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Here are some issues that proactive employers should be...

Richard D. Alaniz • Sep. 13, 2022



The Fair Labor Standards Act (FLSA) is the federal law governing employee compensation in U.S. workplaces. Some states also apply their own, more rigorous wage and hour laws. The FLSA requires employers to pay employees a minimum wage for all hours worked and a time-and-a-half overtime rate for all hours worked over 40 in a workweek.

However, the FLSA provides certain exemptions from the minimum wage and overtime requirements. The so-called “white collar” exemptions to the minimum wage and overtime requirements refer to the executive, administrative, professional, computer, and outside sales exemptions. To qualify for one of these exemptions,

employees must receive a predetermined salary not subject to reduction based on the

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- The **administrative exemption** covers many office managers, financial consultants, sales directors, production planners, inspectors, insurance agents, and human resources employees and requires an employee's primary duty be office or non-manual work directly related to management or general business operations. In particular, the duties must include the exercise of discretion and independent judgement regarding matters of significance.
- The **professional exemption** can be broken up into two categories – learned professionals and creative professionals. Learned professionals' primary duty must involve advanced knowledge in a specialized field of science or learning, generally acquired through prolonged study – often a college degree. Engineers, pharmacists, medical technologists, nurses, dental hygienists, physician assistants, and accountants are common examples. Creative professionals include editorial writers, journalists, graphic artists, actors, and artistic painters.
- The **computer employee exemption** generally excludes IT support employees who install and maintain computer workstation software and similar routine functions. The exemption requires both theoretical and practical knowledge in computer systems analysis, programming, or software engineering and duties that consist generally of designing, testing, and/or implementing software or hardware systems. While the same minimum salary of \$684 per week is required if paid on a salary basis, the FLSA also permits payment of an hourly rate of at least \$27.63 per hour to qualify under the computer employee exception.
- In addition to a duties test, common among each white collar exemption, the **outside sales exemption** requires a location test. However, in contrast to the other exemptions, it requires no minimum salary. As the name suggests, to qualify, an employee's primary duty must be making sales away from the employer's place or places of business, which of course excludes inside sales employees, unless they qualify separately for the executive or administrative exemption.

The DOL has raised the salary threshold numerous times over the years in response

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effect four to five million more workers would have become overtime eligible.

The Biden administration announced several months ago that it plans to issue a proposed increase in the salary threshold in October 2022. If the increase proposed during the Obama administration is any guide, we may see a near doubling of the current \$684.00 per week to about \$1,300.00 per week. Many small and even medium-sized employers may struggle to afford such a dramatic increase, with as many as 10 million workers becoming entitled to overtime pay if the FLSA's salary threshold doubles. Whatever the increase turns out to be, its implementation will almost certainly be delayed by court challenges.

Nonetheless, now is the time for employers to carefully review the specific duties and number of hours worked each week by their exempt-classified employees. A thorough review can confirm whether the employee's primary duties are sufficient for exempt status. Unfortunately, misclassification is a common problem that can create substantial liability.

Reviewing the hours worked will also help determine whether an exempt position typically requires more than 40 hours, such that converting it from salaried to hourly may not result in a significant difference in cost due to the need to pay substantial overtime. This review could also help confirm whether a consolidation of exempt duties and/or positions could be an option.

Beyond additional overtime costs, employers should consider the effect on employee morale and productivity if an employee's position is reclassified from salaried to hourly. A supervisor who rose through the ranks of hourly jobs to ultimately become a salaried supervisor may see going back to an hourly position as a demotion.

Since an increase in the salary threshold, perhaps a substantial one, is virtually certain, even if delayed by court action, these are the types of issues that proactive

employers should be seriously considering in anticipation of any salary threshold

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coordinated the NLRB's enforcement actions in the five-state Midwestern region. A Partner in private practice since 1985, his experience has only deepened Rick's enthusiasm for labor and employment law and his drive for continued excellence in the field. He is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization. Rick contributes dozens of articles per year on labor and employment law to trade journals and conducts numerous seminars each month to client companies and trade associations across the country.

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