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## MOVING ON UP: RAISING THE SALARY THRESHOLD -- AND YOUR NON-EXEMPT EMPLOYEE COUNT

*By Deborah H. Share*

Recently proposed federal labor regulations serve as an excellent reminder for employers to ensure that they are properly classifying their employees as "exempt" or "non-exempt" from overtime rules. They also serve as a heads-up to employers that federal law may soon broaden the scope of employees who qualify as non-exempt quite significantly. Here, we provide a brief refresher of what employers should already be doing, with an eye to the proposed future.

### The Fair Labor Standards Act

The Fair Labor Standards Act (the "FLSA") is the federal mandate governing wages and working hours for employees. The statute and its associated regulations are intended to protect the country's labor force from excessive hours of work, and to ensure an adequate level of compensation. In relevant part, the FLSA dictates that non-exempt employees be paid for working more than 40 hours per week at least time and a half in compensation for such overtime.

An employee is generally presumed to be non-exempt. However, many employees fall into the so-called "white collar" exemption, and they are not covered by the overtime mandates of the FLSA. Whether an employee qualifies as exempt or non-exempt under the FLSA is based on a variety of factors. One way to qualify as an exempt employee is to be paid more than the minimum threshold amount (currently \$23,660 per year), be paid on a salary basis, and primarily perform exempt job duties, such as administrative, professional, and executive. To be exempt, employees must meet all of these factors.

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## **The Proposed Regulations**

Last year, President Obama directed the U.S. Department of Labor to modernize the law surrounding employee wage requirements. In part, the notion is that the current laws about minimum wage and overtime pay are outdated. President Obama's view is that these laws should be brought up-to-date and made more realistic for many Americans.

As a result, last month, the U.S. Department of Labor put forth a set of proposed rules on this topic. The objective is to increase the number of employees classified as non-exempt. One notable proposed change is the increase of the salary minimum threshold for exemption from \$23,660 to \$50,440.

This means that many more employees would qualify as non-exempt because more employees' salaries would fall below the threshold. If an employee's salary is not high enough to meet the threshold, it generally does not matter what his or her job duties are; he or she would still be non-exempt and subject to the overtime regulations.

Another proposed change is for the FLSA to keep up with the changing financial times, by automatically updating the salary threshold required for exempt status, by norming it to the percentile ranking of salaried employees nationally. Since the last change in the salary threshold occurred in 2004, the purported goal is to eliminate the need to constantly update the threshold through new regulations.

Interestingly, the proposed rules state that increased simplicity and decreased litigation are intended outcomes. The idea is that an increased salary threshold will serve as a "bright-line" rule, meaning that employers will have a more straight-forward way of determining whether their employees are exempt. Any test related to job duties performed is necessarily more complicated, and leaves greater room for interpretation. Thus, the Department of Labor believes the proposed changes will better serve both employees and employers, by simplifying the distinction between exempt and non-exempt employees, leading to greater certainty and fewer legal challenges.

## **Moving Forward**

First, assess whether you are properly classifying your employees. The salaries are the easy part, while classifying employees' job duties is a bit more intensive and difficult. This is partly because employees' titles or job descriptions are not enough to secure exempt status. What counts are the job duties actually being performed, on the ground, in real time. Simply granting employees a title of "Manager" or "Director" will not suffice if the actual responsibilities do not follow.

Second, should the proposed rules become final regulations, employers need to be prepared to re-classify their employees. The above exercise will make that easier. Many more employees will be classified as non-exempt, because the threshold to trigger exemption will be higher. This means higher levels of compensation that employers will need to pay out for any of these employees, if they engage in overtime work. Employers will need to consider their overall workforce structure, and whether the current structure will still meet their needs, should the law change.

Note that the regulatory changes discussed above are in the proposal stage only. Comments are being sought through September 4, 2015. We will continue to provide updates as the rulemaking process unfolds.

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