

CLIENT ALERT

Big Changes Coming to Overtime Exemption: Will You Be Prepared?

By JESSIE F. RECKART, ESQ., BOWLES RICE LLP

Your personnel director understands the white-collar, overtime exemption better than anyone else in your organization. He or she knows that if you want to “exempt” an employee from the overtime requirements of the federal Fair Labor Standards Act (FLSA), then you have to pay that employee a set salary (“salary basis test”) greater than \$455 per week / \$23,660 per year (“salary level test”), and that the employee’s duties must be primarily executive, administrative or professional in nature (“primary duties test”).

On July 6, 2015, the federal Department of Labor (DOL) proposed a revision to this familiar test. The DOL intends to raise the salary level test to the 40th percentile of weekly earnings for full-time salaried workers, nationwide. In other words, the DOL will increase the minimum amount employers must pay to an employee before the employer may treat that employee as exempt from overtime requirements. In 2016 dollars and cents, that translates to about \$970 per week / \$50,440 per year – a 213% increase over the current minimum of \$455 per week / \$23,660 per year.

Here’s an example to illustrate the impact of the DOL’s proposed rule: Jean manages a branch for Acme Bank. She earns a salary of \$850 per week, or \$44,200 per

year. Jean works about 45 hours per week. Currently, Acme does not pay Jean overtime because it classifies her as an executive employee, exempt from federal, overtime requirements.

Applying the DOL’s proposed revision, however, Acme Bank could no longer classify Jean as an exempt employee because her pay falls short of the new exemption threshold. Because Jean is no longer exempt from the FLSA overtime requirements, Acme Bank must choose to pay Jean overtime or increase her salary. If Acme Bank chooses the first option, it will have to pay Jean one-and-one-half times her regular rate of pay, that is \$31.88 per hour, for all hours worked over 40 in a workweek. Assuming Jean consistently works five hours of overtime per week, that adds up to over \$8,000 in overtime in a single year.

The DOL is expected to issue a final version of the regulation this summer, with an effective date to follow. While we do not know exactly what the final regulation will look like, the DOL’s proposed rule is strong evidence that the salary level test will increase. Plus, the DOL has not revised the white-collar exemption since 2004, further indicating that big changes are afoot. The DOL has also sought comments regarding the primary duties test,

indicating that the final version may include changes to that test, as well.

Despite this uncertainty, employers should prepare for the final rule now. First, employers should assess their current roster of exempt employees, and identify those exempt employees whose salaries fall within the “grey zone,” that is, between \$23,660 and \$50,440. Employers should also consider which exempt employees would be affected if the DOL would peg the salary level test to the 30th or 35th percentiles of weekly earnings for full-time salaried workers, nationwide (\$773 per week / \$40,196 per year or \$852 per week / \$44,304 per year, respectively). Employers should determine whether those employees who are potentially affected by the rule change routinely work more than 40 hours per work week. Also, employers should assemble and review those employees’ job descriptions to ensure that they reflect the employees’ current responsibilities, and whether those duties may be modified. With that information in hand, employers will be well-positioned to develop a compliance strategy once the DOL publishes the final rule in summer 2016.

Employers should also think now about how to communicate changes necessitated by the final rule. Affected employees may be

confused by their re-classification as non-exempt, if changes are not communicated accurately. Newly, non-exempt employees will also need training regarding timekeeping and other employer policies and procedures applicable to non-exempt employees. Finally, managers of new, non-exempt employees will need training regarding overtime obligations.

The White House estimates that the DOL’s proposed rule would affect approximately five million Americans. Closer to home, the Economic Policy Institute estimates that 68,000 West Virginians will be directly affected by the DOL’s proposed rule. Given the broad applicability of the DOL’s proposed rule, any grace period set by the DOL may not allow employers sufficient time to prepare. Therefore, thoughtful, deliberate assessment and preparation now will be the key to smooth compliance later. [UNLV](#)



Jessie F. Reckart is an attorney in the Charleston, West Virginia office of Bowles Rice LLP. She concentrates her

practice in labor and employment law. She can be contacted directly at (304) 347-1169 or at jreckart@bowlesrice.com.