

Overtime

Obama Signs Memo Telling Labor Department To Expand Employee Overtime Eligibility

Human resources departments may have some time before they feel the full effect of President Barack Obama's new directive expanding overtime eligibility, but depending on the scope of the changes, they could face significant administrative challenges, particularly with regard to auditing organizational wage and hour practices, according to employer-side attorneys interviewed by Bloomberg BNA.

Obama March 13 issued a memorandum directing the Labor Department to modernize and streamline overtime regulations and make more workers eligible under federal law.

"If the new regulations are put in place, it becomes a natural time for an employer to do an audit without raising red flags and causing employees to challenge the fact that they were not paid overtime in prior years," management attorney Quentin Smith told Bloomberg BNA.

Specifically, the presidential memorandum tells DOL Secretary Thomas Perez to consider how the white-collar overtime exemption adopted by the DOL under the Fair Labor Standards Act could be simplified and updated to address the changing nature of the American workplace.

'This Could Create a Tremendous Level of Chaos.' "From HR's standpoint, this could create a tremendous level of chaos," Michael S. Cohen, a partner with Duane Morris LLP in Philadelphia, told Bloomberg BNA in a March 13 interview. "There are huge ramifications," he said. "Obviously, there's the cost to employers for overtime payments. A manager who expects to work 50 or 60 hours a week and suddenly becomes nonexempt will incur large overtime costs that a lot of employers won't

be able to pay." Additionally, employers will have to schedule breaks for these newly nonexempt employees and pay them for the time, Cohen pointed out.

By the same token, the formerly exempt employees will have to get used to clocking in and out, and many of them may not like the increased accountability for how they spend their working day, Cohen said. "You will have to take that freedom away from them," he said.

Equally significant could be the "huge cost of audits" employers will have to undertake to make sure their employee classification system is compliant, Cohen added.

But conducting such audits could provide a backhanded advantage for some employers, Quentin Smith, shareholder/director at Sheehan & Sheehan PA in Albuquerque, N.M., told Bloomberg BNA March 13. Under ordinary circumstances, he said, "when you make a determination that a [given] position should not have been classified as exempt, how do you make the change without raising red flags and becoming liable for unpaid overtime? If the new regulations are put in place, it becomes a natural time for an employer to do an audit without raising red flags and causing employees to challenge the fact that they were not paid overtime in prior years."

Certain Industries Impacted More. The likely increase in the salary threshold for nonexempt employees from \$455 a week, which is only \$23,660 a year, may not affect some industries much, Smith said, but it could prove significant in industries like "fast food, service and retail," where there is "a fair number of low-level 'supervisory' positions that would be affected immediately. That will be pretty easy to deal with administratively, even if it results in significant costs."

The technology industry should also take note of the likelihood of significant impact, he added, since positions like software and hardware analyst, which employers often pay well and seem therefore to assume they can classify as exempt, may become nonexempt as well, Smith said.

Administratively speaking, Smith said, there could be "a bigger impact" if the DOL changes the "duties test" of what kinds of job responsibilities qualify an employee as exempt. That's what could lead to the need for extensive employer audits, he said.

Since it's likely that the new regulations will take time to draft, HR could tell senior management that "the good news is there is nothing we have to do

immediately—except [to ask] ‘are we doing things right currently?’ ” Matt Collins of Brach Eichler LLC in Roseland, N.J., told Bloomberg BNA March 13. “Employers that haven’t checked their classifications recently should do so,” he advised.

Sidesteps Congressional Roadblocks. The memo is intended to publicize Obama’s latest effort to sidestep legislative hurdles in Congress on key employment and income policies.

In a ceremony at the White House, Obama said he wants “to restore the common sense principle behind overtime—if you go above and beyond to help your employer and your economy succeed, then you should share a little bit in that success.”

The FLSA requires employers to pay most employees overtime pay at time and one-half their regular pay rate for the hours they work in excess of 40 in a workweek.

However, the so-called white-collar exemption, found in Section 13(a)(1) of the FLSA, provides an exemption from overtime pay for those employed as bona fide executive, administrative, professional and outside sales employees.

To qualify for the “white-collar” exemption, employees must be paid at least \$455 per week on a salary basis, and their job duties must meet specific tests—such as including managerial or supervisory responsibility or requiring advanced knowledge or independent judgment.

The white-collar exemption’s low salary threshold means that “unfortunately, today, millions of Americans aren’t getting the extra pay they deserve” because “an exception that was originally meant for high-paid, white-collar employees now covers workers earning as little as \$23,660 a year,” Obama said.

The rulemaking process will take “a year to 18 months,” Tammy McCutchen, a shareholder at Littler Mendelson, said. McCutchen headed the DOL Wage and Hour Division when the exemption was last revised in 2004. “Certainly they have time to do it before the end of the [Obama] administration,” she said.

“Today, I’m going to use my pen to give more Americans the chance to earn the overtime pay that they deserve” as part of the administration’s agenda to ensure “that our economy rewards the hard work of every American,” he said.

