DOL Extends Overtime Pay to an Estimated 4.2 Million Workers

Ashley Steiner Kelly, Henry M. Perlowski and Edward P. Cadagin

On May 18, 2016, the United States Department of Labor ("DOL") issued its long-awaited Final Rule expanding the number of employees eligible to receive overtime pay under the Fair Labor Standards Act ("FLSA") effective as of December 1, 2016. Present estimates suggest that over 4.2 million workers will become newly eligible for overtime pay because of increases in the salary thresholds required to potentially classify employees as exempt. This sea change in the employment landscape now requires employers to carefully plan for December 1, 2016, including evaluating how changing employees from exempt to non-exempt status may expose them to significant risk.

As a refresher, the FLSA requires that employees be paid a premium ("time-and-a-half") for any hours worked in excess of forty per workweek. The FLSA specifically exempts some categories of workers, including certain "white collar" workers (*e.g.*, executive, administrative, professional, etc.) from the overtime requirement. Currently, these "exempt" employees must (i) meet a statutory salary minimum of $23,660 per year ($455 per week) and (ii) meet various "duties tests" that include, among other things, managing, supervising, running a business, exercising discretion and independent judgment on significant matters, and/or performing tasks that require advanced knowledge.

The most significant change in the Final Rule is the increase in the minimum salary threshold from $23,660 to $47,476 per year (which is less than the $50,440 previously proposed by the DOL). As a result of this increase, any employee making less than $47,476 per year cannot be classified as a "salaried" employee exempt from overtime under the FLSA. Therefore, a salaried employee making $40,000 per year who is now classified as exempt and does not keep track of time will, as of December 1, 2016, have to keep track of all hours worked and be paid overtime for all hours worked in excess of forty in any workweek.

In the Final Rule, the DOL specifically tied the new threshold salary level to the 40th percentile of all salaried employees in the lowest-wage region of the country's five Census Regions (now, the South) *and* stated that this threshold would increase every three years to reflect changes in this baseline measure. Because of the automatic updating provisions, companies will be required to reassess their employees' pay every three years to determine new eligibility requirements for overtime exemptions. The first automatic update will take place on January 1, 2020.

As a small piece of welcome news for employers, the Final Rule now permits *nondiscretionary* bonuses and incentive payments (including commissions) to satisfy up to ten percent (10%) of the new $47,476 salary threshold. In the past, the DOL instructed employers to count only "actual salary" and fees towards the salary threshold, excluding bonus payments of any kind. Thus, an employee who earned a $23,000 salary and a $1,000 bonus in a single year would not meet the old $23,660 threshold level for an exemption. Employers can now include bonuses and incentive pay (up to 10%) *assuming* that their applicable plans and other agreements ensure that these payments are nondiscretionary. Thus, all bonus and incentive plans should be in writing and carefully reviewed and amended if they are going to be factored into the salary threshold.

The Final Rule also increases the salary threshold for the "highly compensated employee" (HCE) exemption from $100,000 to $134,004 per year. Future automatic updates to the HCE exemption will also occur every three years, beginning on January 1, 2020.

Notably, the Final Rule did not alter the standard duties tests for determining whether an employee performs the type of work that qualifies them for the overtime exemption.

The impact of the implementation of the Final Rule clearly will be concentrated on mid-level management and "white collar" employees. Under the present FLSA framework, the positions most often misclassified as exempt are lower-level "white collar" positions within accounting and finance, human resources, information technology, and management. More of these positions will *de facto* become non-exempt (*i.e.*, hourly), particularly within geographic areas where wages are lower. These changes, in turn, may result in increased scrutiny on the exempt classification of persons with salaries that exceed $47,476.

Consider the following fact pattern: a retail store employs two "exempt" assistant store managers, one with two years of experience who earns $44,000 and one with five years of experience who earns $48,000. The former individual automatically becomes "non-exempt" as of December 1, 2016. If the position carries a meaningful amount of overtime, then the total compensation for the junior assistant store manager, inclusive of overtime pay, could then *exceed* the total compensation paid to the longer-tenured assistant store manager, who still could be classified as exempt under the new rule. That reality could cause the more highly compensated and still exempt employee to question the underlying validity of the exempt classification.

With the present and future risks inherent in any employer's efforts to comply with the FLSA and particularly the changes mandated by the Final Rule, we strongly recommend conducting a proactive audit of current compensation and classification practices well before December 1, 2016. This audit should focus on positions with pay and pay ranges near the new salary threshold and the current facts supporting those positions classified as exempt. After gathering and analyzing this data (in a privileged manner), employers can evaluate needed changes and the best way to communicate those changes.

Authors and Contributors

Ashley Steiner Kelly
Partner, Atlanta Office
404.873.7020
ashley.kelly@agg.com

Henry M. Perlowski
Partner, Atlanta Office
404.873.8684
henry.perlowski@agg.com

Edward P. Cadagin
Associate, Atlanta Office
404.873.8582
edward.cadagin@agg.com

not *if*, but *how*.®

About Arnall Golden Gregory LLP

Arnall Golden Gregory, a law firm with more than 150 attorneys in Atlanta and Washington, DC, employs a "business sensibility" approach, developing a deep understanding of each client's industry and situation in order to find a customized, cost-sensitive solution, and then continuing to help them stay one step ahead. Selected for The National Law Journal's prestigious 2013 Midsize Hot List, the firm offers corporate, litigation and regulatory services for numerous industries, including healthcare, life sciences, global logistics and transportation, real estate, food distribution, financial services, franchising, consumer products and services, information services, energy and manufacturing. AGG subscribes to the belief "not if, but how.®" Visit www.agg.com.

Atlanta Office
171 17th Street, NW
Suite 2100
Atlanta, GA 30363

Washington, DC Office
1775 Pennsylvania Avenue, NW
Suite 1000
Washington, DC 20006

To subscribe to future alerts, insights and newsletters: **http://www.agg.com/subscribe/**