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Overtime Rules: *Labor Department Issues Final Rules on Overtime Pay*

With new federal overtime rules becoming effective Aug. 23, Wisconsin employers - including law firms - will need to determine if their employee classifications are accurate under the new rules and if the new federal or current state rules provide greater overtime protection and eligibility for their employees.

by Charlie Domer & Rochelle Klaskin

The U.S. Department of Labor (DOL) recently updated and revised the white collar exemptions to the overtime rules of the Fair Labor Standards Act (FLSA).¹ The new regulations become effective Aug. 23, 2004, and will affect virtually all Wisconsin employers.

The FLSA guarantees the payment of minimum wages and overtime pay to most American workers. Employees who are covered by the FLSA, called nonexempt employees, are entitled to premium pay of 1.5 times their regular rate for all hours worked in excess of 40 hours in a workweek. Some estimates suggest that overtime pay accounts for about 25 percent of the total income of employees who work overtime.² Certain types of employees, however, are specifically exempted from overtime pay eligibility under the FLSA. The most significant are the so-called white collar exemptions, which exempt executive, administrative, professional, and outside sales employees from the FLSA's overtime pay requirements.



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While employers should regularly analyze which of their employees are and are not eligible for overtime under the FLSA, the new rules provide Wisconsin employers with a much-needed push to reevaluate their workforces and determine whether their previous classifications are accurate under the new rules. Most employers who carefully scrutinize their employees' job functions probably will realize that they have misclassified workers as exempt when they are in fact eligible for overtime.

Reevaluating Worker Classifications

Sidebar:
[Job Duties Test](#)

When conducting this workforce reevaluation, employers will notice that the new regulations continue to use a two-part test for the white collar exemptions. Employees who are 1) paid above a specified salary amount, and 2) perform certain defined job duties are exempt employees and are not eligible for overtime pay. The DOL substantially increased the minimum salary threshold. Now, to qualify for the white collar exemptions, employees must be paid at least \$455 per week (or \$23,660 annually) on a salary basis - a substantial increase from the previous tests of \$250 per week and \$155 per week.³

The new rules also establish streamlined, standard job duties tests, which contain significant - but not overwhelming - changes from the former tests addressing the executive, administrative, professional, and outside salesperson exemptions (see Figure 1). The rules provide more explicit definitions about each exemption, as well as identify specific professions as generally exempt. For example, insurance claims adjusters, financial service employees, team leaders of major projects, and human resource managers usually will be exempt administrators pursuant to the new regulations. Nonhourly registered nurses, dental hygienists, physician assistants, accountants, and athletic trainers generally will be exempt professionals.

Certain computer experts also continue to be exempt professionals under the new regulations. No substantial changes were made to this exemption, because it still applies to the small percentage of employees working as computer systems analysts, programmers, software engineers, or other similarly skilled workers in a computer field, who meet the job duties specified in the regulations. Notably, to classify employees as exempt computer professionals, the employer can either pay them on a salary basis of at least \$455 per week or on an hourly basis of at least \$27.63 per hour.

The regulations add a new type of exempt employee: the highly compensated worker. An employee who performs office or nonmanual work, earns total annual compensation of \$100,000 or more, and customarily and regularly performs at least one of the white collar exempt job duties will not be eligible for overtime. The new regulations also add a new category under the executive exemption to cover employees who are 20 percent or more equity owners in a business and who are actively engaged in management. These exempt owner-employees are not required to meet a minimum salary threshold to be exempt.

In addition to defining which workers are exempt, the new regulations explicitly classify other employees as nonexempt and always eligible for overtime. The DOL made it clear that blue collar workers (for example, carpenters, electricians, mechanics, construction workers, and laborers) are nonexempt, regardless of whether they receive a salary or how highly paid they might be. Additionally, most police officers, firefighters, emergency medical technicians, and other first responders are always eligible for overtime.

The DOL established new rules and safeguards regarding an employer's ability to deduct from an exempt employee's salary without losing an employee's salaried status and the exemption. Employers now can suspend without pay for one or more full days an exempt employee who violates written workplace conduct rules without running afoul of the salary basis rules. Previously, an unpaid disciplinary suspension had to be one week or more to maintain an employee's exempt status. The DOL also established a safe harbor for employers that protects them from the effects of improper deductions from an exempt employee's salary. Now, if an employer has a clearly communicated policy prohibiting improper pay deductions that includes a

complaint mechanism, and if the employer reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, the employer will not lose the exemption for an employee unless it willfully violates the policy. Accordingly, attorneys will want to work with their clients to establish and draft these new policies.

