



New Overtime Rules Are Here: Time to Start Reviewing Your Policies

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The long-anticipated (or long-dreaded, depending on your point of view) changes to the law concerning overtime have arrived. Nearly 4.2 million employees who were ineligible for overtime are now eligible, and woe unto the employer who doesn't pay attention to this sea-change. The U.S. Department of Labor issued a proposed rule in 2015, and the rule has now become final. It will be effective on December 1, 2016.

Background

Under the Fair Labor Standards Act ("FLSA"), all employees must be paid overtime at a rate of at least one and one-half times their regular rate of pay for all hours worked in excess of 40 in a workweek. This is not negotiable or waivable by employees. However, certain employees are not covered by the FLSA, and are not required to be paid overtime, as long as three conditions are met:

- The employee's duties satisfy one of the "white collar exemptions": "executive", "administrative", or "professional". This is the so-called "duties" test. A full discussion of that test is beyond the scope of this article;
- The employee is salaried, i.e. earns a predetermined amount each work week that is not subject to reduction based on the amount of work performed or number of hours worked, with some narrow exceptions (the "salary basis" test); and
- The employee earns at least the minimum salary set by the Department of Labor (the "minimum salary" test).

The DOL's new rule only affects the third test but in a big way. Currently, an employee earning a salary as low as \$455 per week (the equivalent of \$23,660 per year) could be exempt from overtime. As of December 1, 2016, the minimum will more than double to \$913 per week, which equates to \$47,476 per year. (New York State has applied a minimum salary of \$675 per week, or \$35,100 per year, for executive and administrative employees, so the increase is smaller but still significant.) In other words, if an employee is earning less than \$913 per week, the employee is entitled to overtime regardless of the duties of the employee. This minimum will be adjusted every three years, starting in 2020.

What to do?

Many employers will find that they have some employees who regularly work more than 40 hours in a week who have been exempt from overtime but earn less than \$913 per week. Employers have several choices:

1. Increase the salary of those employees near the \$913 per week threshold so that they meet the minimum salary. (Make sure they meet the other two tests as well, of course.) (NOTE: being salaried, all by itself, doesn't make employees exempt, contrary to popular belief. ALL THREE tests must be met.)
2. Start keeping track of hours, and pay the employee overtime if he/she works beyond 40 in a workweek.
3. Reduce the base wages of the employee so that when overtime is applied, the weekly wages will be roughly the same. For example, suppose an employee was earning \$800 a week for a 45 hour week (an hourly equivalent of \$17.78). If the employer reduces the employee's base rate to \$17.00 an hour, the newly non-exempt employee who works 45 hours would be entitled to \$807.50 in pay (40 hours times the regular rate of \$17.00 = \$680; 5 hours at the overtime rate of \$25.50 = \$127.50; the total is \$807.50.)
4. Put a lid on overtime. Employers have the right to keep employees from working more than 40 hours, and this would eliminate any overtime issues. (What employers cannot do is turn a blind eye to employees working extra hours, or tell employees they won't be paid more if they work more than 40 hours.)

What if I don't do this correctly?

Misclassification of employees can be costly. If employers fail to pay overtime which is owed, they can be liable for the number of wages owed PLUS an equal amount in "liquidated damages" (essentially double damages), PLUS civil monetary penalties PLUS attorney's fees in a suit by employees. Doing nothing is not a good idea and can be prohibitively expensive.

Opportunity Knocks

Employers are often advised to audit their workforces to be sure employees aren't being misclassified. Sometimes, employers are fearful of "poking the bear", figuring that if no one complains, there isn't a problem, and if they start auditing and re-classifying employees some of them may figure out they were paid improperly in the past. It's a legitimate fear but does nothing to prevent future liability. (Under Federal law, wage payment liability may extend back up to three years; New York State extends this to six years.) However, the changes to the white collar exemption rules have been well-publicized and employers should realize that more employees will become aware of their rights. At the same time, employers can point out that the change in the rules requires them to re-evaluate, without necessarily admitting that there may have been problems in the past.

Other changes

A couple of other changes are part of the new rule. Since 2004, a related exemption has existed for "highly-compensated employees". If employees made \$100,000 per year or more, they would usually be exempt if they met a "relaxed" version of the duties test. That minimum has increased to \$134,004, and will also be adjusted every three years starting in 2020.

Some good news for employers

Many employees in different industries earn base salaries which do not meet the new requirements but earn significantly more in commissions, incentives, and non-discretionary bonuses. (“Non-discretionary” means just that: if the employee reached certain productivity or sales levels, the bonus or commission must be paid.) In the past, employers could not count these additional payments towards meeting the minimum salary threshold. Now, they can, at least to the extent of 10% of the required salary level. In other words, an employee can be paid a base salary of \$821.70 per week (\$42,728.40 per year) and still meet the minimum salary requirement if the bonus/commissions will make up the difference. Those extra payments must be made at least quarterly. If the payments are not enough to make up the difference (i.e. the employee would earn less than \$913 per week), the employer must make up the difference or risk have the employee be declared non-exempt.

The new rule (including the comments) is over 500 pages long. The Department of Labor has already put out a good deal of guidance, links to which can be found here: <https://www.dol.gov/whd/overtime/final2016/>.

Employers have until December 1, 2016, to get their houses in order. Employee audits, especially for larger employers, will take some time, so employers should get started ASAP. If you have any questions, or need any assistance, please contact one of the members of our Labor and Employment group: Thomas Wassel, at 516-357-3868 or twassel@cullenanddykman.com; or Gerard Fishberg, at 516-357-3703 or gfishberg@cullenanddykman.com.

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