On July 6, 2015, the Department of Labor (DOL) issued proposed regulations with much fanfare from the administration, employee advocacy groups, and others. These regulations will fundamentally alter who is eligible for overtime around the country. Independent schools are not totally removed from the potential effects of these rules, although the impact will be slightly less than for other industries for the reasons explained below. It’s important to note that these are proposed regulations. The changes discussed are proposed by the Department of Labor. The Department of Labor will receive comments on the regulations until September 4, 2015. After comments from the public are received, the Department of Labor may reissue proposed regulations with changes for further comments, or it may issue final regulations. Final regulations on these rules are not expected until the winter or spring of 2016, and then there will likely be a transition period so that employers can implement needed changes.

Background

The federal government, as well as many states, has some fundamental wage requirements for employees. The requirements that are most familiar are those related to minimum wage. However, beyond the minimum wage, the federal government requires that many employees receive extra compensation when their jobs require them to work more than 40 hours a week. Overtime compensation is the usual hourly rate, plus 50 percent.
The Fair Labor Standards Act (FLSA), through the Department of Labor, defines the various tests that tell employers, employees, and the government when an employee is eligible for overtime pay. An element of those tests for many white-collar employees is the compensation that employees are guaranteed at the outset. Although the proposed rules that the Department of Labor has put out there touch on other topics, it is this salary level that is the biggest proposed change, and it is causing the most angst among employers. These tests are ultimately designed for employers, the Department of Labor, and the courts to determine which employees are exempt from the overtime regulations (overtime ineligible) and which are nonexempt (overtime eligible).

There’s a Test?

There are actually a few tests. In independent schools, there are three primary tests: the executive, administrative, and professional tests. For all three tests, the first question is whether the employee is paid a regular, predetermined salary that is not impacted by the amount of work accomplished (i.e., not based on the number of items created or achieved); the second question is whether that salary meets the regulatory minimum; and the third question is whether that employee’s job duties “primarily involve executive, administrative, or professional duties.” You can read, in depth, about the job duties portion of these regulations and all of the ins and outs of wage and hour law here.

At this time, the DOL is proposing to raise the regulatory minimum for the salary portion of these tests. Since 2004, that minimum has been $455 a week (or $23,660 for a full-year worker). If an employee does not meet that minimum, even if he or she is paid a weekly or yearly salary, for most positions there is no further consideration; the employee will automatically be eligible for overtime. The Department of Labor is proposing that this minimum salary level be updated to a level equal to the 40th percentile of earnings for salaried workers around the country: $921 per week or $47,892 for the full-year worker in 2013. The DOL is also proposing that this amount be regularly updated to reflect increases in this average salary benchmark so that this salary amount always reflects the 40th percentile of salaried workers. When these rules are likely to go into effect, in 2016, these dollar amounts will be $970 per week or $50,440 per year for full-year employees.

There is also another test beyond these three basic tests. This one applies to the highly compensated employee. Currently, this test provides that employees who are paid an annual
salary of $100,000 or more and who routinely perform executive, administrative, or professional duties are eligible for overtime. This test is a little different from the regular tests as a highly compensated employee need only *routinely* engage in the duties as opposed to *primarily* engage in them under the standard executive, administrative, and professional tests. The DOL would like to raise this salary level to $122,148, or the 90th percentile of weekly wages for salaried workers, also to be continually updated.

**A Word on Teachers**

One very important exception to all of these rules relates to teachers and those within schools who are truly education support specialists. When teacher positions are reviewed under these tests, the positions are considered under the professional exemption. However, teachers in public and private schools are not required to meet the salary minimum prescribed by the regulations. The same is true for another exemption that is unique to educational institutions — the education administrative exemption. These roles are exempt from the salary requirement as well, but they must be paid at least as much as the salary basis for a new, incoming teacher at that school. These individuals must perform administrative functions directly related to “academic instruction or training in an educational establishment or one of its departments or subdivisions.” In most schools, these staff members might be department heads, learning specialists, college counselors, or similar roles.

**Why Are They Doing This?**

The purpose behind the proposed changes is to ensure that the salary amount test does not lose importance in determining whether an employee is eligible for overtime. The Fair Labor Standards Act was drafted with two major policy objectives. The first was to ensure that employers employed more employees. The second was to ensure the overall well-being of the American worker so that individuals were not routinely worked past that 40-hour mark without financial consequence to the employer and reward for the employee. These objectives were largely aimed at non-white-collar jobs, although the particular changes the Department of Labor proposes relate to white-collar jobs.

