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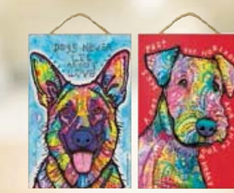

Colorful Dean Russo Wall Décor

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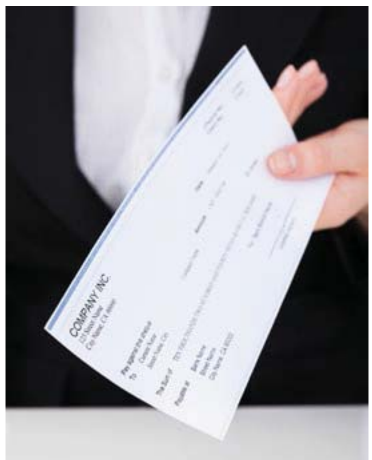
Controversial Overtime Rule About To Become Final

by Dena Sokolow

IN MARCH 2014, President Barak Obama sent an executive memorandum directing Secretary of Labor Thomas Perez to “modernize and streamline” the overtime exemption regulations. After two years of wait, debate and overall angst from employers across the country, on May 18, 2016 the Department of Labor (DOL) announced the final terms of the new overtime rules. This rule is going to have a tremendous impact on the retail industry. But, there are some significant and positive changes in the final rule that differ from the rule initially proposed by the DOL last year. Employers have until December 1, 2016, the effective date of the final rule, to make any necessary changes to come into compliance.



Generally, law requires employees to be paid at least the federal minimum wage ($7.25/hour) and overtime (time and a half) for any time worked in excess of 40 hours in a workweek. In addition, the federal wage law provides strict record-keeping requirements for employees to track their working hours. There are certain employees, however, that are “exempt” from the Fair Labor Standards Act (FLSA)’s minimum wage, overtime and record-keeping requirements. Exemption depends upon three things:

1. How An Employee Is Paid - Salary Basis

The employee must be paid on a “salaried basis,” meaning the employee receives a fixed, guaranteed minimum amount for any workweek in which the employee performs any work.

2. How Much An Employee Is Paid - Salary Level/Threshold

The employee currently must be paid a minimum of $23,600 per year ($455 per week). There is also an exemption for “highly compensated employees” who earn $100,000 per year.

3. What Kind of Work Does the Employee Do - Job Duties Test

An employee who meets the salary basis and salary level/threshold tests is exempt only if the employee also performs exempt job duties. Regardless of the job title, the employee must meet each job duty requirement under one of the exemption categories to satisfy this test.

To qualify for exemption from overtime, all three of these tests must be satisfied. A salaried employee is not the same as an “exempt” employee, although the two phrases are often used interchangeably.

What is the Final Rule?

The final rule looks a bit different from the initial rule proposed last year. The final rule contains some concessions that will make it a little more palatable for employers:

- The new salary threshold will be $913/week, which is $47,476/year. This is $2,964 less than the originally proposed $50,440 salary threshold. The salary threshold will be based upon the 40th percentile of the lowest-wage region, currently the South, rather than the entire country as initially proposed. For the highly compensated employee exemption (HCE), however, the DOL is still basing the new salary threshold on the weekly earnings of the 90th percentile of full-time salaried workers nationally, which will mean an increase in the HCE annual salary threshold from $100,000 to $134,004.
- For the first time, non-discretionary bonuses and incentives (including commissions) can be included for up to 10% of the salary threshold (i.e up to $4,747). The final rule requires such payments to be paid on a quarterly or more frequent basis.
- The salary threshold will automatically update every three years beginning January 1, 2020.

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The proposed changes, however, do not affect the exemption for retail employees paid by commissions. To qualify for that exemption three conditions must be met:

1. The employee must be employed by a retail or service establishment, and
2. The employee's regular rate of pay must exceed one and one-half times the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked, and
3. More than half the employee's total earnings in a representative period must consist of commissions.

If the employee meets these qualifications, they are still exempt from overtime.

What Should We Do Now?

The retail industry is expected to be significantly impacted by these changes. Although employers have until December 1st to come into compliance, now is the time to start preparing. It is important to understand the final rule and its impact on your structure, budget and employees. Here are some steps to take right now:

- Identify employees who will need to be reclassified as non-exempt (entitled to overtime), i.e. current employees who are currently exempt but paid less than $47,476.00 annually. Remember commissions may only count toward 10% salary threshold. However, if an employee is earning more than half their total earnings in commissions, they may qualify for the Retail Commissioned Employee exemption as stated above.
- Determine the number of hours the employee works. This seems simple but exempt employees are not required to track their hours and, therefore, employers may not be fully aware of the hours an exempt employee is working.

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- Analyze the financial impact. Will you raise pay to the new threshold level, reclassify employees as nonexempt and pay overtime, or lower pay to offset the overtime requirement?
- Review job descriptions and tasks of impacted positions to determine if certain exempt tasks may be reassigned or maintained with the current position.
- Consider how pay changes or other changes in job assignments may impact your organization. Will you need to make process or structural changes?
- Develop administrative plans to ensure compliance when the regulations become official. This means you will need to prepare and train your managers.

Lastly, don't hesitate to seek legal help to ensure compliance and help maneuver through the DOL regulations and classification changes. These rules are complex, and there are serious financial consequences if you are found to be in violation of them. The DOL's budget for FY2017 includes $277 million for wage and hour division enforcement, a $50 million increase from FY2016. Once the rule is effective, the DOL auditors will be out in force to ensure employers are in compliance. ■

Dena H. Sokolow is a shareholder in Baker Donelson's Tallahassee, FL office, where she brings more than 20 years of experience counseling and defending employers and management on a wide range of labor and employment matters. With a practice spanning the Southeast, she partners with clients to best position them to avoid employment law claims or, at a minimum, put the company in the strongest position to defend such claims. She may be reached at (850) 425-7550 or by email at dsokolow@bakerdonelson.com.