Subject to Rulemaking Process. The initiative to update the exemption would be subject to the normal rulemaking process, which requires the Labor Department to formally propose a rule, give the public an opportunity to comment, consider making revisions based on those comments, await clearance of the rule by the White House Office of Management and Budget, and then issue the final rule.

At the signing ceremony, Obama said the Labor Department would “do this the right way.”

“[W]e’re going to consult with both workers and businesses as we update our overtime rules,” he said. “We’re going to work to simplify the system so it’s easier for employers and employees alike.”

The rulemaking process will take “a year to 18 months,” Tammy McCutchen, a shareholder at Littler Mendelson in Washington, D.C., told Bloomberg BNA March 12. McCutchen headed the DOL Wage and Hour Division when the exemption was last revised in 2004 (22 HRR 260, 3/15/04). “Certainly they have time to do it before the end of the [Obama] administration,” McCutchen predicted.

In 2004, the Bush administration raised the minimum salary threshold for the white-collar exemption from \$155 a week to \$455 a week and changed some of the requisite job duties. The \$155 amount, set in 1975, is the equivalent of \$970 in today’s dollars, and the \$455 amount would have been worth \$553 in today’s dollars when it was established in 2004.

Most Questions Concern Duties. While it’s still unclear just what changes the Labor Department will ultimately make to the white-collar exemption requirements, management-side attorneys say that the revisions are likely to come at a significant expense to employers.

Employers will have to review how they classify workers for overtime purposes and consider paying certain workers more money in order to retain their exempt status, the attorneys said.

“Many employers are going to face substantial additional costs,” Cindy Schmitt Minniti, a partner in Reed Smith’s labor and employment division in New York, told Bloomberg BNA March 13. “They will have to re-examine their workforce and go through the process of reviewing classifications and tracking overtime hours.”

The deal may look good on paper to employees, but Minniti said that raising the threshold income requirement for the exemption may simply force employers to cut hours for many workers who would now be entitled to overtime pay.

Minniti said it’s “almost a guarantee” that the Labor Department will increase the exemption’s income threshold. But she said changes in the types of duties considered supervisory or a requirement that workers devote a specific amount of their time on the job to such duties would be likely to spur litigation.

She said most classification questions concern the worker’s duties rather than pay. These questions are highly fact-specific, she said, and are regularly the subject of litigation.

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"If you're going to specify a percentage of time that must be spent on supervisory work, that becomes a fact question and that's difficult for both employers and workers to prove," Minniti said.

Tamara Devitt, a partner at Haynes and Boone LLP in Irvine, Calif., said her state's overtime law would be a good model if the DOL chooses to quantify the amount of time exempt employees must spend on supervisory work so that it qualifies as their primary duty.

While the state law requires workers to spend at least 50 percent of their time on the job performing exempt duties, Devitt said she's not sure whether a similar provision in the FLSA regulations would mean a significant change in the way the law is currently applied.

"These are often fact-specific questions about the duties workers perform," Devitt said, adding that many federal courts are already likely to look at a worker's proportion of supervisory duties in considering whether the FLSA's white-collar exemption applies.

Opponents Looking to Elections. Meanwhile, Republican lawmakers and business leaders have chastised the president for his continued pledge to act unilaterally when necessary to push through certain economic and employment policies.

"This is probably largely a political exercise, rather than something that's seriously broken and overdue for reform," David French, National Retail Federation senior vice president, told Bloomberg BNA March 13. "I think the president is trying to find ways to drive his agenda without going through Congress."

A Republican Senate aide told Bloomberg BNA March 13 that the party is seeking to use what it characterizes as the president's heavy-handed, job-killing initiatives as fodder for the upcoming election seasons.

"This administration has never bothered with courtesy, so Congress rarely knows what they're up to over there until after the fact," the aide said. "As far as the policy goes, it's as if they sit around looking for ways to make job creation and economic growth more difficult, all in the name of scoring political victories with their base," he added. "Given their predilection for going

around Congress at every turn, our only recourse is the 2014 and 2016 elections."

Legal, Legislative Challenges Possible. Professor Peter Strauss, who teaches administrative law at Columbia University, told Bloomberg BNA March 13 that the Labor Department generally has discretion to implement regulatory changes such as those related to overtime pay under the FLSA.

Nevertheless, Strauss said opponents of the changes can attempt to challenge or undermine the new regulations, whether in court or at the U.S. Capitol.

He added that the Labor Department is more susceptible to challenge if it tinkers with the types of duties covered under the white-collar exemption than if it simply focuses on the income threshold.

"Courts will have difficulty objecting to a change in qualifying income levels, but if what the Secretary of Labor is going to do now is exclude from the definition of white collar employees types of people who have up until now been so classified, one runs into the same buzz saw," Strauss said.

He added that lawmakers who oppose the changes can seek to undermine them through the appropriations process. "It's not impossible that someone would slip into an omnibus appropriations bill a provision saying that none of the money can be used to implement departmental consideration of the proposed rulemaking," Strauss said. "That would prevent progress on the rule every year such a provision was enacted."

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Text of the presidential memorandum is available at <http://op.bna.com/dlrcases.nsf/r?Open=copr-9h6scd>.