

PUBLICATION

DOL Creates Long-Term Headache for Long Term Care: Higher Wages, More Overtime and Greater Overhead

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Last month, the U.S. Department of Labor (DOL) proposed new regulations under the Fair Labor Standards Act (FLSA) that will dramatically increase the number of employees who must be paid overtime for all hours worked beyond 40 per week.

Under the current regulations, employees who earn more than \$455 per week (or \$23,660 per year) could qualify as exempt and are therefore ineligible for overtime.

Under the newly proposed regulations, the minimum salary to qualify as exempt has been dramatically increased to \$970 per week (or \$50,440 per year). The DOL is also considering whether non-discretionary bonuses and incentive payments should be included when determining an employee's weekly or yearly salary.

To prevent the new minimum salary from becoming outdated, the DOL proposes tying it to an automatic annual update; for example, (i) a fixed percentile of hourly wages, or (ii) the Consumer Price Index for urban consumers.

In its statement accompanying the proposed regulations, the DOL made clear that the purpose of the new regulations is to "transfer income from employers to employees in the form of higher earnings."

Will the new regulations apply to the long term care industry? Absolutely. Under the new regulations, any employee making less than \$970 per week (or \$50,440 per year) will now likely be classified as non-exempt (subject to a few exceptions). This means these employees must be paid overtime for all hours worked over 40, and time keeping records for all hours worked must be maintained for each employee.

Is your facility covered by the new regulations? Yes, most likely. A facility need only have two or more employees to be covered – but that isn't all. The facility (by itself or as part of a larger company or group) must also have annual gross income equal to or more than \$500,000, and the facility must be engaged in interstate commerce, which most facilities are.

What positions are most likely impacted? While it will vary for each facility, the positions most likely to be impacted include: directors and assistant directors of nursing, maintenance managers and directors, housekeeping managers and directors, RN unit managers and directors, HR specialists, marketing and sales employees, administrators, dietary managers, RNs (if paid hourly) and MDS coordinators.

Will your facility's employment practices liability insurance (EPLI) cover lawsuits triggered by the new regulations? No, not likely. While EPLI policies vary, they typically do not cover claims or lawsuits brought under the FLSA. So if a facility is sued under the FLSA, the facility, not an insurance company, will pay all defense costs and attorneys' fees, as well as any judgment entered against a facility. The new regulations do not change this in any way, and they do not have any impact on EPLI policies in general.

How much time will your facility have to implement the new regulations? Likely less than 90 days. Typically the DOL provides a 180-day "grace period" for implementation of new regulations. In this case, however, because the Obama administration is pushing for the new regulations to be in place before the 2016 presidential election, we anticipate the DOL will shorten the "grace period" to less than 90 days. In other words, if a facility waits until the DOL orders the new regulations, which we anticipate will occur in late 2015 or early 2016, it will then have just 12 weeks to implement the new regulations and make all necessary changes.

What can a facility do to lessen any impact? We highly recommend facilities audit at-risk positions. Our [FLSA Audit Team](#) will work with your facility to determine whether current classifications remain lawful under the proposed regulations. We also offer training sessions for impacted employees, covering topics such as the importance of clocking in and out, after-hours email practices and working remotely.

How do you set up an audit or training? What if you need more information? Contact your regular Baker Donelson attorney, or you can contact a member of our [FLSA Audit Team](#). When you do, ask about our flat fee pricing for certain types of audits. We offer three levels of flat fee pricing for salary audits: silver, gold and platinum. Each level includes review and analysis of positions that will be affected by the new regulations, such as directors and assistant directors of nursing, or RN unit managers and directors. At the gold and silver levels, we go further and collect information directly from employees. We then use this information to identify trends in work performed outside of normal business hours and/or away from the facility. This allows a facility to better estimate future overtime costs under the new regulations.