While the new rules make significant changes to the federal standards, Wisconsin employers must be aware that the state wage and hours law remains unchanged. Accordingly, if an employee is eligible for overtime under Wisconsin law, the employee will continue to be eligible after the new federal regulations go into effect. The Wisconsin Department of Workforce Development (DWD) has stated that although it will not issue new regulations by Aug. 23, it plans to issue an employer advisory on its Web site, www.dwd.state.wi.us, and to the media before the Aug. 23 effective date. Also, certain members of the U.S. Congress have introduced legislation that has the ability to undermine the effectiveness of the new rules.

How Wisconsin Law is Affected

The DOL's new overtime regulations altered only the federal law - Wisconsin's wage and hour laws remain unchanged. A spokesperson for Gov. Doyle indicated that the DWD is reviewing the new federal regulations to determine their differences from the Wisconsin regulations and what changes, if any, should be made.

If no changes are made to the state rules, Wisconsin employers must comply with two sets of regulations regarding the white collar exemptions. Currently, the Wisconsin regulations expressly defer to the federal regulations.⁴ While this might suggest that Wisconsin law would simply track the new DOL changes, the DWD regulations still specifically use the same white collar exemption language and tests from the *old* federal regulations, thus creating a variance between the existing Wisconsin rules and the new federal rules.

Whether an employee is eligible for overtime pay will require a determination under both state and federal law, including an analysis of which law offers greater overtime protection or eligibility for an employee. The laws and regulations that provide the greater overtime protections, whether federal or state, will be the ones that apply.

Several differences exist between the Wisconsin rules and the new federal rules. One main difference is that to satisfy the executive, administrative, or professional exemption test in Wisconsin, generally, an employee cannot devote more than 20 percent (40 percent in a retail or service establishment) of his or her time in a workweek to nonexempt work. The new federal regulations *do not* have that restriction and instead use a primary duty test. Employers, therefore, must analyze their workforce under both rules to determine whether this percentage restriction will afford greater or lesser overtime protection for a given employee.

While the federal and state duties tests for the executive, administrative, and professional exemptions are similar in many aspects, Wisconsin and federal law diverge with respect to the outside salesperson exemption. Under Wisconsin law, an outside salesperson who spends at least 80 percent of his or her time away from the employer's place of business is exempt. The new federal rules, in contrast, contain no percentage restriction. An employee is an exempt salesperson if he or she is customarily and regularly engaged away from the employer's place of business. Wisconsin law is more favorable to the employee because under the Wisconsin regulations, a salesperson is less likely to qualify for the exemption from overtime.

Additionally, even though outside salespersons are exempt from minimum wage requirements under federal law, Wisconsin law requires that employers pay outside salespersons at least minimum wage each pay period (even if they are exempt from overtime and even if they are paid entirely on commissions).

Another notable difference between the two sets of laws is the minimum salary threshold required for the white collar exemptions. Wisconsin law has a much lower minimum salary requirement (\$700 per month for executive and administrative employees, and \$750 per month for professional employees) than do the new federal rules (\$455 per week for all white collar employees). The new higher salary threshold under federal law will apply to Wisconsin workers. But, for example, the new highly compensated exempt employee category under the new federal regulations may not be applied to Wisconsin employees.

Wisconsin law, just like the federal law, requires exempt employees to be paid on a salary basis. However, Wisconsin law does not define the term "salary basis" in its regulations. Accordingly, the new federal regulations that define and explain the salary basis test are the only applicable rules for employers. Unless and until Wisconsin defines salary basis, Wisconsin employers can follow the new federal rules regarding the salary basis test, including when employers can lawfully make deductions from salaried employees' wages, as well as the new safe harbor provision for improper pay deductions.

Because the Wisconsin rules most likely will not have changed by Aug. 23, 2004, two applicable tests exist for the white collar exemptions. Wisconsin employers and attorneys, therefore, have the unenviable task of trying to classify employees under both laws. Employers will need to review both Wisconsin and federal law and apply the law that affords greater overtime protection to their employees.

