

Overtime Pay - to whom I may, and to whom I must

Overtime pay has been in the news after the Department of Labor recently issued proposed regulations, which would dramatically overhaul the overtime rules. If the proposed rules become law, millions of non-union, white-collar workers will be eligible for overtime pay. More than 6.5 million businesses with 110 million workers will be impacted. The vast majority of these employers would be small businesses.

Exempt and nonexempt employees

Most executive, administrative, professional, and outside sales employees are not covered by union contracts, which control overtime pay. However, they are covered by the Fair Labor Standards Act (FLSA). Many employers assume that the overtime rules do not apply to salaried employees. This is incorrect. The rules apply to all salaried workers unless they are deemed "exempt" employees. Even if they are exempt, they are entitled to overtime if their pay is below a certain threshold.

All employees must be classified as exempt or non-exempt under the FLSA. When an employee is exempt from the FLSA, it generally means that he or she does not have to be paid in accordance with the law's overtime requirements. Non-exempt employees are entitled to overtime pay at the rate of time and one-half their regular rate of pay for all hours worked in excess of 40 hours per week. Keep in mind that employees who are paid an hourly wage are automatically considered to be non-exempt.

The FLSA also imposes salary and duties tests to gauge if an employee is exempt or nonexempt. The salary threshold is \$155 weekly or \$8,060 annually. The proposed rules would raise the threshold to \$425 weekly or \$22,100 annually. Job duties required to qualify for exemption were written in 1949 and haven't been updated. It's important to remember that titles do not control an employee's duties. A person may have the title "manager" but his or her duties may not be managerial. In that case, the employee would be entitled to overtime pay under the FLSA.

Classifications

The proposed rules explain how to identify executive, administrative, professional, outside sales, and computer employees.

Executive employees

--Primary duty is managing the enterprise, a department, or subdivision.

--Customarily and regularly direct the work of two or more employees.

--Authority to hire or terminate employees.

Administrative employees

--Primary duty is performing office or non-manual work directly related to the management or general operations of the employer or its customers.

--Holds a "position of responsibility," which involves either performing work of substantial importance or work requiring a high level of skill or training.

Professional employees

--Primary duty is performing office or non-manual work requiring knowledge in an advanced field of learning or work requiring invention, imagination, or talent in a field of artistic endeavor.

Outside sales

--Primary duty is making sales or obtaining orders/contracts.

--Customarily and regularly work away from employer's place of business.

Computer employees

--Primary duty involves system analysis techniques and procedures, design and development of computer systems or programs, or any combination of these responsibilities.

In addition to these groups, the FSLA expressly exempts many other workers. For example, agricultural employees, seamen, and companions to ill or aged persons are not covered.

Millions more covered

If the proposed rules become law, millions of salaried employees, working more than 40 hours per week but earning less than the new threshold of \$22,100 annually, will be eligible for overtime pay. Business owners have some options. Let's look at an example.

ABC Co. employs a large number of restaurant managers who work 45 hours per week. They are salaried employees who direct the work of two or more employees. Their weekly compensation is \$400. Under the proposed rules, these employees would be automatically entitled to overtime because their weekly compensation is below \$425.

ABC Co. has some choices. It can:

--Reduce the employee's work week to 40 hours;

--Pay overtime for hours worked in excess of 40;

--Change the employee's duties so they remain exempt; or

--Raise the employees' salaries above the \$425 threshold.

Don't forget state law

More than one-half of the 50 states have laws governing overtime. Some have more demanding requirements than the FSLA. Others do not.

Planning for future changes

Overtime pay is in a great state of flux because of the proposed rules. The traditional framework, which has been in place for more than 50 years, will be vastly re-designed. Business owners must review all the duties and classifications of every employee to stay in compliance with the FSLA or they could be hit with huge back pay awards. An employee who was exempt under the

old rules may not be under the new ones and vice versa. Contact this office today. We can draft a blueprint to keep you in compliance with the FSLA and state law.