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New FLSA Rules Put Focus on Compliance

By Stephen Miller, CEBS 7/1/2015

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LAS VEGAS—The Department of Labor's (DOL's) proposed rule (/legalissues/federalresources/pages/dol-announces-ot-changes.aspx) to limit the Fair Labor Standards Act's (FLSA's) white-collar exemptions is likely, when finalized, to add to "the explosion of class-action litigation under the wage and hour statute," cautioned Robert A. Boonin, an attorney in law firm Dykema's Detroit and Ann Arbor, Mich., offices.

Boonin spoke at the Society for Human Resource Management's 2015 Annual Conference & Exposition on June 30, the day the proposal was released. The proposed rule subsequenty was published in the *Federal Register* (http://www.gpo.gov/fdsys/pkg/FR-2015-07-06/pdf/2015-15464.pdf) on July 6, 2015.

Changes to Salary-Level Test

Under the proposed rule, the salary threshold above which employees would be exempt from overtime pay would be the 40th percentile of weekly earnings. The DOL projects that the 40th percentile weekly wage in the final rule would likely be $970, or $50,440 per year for a full-time worker.

» As a result, Boonin noted that the proposal would alter the FLSA's salary-level test by more than doubling the minimum salary amount that classifies an employee as exempt from mandatory overtime, by raising the salary threshold from the current level of $23,660 per year to $50,440 ($970 per week).

"That is huge," Boonin said, and is likely to affect millions of employees currently considered exempt from overtime.

To avoid paying overtime to employees who would need to be reclassified as nonexempt, employers could increase the employees' salaries to at least $50,440. ("That would be the employees' preference," Boonin noted.) Alternatively, employers could reduce the hours of these employees, or they could pay a lower hourly rate so that, when multiplied by time-and-one-half, weekly compensation remains unchanged.

These "may be steps employers feel compelled to take" but they could leave employees unhappy, Boonin said. However, "At the end of the day, employers are going to figure out how to make this work" so it doesn't hurt their bottom line, he noted.

Changes to Duties Test Possible

While focusing on the salary-level test, the DOL did not specifically address revising the other main prong for determining exempt status, the duties test (http://washingtonovertimelaw.com/Duties_Test.html), Boonin said. However, the DOL solicited comments on a series of questions regarding the duties test that "might indicate changes could appear in the final rule," Boonin observed.

Comments on the proposed rule are due Sept. 4, 2015.

Defining Exempt Duties

Currently, a worker's primary duties are determined by emphasizing the character of the job as a whole, noted Tammy McCutchen (:% 20http:/edit.shrm.org/hrdisciplines/compensation/articles/pages/prepare-to-reclassify-employees.aspx), former administrator of the DOL's Wage and Hour Division under President George W. Bush and an employment attorney with Littler, when she addressed SHRM's 2015 Employment Law & Legislative Conference in Washington, D.C., last March. One possibility regarding future changes in the duties test, McCutchen said, would be adoption of California's requirement that more than 50 percent of an employee's time must be spent on overtime-exempt duties each week for the position to be classifiable as exempt. While the DOL might view adoption of a percentage threshold as a way to reduce ambiguity, in practice this could mean "conducting a time study for every employee," McCutchen said.

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Eliminating the concurrent duties exemption would particularly affect employees whose primary duty is to manage a small enterprise or a subdivision of a larger enterprise while also undertaking nonexempt tasks, she pointed out.

Stepped-Up Enforcement

Some 90 percent of employment class actions are wage and hour cases, Boonin pointed out, and "the DOL estimates that 70 percent of employers are violating the FLSA in some way." Under the Obama administration, Secretary of Labor Thomas Perez and Wage and Hour Division Administrator David Weil have been committed to stepped-up enforcement.

The financial consequences of FLSA violations can be steep and include:

- Amount of unpaid overtime for the past two to three years, depending on the statute of limitations.
- Fines, interest and possible criminal sanctions.
- Attorney fees for prevailing employees' attorneys. "We can generally settle for damages, but the fight is almost always about attorneys' fees," Boonin noted, which can amount to millions of dollars.

Common Pitfalls

To avoid enforcement actions and lawsuits, employers can take steps to avoid common FLSA pitfalls. At the top of that list is making sure employees are not misclassified as exempt.

As part of the FLSA's primary duties test, an exempt employee must exercise "independent judgment and discretion" with respect to "matters of significance," Boonin explained. This includes having "authority to formulate, affect, interpret or implement management policies or operating practices."

While that might sound clear-cut, it's the crux of most FLSA litigation.

For instance, "administrative assistants are frequently misclassified," Boonin said. "Only 2 percent probably have sufficient exercise of independent judgment and discretion to be exempt."

The classifications of low-level accountants (if they're really bookkeepers), stockbrokers and entry-level engineers also can trip up employers. So can the classifications of assistant managers and low-level supervisors. "It can be a question of how much of their jobs are nonexempt duties as opposed to actual management," particularly in small firms and retail operations, Boonin said.

Off-the-clock working violations are another problem for employers, including failure to pay for all time worked by not properly recording all work time. "The workday includes the period between the commencement and completion of an employee's principal activities," Boonin noted, but that can be subjective.

To avoid being sued, he said, employers should have a safe harbor policy in writing that tells employees, "If we make a mistake with overtime time in error, you let us know and we will correct it."

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