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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

DOL Overtime Rules May Rattle Retailers With Litigation

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William C. Martucci

Currently, wage-and-hour litigation is thriving. In 2014 alone, 8,086 Fair Labor Standards Act cases were filed across the nation.[1] This is an increase of 124 percent from the number of cases filed 10 years prior.[2] The legal system has witnessed several consecutive years of increased wage-and-hour filings, outpacing all other types of workplace class actions. Accordingly, significant costs continue to be incurred by employers due to wage-and-hour claims.

Section 13(a)(1) of the FLSA exempts white collar employees, or those who are employed in a bona fide executive, administrative, professional or outside sales capacity, from the FLSA's minimum wage and overtime pay requirements.[3] Currently, to be classified under this exemption, employees must make no less than $455 per week (or $23,660 annually) and perform certain job duties.[4] In addition, highly compensated employees — those who earn at least $100,000 annually (and at least $455 per week on a salary or fee basis) — are exempt from the minimum wage and overtime requirements if they meet just one of the job duty requirements.

On July 6, 2015, the National Archives and Records Administration published the U.S. Department of Labor's proposed rule changing these requirements in the Federal Register.[5] Pursuant to the DOL proposed rule, the standard salary level required to meet the white collar exemption will be amended to equal the 40th percentile of weekly earnings for full-time, salaried workers. This figure is projected to be about $970 a week (or $50,440 annually) in 2016. In addition, the DOL proposes increasing the total annual compensation requirement for exemption of highly compensated employees to the annualized value of the 90th percentile of weekly earnings for full-time, salaried workers (or $122,148 annually). Finally, the proposed rule establishes a mechanism for automatically updating the salary and compensation levels going forward.

Ramifications for the Retail Industry

The DOL's proposed rule could dramatically impact retail industry operations across the U.S. Retailers will need to assess whether previously exempt positions, such as assistant store managers, would be subject to the FLSA's overtime pay requirements under the new rule. A significant increase in the number of hourly retail workers may lead employers to consider overhauling their staffing models.

Employees, such as assistant store managers previously covered by Section 13(a)(1)'s white collar exemption, may be reclassified as hourly employees and experience decreased working hours as employers attempt to reduce overtime payments.

However, the DOL's proposed rule does not change the test to assess whether an employee is engaged in a bona fide executive, administrative, professional or outside sales capacity (and thus subject to the white collar exemption). Currently, an employee need not spend any specific percentage of his or her time on executive, administrative or professional tasks to be classified as exempt from the FLSA's overtime pay requirements. Many employers, particularly those in the retail industry, were concerned the DOL would impose a quantitative analysis (such as the test employed under California law) to assess whether a worker is sufficiently engaged in an executive, administrative or professional position.

In California, an exempt white collar employee must be: (1) "primarily engaged" in executive or professional duties and (2) must spend more than 50 percent of his or her work time engaged in such duties.[6] For now, the DOL has not adopted the California standard or a similar assessment requiring employers to quantify their employees' time. This should come as a relief to retail employers, as such tests are particularly difficult to apply to assistant store managers and other workers who alternate between exempt and nonexempt tasks throughout a given workday.[7]

Potential Effects on Litigation and Public Policy

If adopted, the DOL's proposed changes will likely have a significant impact on litigation trends and public policy as it relates to wage-and-hour law.

First, the proposed rule's suggested changes to the salary requirements for white collar exemptions are likely to spur additional litigation in the wage-and-hour arena. By nearly doubling the salary requirement, the DOL's proposal would subject millions of currently exempt employees to the FLSA's minimum wage and overtime requirements. This would require employers not only to pay their salaried nonexempt employees more overtime, but also to place more employees "on the clock" to track their time. For many employers, this will likely create more headaches and extra costs. Along with an increased number of employees entitled to minimum wage and overtime protections, the proposed changes will generate more room for wage calculation errors and will likely spur more litigation. Further, under the new rule, employers will need to track regular increases to the salary thresholds as determined by the automatic updating mechanism proposed by the DOL. Failure to do so could result in a simple error impacting a large number of employees. This type of error would be easy for an employee to prove and, thus, detrimental to an employer facing a wage-and-hour lawsuit.

In addition to increasing employers' litigation exposure, the DOL's proposed changes will likely impact economic and policy considerations in the public arena. While increased overtime protections mean higher payroll costs for employers, the DOL has described the proposed rule as "a critical first step toward ensuring that hardworking Americans are compensated fairly and have a chance to get ahead."[8] Critics of the rule note that employers may attempt to limit increased costs by cutting hours worked by nonexempt employees. Marc Freedman, executive director of labor law policy at the U.S. Chamber of Commerce, has also argued that "[o]ne [income] threshold for the whole country won't work," given the wide cost of living variance between states.

How employers respond to the proposed DOL regulations is yet to be seen. However, it is likely that many employers, particularly those in the ever-competitive and dynamic retail industry, will look for solutions to reduce exposure to liability and maintain predictable, nonfluctuating wage costs. For

instance, greater numbers of employers may turn to the “fluctuating workweek” method of calculating overtime, which enables employers to pay a fixed salary to nonexempt employees, even if their hours fluctuate from week-to-week.[9]

Conclusion

It is very likely that in 2015 and beyond, this area will expand due to concerns about protection for workers, social consciousness and the need for a living wage. The already very active wage-and-hour litigation arena is likely to become even more active because of the changes set forth by the DOL. As has been the case for years, employers will continue to face more FLSA lawsuits and will likely continue to incur increasing costs in resolving these matters. For the retail industry in particular, the proposed changes will likely reshape the way employees are classified, scheduled and paid.

—By William C. Martucci, Ashley Harrison and Margaret Inomata, Shook Hardy & Bacon LLP

William Martucci is a partner in Shook Hardy & Bacon's Washington, D.C., and Kansas City, Missouri, offices, where he leads the firm's national employment litigation and policy practice. Martucci teaches multinational business policy and the global workplace at Georgetown University.

Ashley Harrison is an associate in Shook Hardy & Bacon's Kansas City, Missouri, office.

Margaret Inomata is a staff attorney in Shook Hardy & Bacon's Washington, D.C., office.

[1] Doug Hass, “FLSA Minimum Wage, Overtime Lawsuits Smash Records in 2014, Sharp Growth Continues,” Wage Hour Insights, available athttp://www.wagehourinsights.com/dol-news/ (posted Jan. 16, 2015).

[2] *See id.*

[3] Under both the existing and modified regulations, the DOL imposes meaningful salary requirements for exemption, including the requirements that wages are paid on a consistent basis and that no pay is deducted for absences occasioned by the employer or by the operating requirements of the business. *See* 29 C.F.R. §§ 541.600-606.

[4] These requirements mandate that the executive employee’s primary duty is management of the enterprise or of a customarily recognized department; that the executive employee customarily and regularly directs the work of two or more other employees; and that the executive employee has the authority to hire or fire other employees or holds some weight in making recommendations on the hiring, firing and advancement of other employees.

[5] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 38,515 (July 6, 2015).

[6] Cal. Lab. Code §515(a); Industrial Welfare Commission Wage Order 7.

[7] Had the DOL adopted the California standard, the impact on litigation would likely have been far more meaningful.

[8] http://www.dol.gov/whd/overtime/NPRM2015/

[9] *See* 29 C.F.R. § 778.114(a).