Congress May Block the Regulations

With the Aug. 23, 2004, effective date looming, political battles over the impact and implementation of the new overtime regulations have heated up in Washington, D.C. The DOL defended its regulations by stating that overtime eligibility will be "strengthened" for 6.7 million workers under the new rules, including 1.3 million workers who will gain overtime eligibility, while only 107,000 workers might lose overtime protection.⁵ Opponents of the regulations, led by Sen. Tom Harkin (D-Iowa), dispute the DOL's estimates and believe that the new regulations contain too many loopholes and nuances that employers could exploit, resulting in the loss of overtime protection for millions of American workers.⁶ MIT professor of management Tom Kochan estimates that a new category of administrative employees, an ambiguous "team leader," could alone strip overtime rights from between 750,000 to 2.3 million workers.⁷

Both sides of this issue are vigorously defending their stances - after all, it is an election year and no party or group wants to be viewed as taking away workers' overtime pay. According to a statement Harkin issued, the "cosmetic changes in the final Bush rules amount to putting lipstick on a pig. Make no mistake, this is still a pig."⁸ The political battles rage on as the Secretary of Labor, Elaine Chao, indicated that her agency will strive to strengthen overtime rights for workers by exposing this "misinformation campaign against the rules."⁹

The politicians opposing the regulations want to block the implementation of the new

regulations. Such efforts gained ground on May 4, 2004, when the U.S. Senate approved an amendment (the so-called "Harkin amendment") to a separate, unrelated corporate tax bill that could block aspects of the new regulations from taking effect.

Whether this attempt to block implementing the regulations will succeed is unclear. The Senate has yet to vote on the larger bill with the new amendment attached. Furthermore, the House of Representatives has not even addressed this issue. The DOL, as well as President Bush, are committed to the new regulations and to their implementation. Accordingly, even if the corporate tax bill or some joint legislation is approved by both the House and the Senate, the President could still veto the bill. However, Sen. John Kerry has indicated that if elected President he would reverse the DOL regulations.

If the Harkin amendment becomes law, it would block the implementation of only certain aspects of the new rules. The Harkin amendment does not affect the increase in the minimum salary threshold (the \$23,660 amount) or any other changes that provide greater overtime pay eligibility for workers. But it does prohibit the new regulations from excluding any employee from overtime if under the old rules the employee had been eligible for overtime - in effect, "grandfathering" many employees. Such changes would create confusion for employers when classifying their workforce, as employers would need to compare an employee's overtime pay eligibility under both the old and new regulations to determine which one was more favorable to the employee. This may increase the likelihood of misclassification, which, in turn, may increase the potential of litigation.

For now, employers and practitioners should remain aware of these (or any future) legislative changes that could void aspects of the DOL's new rules. At present, the Aug. 23 effective date still remains in place. Whether election-year politics will overturn some or all of a portion of the new rules remains to be seen.

Conclusion

Even if a portion of the new overtime rules are blocked, most employers are long overdue in their analysis of outdated job classifications and still have misconceptions regarding which employees are eligible for overtime under the FLSA. Because of such misconceptions and the short time for employers to prepare for the Aug. 23 effective date, employers should not delay their analysis of their workforce's eligibility for overtime pay under the new rules.

Endnotes

¹Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 69 Fed. Reg. 22,122 (April 23, 2004) (to be codified at 29 C.F.R. pt. 541).

²[Statement of Sen. Tom Harkin](#) (D-Iowa) on the Administration's Final Overtime Regs (May 4, 2004).

³Under the old regulations, an employer could classify an employee as exempt using either a short or a long job duties test. The short test had a higher minimum salary basis (\$250 per week) than the long test (\$155 per week). The new DOL regulations, however, eliminate the long and short tests in favor of one "standard" test.

⁴"These exemptions shall be interpreted in such a manner as to be consistent with the Federal Fair Labor Standards Act and the Code of Federal Regulations as amended...." *See* Wis. Admin. Code § DWD 274.04 (Feb. 2004).

⁵Press Release of Labor Secretary Elaine L. Chao, [Harkin Amendment Hurts Worker Protections](#) (May 4, 2004).

⁶[Statement of Sen. Tom Harkin \(D-Iowa\) on the Administration's Final Overtime Regs](#) (April 28, 2004); *see also* [Economic Policy Report on Overtime Pay](#) (July 14, 2004).

⁷Ross Eisenbrey, [On the Department of Labor's Final Overtime Regulations](#), Testimony Presented Before the U.S. Senate Committee on Appropriations (May 4, 2004).

⁸*See supra* n. 6.

⁹*See supra* n. 5.

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