

New Proposed Rules Aim to Increase Number of American Workers Eligible for Overtime

Q I have heard about recent actions by the U.S. Department of Labor potentially affecting the number of workers who are entitled to receive overtime pay. Should I be concerned?

A Yes. The U.S. Department of Labor issued two important documents in July with the intent of increasing the number of American workers entitled to receive overtime pay. On July 6, the DOL proposed new rules that would more than double the minimum annual salary threshold necessary for a “white collar” employee to be exempt from overtime pay requirements—from \$23,600 to \$50,440. On July 15, the DOL issued an interpretive guidance that clarifies the six factors to be considered before a worker can be classified as an independent contractor. The intent of both documents is to bring more workers under the protections of the Fair Labor Standards Act, including the FLSA’s requirement for time-and-a-half overtime pay after 40 hours of work per week.

Salary Threshold for Overtime

In its proposed new salary threshold rule, the DOL would update the FLSA provision that exempts certain white collar workers from the FLSA’s minimum wage and overtime pay protections. Generally, the following three-part test applies to determine whether the white collar exemption applies: (1) the employee is paid a predetermined and fixed

salary that is not subject to reduction due to variations in the quality or quantity of work performed (the “salary basis test”); (2) the amount of salary paid must meet a minimum specified amount (the “salary level test”); and (3) the employee’s job duties must primarily involve executive, administrative or professional duties, as defined by the DOL (the “duties test”).

The proposed new rule is focused on the second part of the three-part test—the salary level test—and would raise the minimum annual salary amount from the current level set in 2004, with automatic annual upward adjustments based primarily on increases in the consumer price index. (The \$50,440 amount is based on the 40th percentile of weekly earnings for full-time salaried workers.) All components of the three-part test must be satisfied in order for the FLSA’s white collar exemption from overtime pay to apply.

The intent of the new rule is to establish a significantly higher, and less-inclusive, bright-line test for the white-collar exemption from FLSA overtime pay requirements. DOL estimates that 21.4 million exempt workers could be affected under its proposal to tighten the white collar exemption. DOL also is seeking public comment on whether the “duties test” should be modified to narrow its scope as well (e.g., by adding a requirement that at least 50 percent of an exempt employee’s time be spent performing actual executive and administrative duties). Comments on the proposed rule are due by Sept. 4.

Employee or Independent Contractor

The DOL has clarified and emphasized that the presumption under the FLSA is that workers are employees rather than independent contractors, and so are entitled to the protections of the FLSA, including overtime pay and other employee benefits. It explains that a six-factor “economic realities” test applies in determining whether a worker is an employee or an independent contractor. Those six factors, all of which must be considered together, are: (1) the extent to which the work performed is an integral part of the employer’s business; (2) the worker’s opportunity for profit or loss depending on his or her managerial skills; (3) the extent of the relative investments of the employer and the worker; (4) whether the work performed requires special skills and initiatives; (5) whether the relationship between the worker and the employer is permanent or indefinite; and (6) the degree of control exercised or retained by the employer.

The ultimate question the six factors are designed to answer: Is the worker “economically dependent” on the employer or truly in business for him or herself? If the worker is economically dependent on the employer, then the worker is an employee. The DOL emphasizes that the application of the economic realities factors “is guided by the overarching principle that the FLSA should be liberally construed to provide broad coverage for workers.”

The DOL’s proposed rule and guidance reflect the policy

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initiative the Obama Administration announced in a presidential memorandum on March 13, 2014, which instructed the DOL to look for ways to ensure that the FLSA’s overtime protections are “fully implemented.” If the DOL finalizes the proposed rule, which is expected, all employees making \$50,440 or less per year would be eligible for overtime pay as non-exempt employees. The new rule will place an extra premium on accurately recording, monitoring and managing the hours worked by an increased number of non-exempt employees, including how to handle work done out-of-office, such as responding to emails in the evening or working at a conference over a weekend.

The Bottom Line

Associations need to make sure that they properly classify their workforce and plan to pay overtime, when earned, to all employees making less than \$50,440, regardless of how they are classified. **■**

The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.