

Attn. General Counsel: Big Changes are Coming to Wage-and-Hour Law

By Rob Rickman – (September 19, 2014) – Significant changes are coming to wage-and-hour law. It is simply a matter of time.

The White House has already taken steps to propel no less than three significant changes in wage-and-hour law, all of which could have wide-ranging effects on employers of all sizes. The likely changes include an increase in the minimum wage, an increase in the salary threshold for overtime exemption, and changes to commonly used overtime exemptions that will make it more difficult for employers to qualify employees under those exemptions.



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With wages being one of the largest costs incurred by employers, an increase of as much as 40% in the minimum wage and as much as 100% in the exemption salary threshold will undoubtedly have a significant financial impact on employers. It will also increase the amount of wage-and-hour lawsuits filed by plaintiffs, which has already seen a tremendous spike over the past decade.

These changes will come sooner rather than later.

Recognizing that any legislative amendments are likely to get bogged down in a grid-locked Congress, President Obama has used Executive Orders and directives to administrative agencies to begin implementing these changes, neither of which require Congressional approval.

An Executive Order has already been signed raising the minimum wage to \$10.10 per hour for any individuals working on new federal contracts.

Also, the Department of Labor—in response to a mandate from the White House—is currently in

the process of drafting new proposed overtime regulations that will likely increase the salary threshold for exempt workers and will reshape the applicability of the commonly-used “white collar” exemptions under the Fair Labor Standards Act.

This article is a closer look at what has transpired so far and what employers can expect to see in the future regarding these three potential changes.

Minimum Wage

In addition to the Executive Order raising the federal contractor minimum wage to \$10.10 per hour, the White House has launched a webpage dedicated to raising the federal minimum wage at www.whitehouse.gov/raise-the-wage. The U.S. Department of Labor conducted its #RaiseTheWage “Week of Action.” And the states of Connecticut, Hawaii, Maryland, Massachusetts, and Vermont have passed legislation that will eventually increase their state’s minimum wage to at least \$10 per hour.

Despite stalled efforts in Congress this year to pass legislation increasing the federal minimum wage, there clearly is still momentum towards an eventual increase.

The federal minimum wage currently stands at \$7.25 per hour, with the last increase coming from legislation that was passed in 2007.

Texas does not currently have any minimum wage above and beyond the federal minimum wage. Thus, raising the federal minimum wage to \$10.10 per hour would be an increase of almost 40% for those employers in Texas and other states that are currently at \$7.25 per hour. >



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The increased labor costs will not just affect those employees currently at the minimum wage.

Even companies that do not currently have any hourly employees at minimum wage or even below \$10.10/hour could see a “trickle up” effect whereby employees currently in the \$10-15/hour range may expect or need to see a proportionate increase in their hourly rate.

Employers may find some respite in the fact that any increase of more than \$1 per hour will likely be phased in over a multi-year period.

For instance, Congress could stair-step the increase so that the federal minimum wage would increase to \$8.25 in 2015, \$9.25 in 2016, and then to \$10.10 in 2017. Congress utilized a similar process when increasing the minimum wage from \$5.15 to \$7.25 in three increments between 2007 and 2009.

Raising the minimum wage would require Congressional approval, and Congress may eventually compromise on an amount less than \$10.10/hour as legislation winds its way through the House and Senate.

Regardless, prudent employers should plan for an increase in the minimum wage, and should expect to see legislation passed within the next year finalizing such increase.

Salary Threshold

Three of the most commonly used overtime exemptions under the FLSA are the administrative, executive, and professional exemptions, all of which are commonly referred to as the “white collar” exemptions.

All three of these white-collar exemptions require, among other things, that the employee’s salary be no less than \$455 per week (or \$23,660 on an annualized basis).

Since the Fair Labor Standards Act was passed in 1938, there have only been two adjustments to the

salary threshold. In 1975, the threshold was set at \$250 per week, and in 2004 it was increased to \$455 per week. Adjusting the 2004 figure just for inflation would result in the equivalent of \$561 per week.

But proponents have said that an inflationary adjustment alone is not adequate, and given that the poverty line for a family of four with two children is currently \$23,624, employers should pay significantly above that amount in order to utilize the so-called white-collar exemptions.

President Obama’s directive to the Department of Labor does not specify an amount or timetable for increasing the salary threshold, but does instruct the Secretary of Labor to develop a plan that would increase the number of workers entitled to overtime.

One way of accomplishing that objective is to significantly increase the salary threshold. Some have advocated or speculated that the Department of Labor could propose a salary threshold increase to as much as \$1,000 per week, which would be more than double the current level.

Any proposed increase would be followed by a period of public comment, giving the Department of Labor an opportunity to adjust its initial recommendation.

Ultimately, however, it is very much within the realm of realistic possibilities for an employee’s annualized salary rate to be increased to somewhere in the \$40,000-\$50,000 range in order for that individual to be exempt from overtime under the administrative, executive, or professional exemptions.

Duties Test

Not only must the employee meet the salary threshold in order to be exempt from overtime, they must also meet the “job duties” test for a particular exemption. >

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For instance, an employee must meet all of the following in order for the executive exemption to apply:

- The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and,
- The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Thus, the employee’s primary duty must be managing the enterprise, and “primary duty” is currently defined as “the principal, main, major or most important duty that the employee performs.” The phrase “or most important duty” allows employers to classify managerial employees as exempt, even if they spend a majority of their time performing non-managerial duties.

If the employer articulates that the managerial duties are the “most important” duties, then it can avoid overtime obligations.

Critics of the current overtime regulations argue that many of these managers spend the vast majority of their time performing the same job tasks as other non-managers, and therefore they should not be exempt from overtime.

Most people expect that any change to the executive exemption would include a specific amount of time, likely at least 50%, be spent on managerial duties. The State of California currently requires employees to spend more than 50% of their time performing managerial duties in order to meet the executive exemption, so there is precedent for the Department of Labor to follow such a lead if it so chooses.

In light of President Obama’s directive to increase the number of employees eligible for overtime, it is likely and logical that some sort of time requirement will be implemented.

Any or all of these changes would have a significant impact on the profitability of most employers.

Companies should give serious thought and deliberation to reclassifying employees that are currently exempt and assess the financial impact that these changes would have on their budgets, because it is a matter of when—not if—these changes will come.

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