



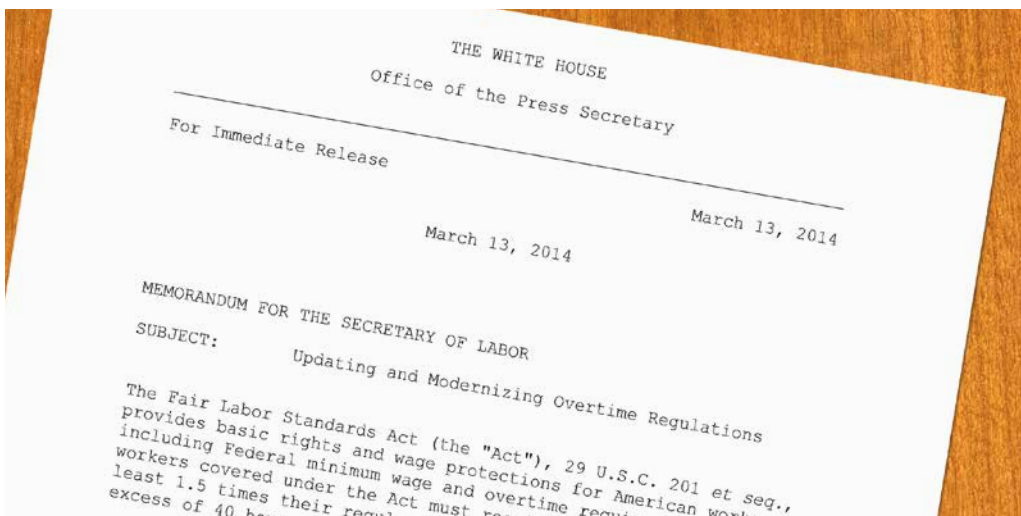
Department of Labor to Revise Federal Regulations Interpreting the Right to Receive Overtime Pay under the Fair Labor Standards Act of 1934

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On March 13, 2014, President Barack Obama issued a *memorandum* to the Secretary of Labor asking the Department of Labor (DOL) to propose revisions to the regulations that dictate when an employer may lawfully designate an employee as exempt from overtime pay under the Fair Labor Standards Act (FLSA). Focusing on the statutory exemptions for executive, administrative and professional employees, the president asserts that the regulations have not kept up with our nation's modern economy. Such "outdated" regulations, he argues, prevent millions of employees from obtaining the benefits of overtime pay. He directs the DOL to "modernize and streamline" the existing regulations while considering the intent of the FLSA, the ever-changing nature of the workplace, and the inability of many employers and employees to garner a basic understanding of the exemptions and their intended application.

This confusion over the regulations is likely one of the reasons contributing to the alarming rise in the number of new wage and hour suits. According to the Bloomberg BNA's *Daily Labor Report*, more than 8,000 wage and hour lawsuits were filed in federal court in the year-long period ending March 31, 2014.

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This record-breaking figure represents the seventh straight year of increases and does not include claims filed in state courts under corresponding state statutes. The numbers confirm that employees continue to scrutinize their employers' wage and hour policies and seek relief from the courts if they believe the law has been violated.

THE LAW AND ITS 2004 REVISION

The FLSA (29 U.S.C. section 201 *et seq.*) was promulgated in 1934 to provide wage protections for employees in the form of a federal minimum wage and overtime pay. With respect to overtime pay, the general rule is that covered employees must receive pay of at least 1.5 times their regular rate of pay for all hours worked in excess of 40 hours in any particular workweek.

However, statutory exemptions exist under the FLSA for certain categories of workers, including those for executive, administrative, professional, outside sales and certain computer employees (white collar exemptions). To qualify for any of these exemptions, an employer must pay the employee a certain threshold of weekly pay in the form of a true salary (one that does not fluctuate with the quantity or quality of work performed) and be able to demonstrate that the employee adheres to a set of particular job duties exemplifying the classification. Historically, the regulations for these exemptions dictated a minimum salary threshold of \$155 per week (or \$8,060. annually) and the corresponding initial job duties were loosely defined and difficult to interpret.

In 2004, the DOL under the Bush Administration increased the minimum salary threshold for these white collar exemptions to \$455 per workweek (or \$23,660 annually). It also revised the job duty requirements to make them easier to understand and administer accurately. Generally speaking, the defining characteristic of the executive exemption became the extent of managerial authority given to the employee. For the administrative exemption, the revisions focused on the extent of discretion allowed to an employee in managing general business operations.

LIKELY FOCUS OF NEW RULES

It is unknown at this time how the DOL will interpret President Obama's directive to "modernize and streamline" the existing regulations and whether that will result in an increase in the minimum salary threshold and/or further delineation of the job duties required to meet the respective exemptions. Either way, they will likely subject employers to increased costs and expenses.

For example, if the salary threshold is increased, employers will be required to pay certain workers more money if they want to retain the employees' exempt status. If the employer chooses not to respond to a salary increase requirement, the employer would then become liable for the payment of an overtime wage for hours worked by the employee in excess of 40 per workweek.

If the revisions result in a further delineation of the job duties required to meet the respective exemptions, it will most likely mean that they will become much more restrictive. Even more focus may be applied to the issues of managerial or supervisory responsibility, advanced knowledge in a particular field or the exercise of independent judgment. Such fact-intensive criteria are regularly the subject of litigation.

To the extent that the overall revisions cause more employees to be eligible for overtime pay, which is highly likely, it will also mean increased costs in recording and tracking hours worked.

While some employees may be excited about the prospect of obtaining a right to receive overtime pay if their employer chooses not to respond to a salary

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increase requirement or reclassifies them due to changes in the duties test, there is no guarantee that such an employee would actually receive any more money. The employer could very well restrict the number of hours worked by such an employee to avoid incurring overtime pay. Accordingly, a balancing test may be required of employers to weigh the potential financial advantages and disadvantages of keeping current exempt employees exempt or allowing them to convert to a nonexempt status. This would be another time-consuming and costly analysis for most large employers.

TIME LINE AND RECOMMENDATIONS

The rule-making process is expected to take anywhere from 12 to 18 months. This would include issuing the DOL's proposed revisions, accepting public comments, considering those comments with possible additional revisions, obtaining clearance from the White House Office of Management and Budget, and issuing the final rules. To be prepared for revised regulations on the scope of the exemptions, now is a good time for

employers to assess their existing job descriptions to ensure that job descriptions actually reflect the work being performed by the employee filling that job. This will make it easier upon receipt of the changes to make determinations on possible reclassification.

In anticipation of these proposed revisions, employers should take the time now to coordinate a review of their current employee classifications with their counsel to ensure compliance with the current salary threshold and job duties tests. Wilson Elser's employment practices lawyers are well versed in all aspects of the FLSA and its state and local counterparts, and are available to assist at all stages of the review process.



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