Expansion Of A “White Collar” Worker’s Ability To Be Eligible For Overtime Pay

In February, 2014, President Obama raised the minimum wage for federal contract workers. The Executive Order for federal contractors goes into effect next year but only applies to new contracts.

President Obama has also pressed Congress to raise the minimum wage for hourly employees.

The determination of who is designated as an “hourly employee,” versus an “exempt or salaried employee,” and who is entitled to overtime, finds its genesis in the Fair Labor Standards Act of 1938 (FLSA). Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees who are employed in bona fide: 1. Executive; 2. Administrative; 3. Professional; or 4. Outside Sales capacities. Certain computer employees also may be exempt. There are three tests for exemption, a salary level test, a salary basis test, and a job duties test. Under the salary level test, the current minimum salary level that must be paid to a low level manager or supervisor (white collar worker) is $455.00 per week. That amount must be paid “free and clear,” although the $455.00 per week may be paid in equivalent amounts for periods longer than one week.

Further, pursuant to the salary basis test, there are a number of rules applied, including what can be properly deducted from salary and the effects of any improper deductions. For instance, what is the effect of deductions for a two day absence due to a minor illness when the employer does not provide wage replacement benefits for such absences?

The Presidential Memorandum signed by President Obama on March 13, 2014, is really aimed at increasing the minimum $455.00 per week amount to a higher amount so that anyone who makes less than that weekly wage is considered an hourly employee and subject to the overtime provisions of the FLSA. $455.00 a week equates to only $23,660.00 per year. Such a salary does not lead one to think of a manager or supervisor salary. While President Obama, in his press conference, did not indicate what the new threshold may be, some are advocating the minimum be raised to $1,000.00 per week. California and New York, have set higher thresholds for employees under their state wage laws. Currently, the threshold in California and New York are $640.00 and $600.00 per week. In 2016, the amounts are due to rise to $800.00 and $675.00.

The last change to the current minimum level was made by the George W. Bush administration in 2004, raising the then $250.00 a week guaranteed overtime protection in place since 1975 to the current new level in 2004.

Under what authority are these increases contemplated and made? Under the FLSA, the Department of Labor was given authority to implement, explain, or prescribe law or policy. This is the “rule making” authority autho-
rizing a government agency to create, modify, or delete rules in the Code of Federal Regulations (CFR). The Department of Labor has the ability and authority under the FLSA to implement, explain, and prescribe law or policy in its rule making authority. Hence, the thresholds for overtime eligibility have been changed over time administratively.

What is the process for these changes? The United States Department of Labor will draft proposed rules. They will be published in the Federal Register and undergo a “comment period,” which usually lasts approximately three months. After review of the comment submitted, the Department of Labor will publish “final” rules with an effective date. Of course, Congress may hold hearings and try to pass bills or amendments to restrict the Department of Labor’s ability to make such rules. Congress could also itself set the threshold and eliminate the ability of the Department of Labor to “make rules” on the specific issue. Congress could also cut off funding to the Department of Labor or delay implementation. This would require consensus of Congress, however, which may never occur.

In addition, the Department of Labor has the ability not only to change overtime regulations in terms of minimum thresholds, but could also change other tests for determining whether an employee is a salaried/exempt employee or non-exempt. For instance, there currently are several tests to determine whether a person has a managerial or supervisory role, the percentage of time in these roles versus other roles, and an analysis of the duties performed. These types of tests are also subject to the Department of Labor’s rule making “implementation” of the FLSA.

Consequently, this is an area where clearly the administrative agency has the ability to change thresholds and floors subject to its rule making process. Because of the Department of Labor’s focus on “misclassification” of employees, and expected changes in the rules in the upcoming months and years, it is imperative that employers continue to review their current employees' classifications. Further, newly hired employees should also be realistically evaluated as to their job, job function, and whether or not they are subject to the overtime laws.

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