

PUBLICATION

Is Today Overtime D-Day?

May 16, 2016

May 16th may be a significant day for employers across the country. After more than two years of debate, analysis and overall panic from employers across the country, this is the deadline that was widely reported when the final overtime rule would be published by the Office of Management and Budget (OMB). Don't panic. As of the time of this posting the final overtime regulations HAVE NOT been published but if it is not today, it is definitely soon. The regulation change will impact the exempt status of employees in virtually every industry and has created one of the most significant challenges to face employers in the last decade. It is high alert time.

Is May 16th The Day??

As we have discussed in prior alerts and articles, after the OMB publishes the final overtime rule it may be challenged under the Congressional Review Act (CRA) by a "joint resolution of disapproval" which, if passed, has the effect of nullifying the regulation. A CRA challenge to a final rule has only been successful once but this law still has the potential of having a significant impact on the viability of the new overtime regulations. According to the Congressional Research Service, rules submitted to Congress after May 16 "will be subject to renewed [CRA] review periods in 2017 by a new President and a new Congress." You read that right. Regulations submitted to Congress after today are expected to be subject to the CRA's "clawback" provision, which would allow the CRA challenge to be considered by the next – and possibly more employer-friendly – Administration.

As of today, the final rule has been under OMB review for 63 days. The OMB has been conducting stakeholder meetings with employer groups since March 14 with the latest one scheduled for May 10. All signs point to the DOL publishing the rule today...but we still wait.

What is in the Final Rule?

We don't know and unfortunately will not know until the final rule is published. The OMB has been meeting with stakeholders since March 14 and although the OMB does not disclose the contents of the rule during the meetings, there have been several "leaks" about the possibility of the salary threshold being lowered to \$47,000. This seems unlikely but we will have to wait to find out.

When Will We Need to Be in Compliance?

By law, employers will have a minimum of 60 days to comply with the new overtime regulation. In both the comments and in the stakeholder meetings with the OMB, employers expressed concern about the time period to come into compliance with such a significant change, particularly when no one knows what that final rule will be. Compliance with the new salary threshold is not as simple as changing employees' salaries. Employers will have to determine if payroll systems are adequate to account for the additional hourly employees, policies and practices will need revision, and employees will need to be trained. Since the finalized salary threshold is unknown it is impossible for employers to accurately budget and analyze the financial impact of the rule. Additionally, employers will need to establish a communication plan to help their employees understand the law change and to combat potential morale issues. Sixty days seems like an awfully short time to get all of that

done. The last changes to the overtime regulations occurred in 2004, and the Department gave employers 120 days to implement the changes. Until the rule is finalized we will not know how long employers will have to comply with the new regulation.

What Should I Be Doing Now?

Get started! Now is the time to get your house in order. Employers should identify the affected employees and possible issues relating to the re-classification of those employees, such as budgetary effects, workforce effects (job/compensation restructuring), employee morale, etc. Does your time keeping mechanism work with the additional employees? Is it possible to get the same work hours under the employer's current payroll budget? How is the information going to be communicated to employees and what is the potential effect on morale and work performance?

It is also beneficial to have your outside employment counsel conduct a privileged audit and analysis of how the proposed regulation will affect your workplace. An attorney can help walk you through your options regarding re-classification within the scope of FLSA regulations and the organization's culture, concerns and budgetary issues. Right now is also a golden opportunity to analyze and correct any misclassification. The changes in the law are being reported in mainstream news. Employees will be expecting changes of some type, and employers can say, "The law made me do it."