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Richard D. Alaniz, JD • Jan. 24, 2022



Approximately 43 million U.S. workers are classified as “exempt” under the Fair Labor Standards Act (FLSA), meaning they are not entitled to overtime pay when working in excess of 40 hours in a work week. For a worker to be exempt, he/she must perform certain duties and be paid a salary above a certain threshold. In an effort to expand overtime eligibility to millions more workers, the Department of Labor (DOL) under the Obama administration proposed to more than double the then-current \$23,660 per year eligibility threshold.

A coalition of 21 states and numerous business associations challenged this proposal

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salaries fall below the threshold and become eligible for overtime pay. That all of them are potential voters is not lost on the administration.

In preparation for an increase in the eligibility threshold, employers should consider conducting a thorough review of the job duties of all salaried employees – more than merely identifying these employees whose salaries are below the proposed threshold. Ensuring that the employees' duties are consistent with the exemption relied upon, irrespective of the salary threshold, is critical in avoiding potential misclassification liability.

Responding to a probable threshold increase is an issue with several dimensions. Employers should identify key positions where the employer must increase the salary above any new threshold. For some positions, it may depend upon whether they routinely work in excess of 40 hours per week. Employers must also account for salary compression issues. When you raise the floor, you have to consider the effects on the ceiling. Salary compression can affect employee morale, as can the fact that some employees see their exempt status as a badge of honor. Loss of that status could be seen as a demotion or cause an employee to lose work schedule flexibility and/or benefits that are unique to salaried employees.

Exempt Status

To be properly classified as “exempt” under the FLSA, an employee must satisfy both the salary and duties tests. Employees must be paid a salary of at least \$684 per week/\$35,568 annually and the employee's duties must fall within one of the so-called “white collar exemptions.” Those exemptions are the “executive,” the “administrative,” the “professional,” “computer professional,” and “outside sales.” Each one of these exempt classifications requires the performance of unique duties.

Executive

The “executive” exemption applies to employees whose primary duties are

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employees as exempt and draws the most legal challenges. To qualify, it requires the employee perform office or non-manual work directly related to the management of the business and exercise discretion and independent judgment on significant matters. It is not uncommon for some employers to pay a salary to employees who perform clerical or secretarial functions such as answering the telephone or filing documents and considering them exempt for overtime purposes. This would be an obvious case of misclassification if challenged. Some well-recognized exempt administrative positions include human resources personnel, purchasing agents, payroll managers, office managers, and executive assistants to business owners.

Professional

The FLSA recognizes four separate categories of exempt professional employees: “learned professionals,” “artistic or creative professionals,” “teachers,” and “employees engaged in the practice of law or medicine.” Examples of the first include engineers, accountants, and others for whom the basis for the exemption is evident. They will have a college degree or comparable training qualifying them as a professional in their area of expertise.

Computer Professionals

There are two, separate “computer professional” exemptions. In addition to an exemption for computer professionals paid a salary of at least \$684 per week and an exemption for those who are paid at least \$27.63 per hour. Neither exemption applies to employees who merely install, upgrade, or maintain computer station software, nor to those who install hardware for their employer’s local area network. Unless they have the educational/professional background, the company’s IT employees do not qualify for the exemption either. The employees that qualify for these exemptions are computer systems analysts, computer programmers, software engineers, and other similarly skilled employees.

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It is difficult to predict exactly when the Biden administration will move ahead with increasing the salary threshold or exactly how large the increase may be. Nonetheless, through careful consideration and taking the recommended actions employers should at least be in a better position to defend a claimed exemption if challenged.

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Rick Alaniz, JD, of [Alaniz Associates](#), has been at the forefront of labor and employment law for over forty years. He began his legal career as a trial attorney with the U.S. Department of Labor, served on the President's Cost of Living Council during the Nixon Administration and also held prominent posts within the National Labor Relations Board, first in Washington D.C. and later in Minneapolis where he coordinated the NLRB's enforcement actions in the five-state Midwestern region.

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