

Anticipated Labor Regulations May Cause Issues for Employers

In June 2015, the U.S. Department of Labor, Wage and Hour Division, issued 29 CFR Part 541, detailing proposed revisions to



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proposed revisions to federal regulations under the Fair Labor Standards Act. These proposed regulations address the requirements for exempt employees, or salary employees. A final version of the regulations is expected to be issued and go in effect sometime next year. For an employer with salaried employees who could be affected by these new regulations, prudence dictates planning for a 2016 compliance deadline.

Under the FLSA and its regulations, employees may be exempt from overtime rules if the employee meets three tests — Salary Test: the employee must not earn

less than \$455/week or \$23,660/year; Salary Basis Test: the employee must earn a guaranteed minimum amount of money weekly provided they perform “any” work; and Duties Test: the employee must generally have job duties consistent with being a supervisor, a professional or an administrator.

Under the proposed rules, the Salary Test will increase from \$455/week (\$23,660/year) to \$970/week (\$50,440/year). Any employee not satisfying the test will become non-exempt. The DOL also has proposed regulations to cre-



ate a mechanism for automatically adjusting the minimum annual salary level which, according to an Aug. 27, 2015 study by **Edgeworth Economics**, could drive the minimum salary from \$50,440 in 2016 to nearly \$100,000 by 2020. Additionally, the rules would raise the minimum annual salary for “highly compensated” employees (employees whose pay is high enough that they do not have to pass the Duties Test) from \$100,000 to \$122,148 annually. The regulatory changes do not specify what changes may be made to the Duties Test; however, comments on the issue were requested for consider-

ation in the Final Rule. Depending on the changes to the Duties Test, employees with salaries between \$50,440 and \$122,148 may also have to be reclassified as hourly, and thereby, subject to the FLSA.

What options do employers have?

One way employers can gain compliance is by increasing salaries. However, should your business model and resources not allow for such increases, salaried employees may be reclassified as hourly. Though theoretically simple, this may not necessarily be an easy task. Employees’ pay would have to be re-calibrated at

an hourly rate accounting for likely overtime pay. Moreover, hourly employees cannot be forced to work overtime. Additionally, the nature of many salaried positions includes activities that are vague as to whether they fall outside the scope of employment, like attending social functions. Thus, employers will have to address ways to calculate time on the clock, possibly updating employee handbooks and modifying job descriptions to fit the realities.

Another option is to consolidate the number of salaried employees, and then utilize hourly support for the salaried positions. For this option to be viable, an employer may need to promote a limited number of employees, bumping their salaries to the new minimum, adding job duties commensurate with the new pay, and then hiring hourly assistants, so the remaining salary employees can take on the additional consolidated job duties. An additional alternative may be to utilize independent contractors.

For a variety of reasons, these rules may never be finalized or may be revised further. Nevertheless, if you have salaried employees who could be affected by these regulations, you should consult with a professional for custom solutions as these potential regulatory changes present no “one-size-fits-all” fix.

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