. Such employees will need to be reclassified and staffing firms will need to ensure any status changes are accurately reflected in payroll.

Staffing firms must also consider the application of related state and local wage and hour laws. Where state or local law overlaps with the FLSA and provides more employee-friendly protections, those protections will generally apply. For example, the current minimum wage in New York State is \$9.00 per hour – greater than the current federal minimum wage of \$7.25. Given the more employee-friendly state law, New York employers must pay their non-exempt employees at least the \$9.00 per hour rate, and, more importantly, overtime pay of at least one and one-half times \$9.00 for hours worked over 40 in a workweek. Therefore, it is important that staffing firms consult with their local employment counsel to parse through any differences between applicable state and local law and the FLSA.

Finally, it would be prudent for staffing firms to determine the best ways to communicate any changes, in employment status or otherwise, to employees in order to minimize morale problems or even prevent litigation.

These are some of the ways in which staffing firms should begin planning for the effects of the new FLSA rule. There will undoubtedly be difficult transitions. Accordingly, staffing firms are encouraged to consult with their employment counsel to help analyze these issues and determine best practices moving forward.

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