Although perhaps hard to fathom given how complicated the current system is, this process of determining who was overtime ineligible used to involve two tests, a long test and a short test with differing salary amounts. In 2004, the last time the regulations were updated, the long test
was dropped in favor of the short test with a higher salary threshold. However, the DOL has noted that the current salary level for the test, $23,660, is actually below that of the poverty level for a family of four. This salary limit was taken from an older statutory test, which was more rigorous in application and therefore made the salary level less consequential. With the exclusive use of the current, easier test, the DOL feels that the salary level should be higher given the relative ease of the other factors. The current salary does not have much consequence on the number of employees who meet the other factors of the exemption tests. Only four percent of employees who would otherwise qualify as exempt under the other elements of the test are ineligible due to the current salary limits. The proposed changes would increase the number to roughly 25 percent.

**Are There Any Other Changes?**

The DOL has also requested suggestions on changes to the exemption tests and a couple of other discrete areas and future changes may be considered at a later date. However, the change in the salary level is so profound for many industries that the focus will likely remain most heavily on the salary levels.

**What Should We Do?**

The salary level on these tests will likely increase, although perhaps less than the proposed amount. Many schools have wanted to know, roughly, what this might mean for them and how to prepare. In terms of financial impact, once the regulations are finalized, any employee who is not a teacher or who doesn’t meet the education administrative exemption will likely be eligible to receive overtime pay if they earn less than the income threshold. To get a handle on how this might work in your school, consider the following steps.

1. **Get a grip on wage and hour law.**
   
   This is a notoriously difficult task for independent schools. The documents available at [this link](#) can help. The documents walk through how to get into compliance and what the current tests look like; they also address some particularly complicated situations such as technology employees, coaches, dorm parents, seasonal employees, and others for whom there are special rules. While this change might not be particularly welcome, these proposed rules do provide a great window to get into compliance with wage and hour law if you are not yet fully compliant.

2. **Assess who might not meet the minimum salary requirement.**
In 2016, when the rules would likely take effect, this salary requirement would be $970 per week or $50,440 per year for full-year employees. Remember that teachers will not fall into this category, nor will administrative education employees. For those employees who might qualify for the highly compensated employee exemption, the salary amount will also be projected to 2016 amounts, likely more than the $122,148 currently proposed.

3. Be aware of the particular jobs where this may be an issue. Heads’ assistants; assistant directors of admissions, advancement, and similar offices; and media, security, and other staff who tend to have salaries right on the cusp of this new standard are all potential roles that may need to track overtime in the future if their salaries do not meet the new minimum. While the duties of these positions may meet the duties test or be right on the line, the new salary requirements may shift them firmly into being eligible for overtime.

4. Start projecting how you will manage the shift for the new overtime-eligible employees. Changes from exempt from the overtime rules to nonexempt require not only changes on the accounting side for a school but also cultural and time-tracking shifts. Employees often feel that these categories are a reflection of the importance of their work, rather than merely designations under federal law. Employees can be salaried and eligible for overtime. However, the school will need them to track their time and to note to their supervisors when they are potentially triggering overtime, something they may not be used to doing.

5. Build any impact into your future budgeting. Use this fall to determine what impact the proposed changes may have on your school. Begin tracking time now so that you have concrete numbers to work with to plan next year’s budget.

6. Think about the opportunities here. If you have been hesitant to reclassify someone as eligible for overtime, the final implementation of the regulations may be an opportunity to get your house truly in order.

Conclusion

It is not uncommon for major changes such as these to move to regulatory actions as a president is preparing to leave office. These regulations may be the first of many we see over the next year or so as agencies enact final changes from this administration. Schools must remain informed.
about these proposed changes as they may seriously impact the budgeting efforts of many, particularly schools those outside high-cost-of-living cities that may have salary levels for non-faculty that are right on the cusp of the proposed levels. Schools will need to address not only the financial ramifications of these changes but also the cultural and process ones that may be triggered. NAIS is tracking this issue closely and will continue to update the membership on the changes as they unfold.