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Richard D. Alaniz • Nov. 14, 2016



Starting December 1, millions more American workers will be eligible for overtime, thanks to a new U.S. Department of Labor rule that takes effect on December 1st. Under the previous guidelines, certain salaried workers who made less than \$23,660 per year were entitled to receive overtime when they worked more than 40 hours a

week, even if they weren't hourly. Under the new rule, most salaried workers who

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lawsuits have been filed to postpone it. A delay would provide "breathing room for retailers large and small struggling to comply with the changes during their busiest time of year," said National Retail Federation (NRF) Senior Vice President for Government Relations David French in a statement.

Whether the action takes effect on December 1st or is delayed by a few months, it will have a significant effect on employers, workers, and the U.S. economy. Employers should prepare now for whatever happens, in order to minimize the financial cost of complying and the legal risks of failing to comply.

The New Rule

The federal Fair Labor Standards Act (FLSA), passed in 1938, guarantees a minimum wage to almost all employees in the United States, and requires employers to pay overtime when employees work more than 40 hours in any workweek. There are, however, several exemptions to the overtime requirements. Employees who are exempt from overtime requirements under federal law most often fall under one (or more) of five exemptions (the so-called "white collar" exemptions): executive, administrative, professional, computer employees, and outside sales.

Under the FLSA, in order to classify a position as exempt, generally that position must pass both a salary test and a duties test. Currently, the salary test requires a weekly salary of \$455 per week (or \$23,660 per year). The duties test depends upon the exemption, but typical duties to look for include: directing and supervising the work of others; the authority to hire, fire, and promote; non-manual work; exercising independent judgment and discretion; advanced knowledge in a field of science and learning through prolonged course of instruction; or sales performed away from the employer's place of business.

Under the new rule, the salary test will more than double from \$455 per week to \$913

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Challenges to the Rule

Several groups, including the U.S. House of Representatives, have sought to delay the scheduled December 1st implementation. On September 28th, Congress passed the Regulatory Relief for Small Businesses, Schools and Nonprofits Act by a vote of 246-177, mostly along party lines. Under the bill, the new overtime pay rules would be postponed until June 1, 2017. A similar bill has been introduced in the Senate, but its chances of passing are questionable. Even if the bill is passed, Obama has said he will veto it.

Two lawsuits have also been filed against the new rule. Twenty-one states—Alabama, Arizona, Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, New Mexico, Ohio, Oklahoma, South Carolina, Texas, Utah and Wisconsin—have filed a lawsuit in the Eastern District of Texas against the Labor Department, Secretary Perez, and other federal officials to stop the new overtime rules.

In a separate lawsuit filed in the same court, more than 50 business groups have banded together to try to stop the rule. The groups include the NRF, the National Federation of Independent Business, and the National Association of Manufacturers. According to the lawsuit, the Labor Department exceeded its statutory authority in issuing the regulation and violated the Administrative Procedure Act.

“The DOL went too far in the new overtime regulation,” said Randy Johnson, senior vice president of Labor, Immigration, and Employee Benefits for the U.S. Chamber of Commerce, which is part of one of the lawsuits, in a statement. “We have heard from our members, small businesses, nonprofits, and other employers that the salary threshold is going to result in significant new labor costs and cause many disruptions in how work gets done. Furthermore, the automatic escalator provision

means that employers will have to go through their reclassification analysis every

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On Oct. 19, Judge Amos Mazzant of the U.S. District Court for the Eastern District of Texas granted a request by the two groups of plaintiffs to combine their cases. Both lawsuits have now been consolidated, and the parties have filed motions asking the court to issue a preliminary injunction to prevent the rules from going into effect while the legality of the rule is fully litigated.

Next Steps

Most employers are hoping that the lawsuits will be successful. However, they should also prepare for new overtime regulations to begin on December 1st. Here are some of the steps companies need to take:

- **Review Your Workforce Now and Gather Information**

The rule change will require employers to take action. Now is the time for employers to conduct a thorough review of their workforces, in order to gather the information necessary to make informed decisions. This review should be more substantial than simply identifying what exempt employees currently make less than \$47,476 per year. Considerations that should be examined include the number of hours potentially affected exempt employees currently work, potential salary compression issues, pay differences across regions or state lines, and the potential effect on incentive payments or similar bonus payments.

If employees are reclassified as non-exempt, they will be required to begin accurately keeping track of time worked. This will affect the employee's ability to go above-and-beyond, perform outside of regular work hours, or put in the extra effort to secure

additional training. The effect these changes will have upon a business should be

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Employers should be cognizant of workplace morale and its impact on productivity when deciding on any solution. Simply re-designating previously exempt employees as non-exempt can have significant negative effects. First, many employees will view this as a demotion, especially supervisors who have worked their way up from the crew. Second, previously exempt employees will likely lose work schedule flexibility, benefits that are provided only to exempt employees, and perhaps equally important to many, their status in the workplace.

- **Consider Alternatives**

Employers could also explore alternative methods to help limit the impact of the new regulations, such as the fluctuating work week schedule or moving employees to non-exempt salaried status. However, before making any changes, employers should ensure that they are complying with both state and federal law, which often have different requirements. And employers should remember that alternative arrangements, other than traditional non-exempt or exempt status, often lead to inadvertent violations of the FLSA.

- **Provide Clear Communication**

Whatever steps a company chooses to take to address the new rules, clear communication with affected employees will be paramount. Employees who are reclassified as non-exempt will require a clear explanation why, as well as an explanation of new requirements, such as keeping track of their time. In addition, some employees may need to be let go, some jobs may need to be restructured, and some duties may need to be absorbed across several jobs—all of these operational and other changes will need to be carefully explained.

The changes to overtime regulations will have a major impact on many organizations from a financial and management perspective. It will take close

monitoring and proactive work to make sure employers stay in compliance.

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