Proposed Regulations on Non-Exempt Employees and Overtime Requirements

History: Although passed in 1938, the Fair Labor Standards Act ("FLSA") did not originally apply to public sector employers. However, it was amended in 1966 and 1974 to require public employers to follow the FLSA wage and hour requirements for many state and local government employees. This was challenged in National League of Cities v. Usery, 426 U.S. 833 (1976) and the Supreme Court held that it was unconstitutional to apply the FLSA to state governments. It determined that the federal government’s imposition of the FLSA on states was a violation of the 10th Amendment which preserves states’ rights. In Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), the Supreme Court reversed the National League of Cities holding and determined that the Commerce Clause permits Congress to require state and local governments to follow the FLSA.

Current Law: The FLSA guarantees a minimum wage and an overtime pay rate of at least one and one-half times an employee’s regular hourly rate for hours worked above 40 hours per workweek, unless that employee is “exempt” under an FLSA exemption. Under the current regulations, exempt employees include those in “a bona fide executive, administrative, or professional” position. In order to be considered in an executive, administrative, or professional position, an employee must fulfill three requirements: (1) the employee must be paid on a salaried basis, or receive a predetermined amount of pay each pay period regardless of quantity or quality of work performed; (2) the employee must make over $455 per week, or $23,660 per year; and (3) the employee must perform specified primary duties commonly associated with executive, administrative, or professional functions. In addition, the FLSA exemptions include “highly compensated employees,” which are employees who perform office or non-manual work, customarily perform at least one of the duties of an executive, administrative, or professional employee, and make at least $100,000 per year.¹

Proposed Changes: The DOL proposes three major changes to these requirements:

- **Exempt Salary Threshold:** The first and most substantial proposed change is to the exempt salary threshold requirement. The proposed regulations increase the salary threshold from $455 per week ($23,660 per year) to the equivalent of the 40th percentile

¹ The FLSA designates other exempt employees, including but not limited to “outside sales employees,” certain computer professionals, commissioned sales employees, farm and fishing workers, small newspaper employees, babysitting or companionship occupations, criminal investigators, mechanics, and others that satisfy specified criteria. See 29 U.S.C. § 213(1).
of earnings for full-time salaried workers. When the regulations are likely to go into effect in 2016, the salary threshold is expected to be roughly **$50,440** per year.

- **Most Recent Prior Adjustments:**
  - 1975: $155 per week ($8,060 per year)
  - 2004: $455 per week ($23,660 per year) – current rate is lower than the poverty threshold for a family of four

- **Highly Compensated Employee Threshold:** The next proposed modification is an increase in the threshold to meet the highly compensated employee exemption from **$100,000** per year to **$122,148** per year. If the salary threshold for the highly compensated employee is raised, fewer employees will qualify as highly compensated employees and overtime may need to be paid to these individuals.

- **Annual Threshold Adjustment:** The final major recommended change is a self-adjusting update to the salary threshold and the highly compensated employee threshold on a yearly basis. The DOL proposes two measures to update the salary level; it will either be updated based on a fixed percentile of wages, or on the consumer price index. This is to ensure that the threshold does not become outdated as the cost of living rises, and to provide predictability to employers. Rather than drastic increases in the threshold when the rules are sporadically updated (which historically, has been once every ten years), employers will be able to expect incremental, annual increases of a nominal amount.

- The DOL is also debating adding two further provisions which would: (1) allow employers to include bonuses when calculating an employee’s yearly pay for determining exemption from overtime, and (2) amend the functions an employee must perform in order to be considered a bona fide executive, administrative, or professional position.

- The DOL is seeking further public comment on all of the proposed regulatory changes listed above, and comments must be submitted by September 4, 2015. After all comments are received, the rules will be revised to reflect both employer and employee commentary.

**Advice:** Although the final regulations are not expected to go into effect until sometime in 2016, employers can start preparing now for the upcoming change. If enacted as currently written, it is anticipated that approximately 4.6 million more Americans (including 50,000 more Iowans) will be entitled to overtime pay.

- The DOL suggests employers cope with the new rules in one or more of the following ways:
  - (1) pay the required overtime premium for overtime hours;
  - (2) reduce employees’ regular rate of pay so the total weekly earnings of the employee and hours do not change after overtime is paid;
  - (3) eliminate overtime hours; or
  - (4) increase employees’ salaries to the proposed exempt salary threshold.
• Employers should begin preparing a rollout plan for the new regulations. This plan should include proper documentation for employee reclassification, training and information sessions for employees regarding overtime eligibility, timekeeping requirements, and whether other benefits—such as paid time off—will be affected.

**White Collar Exemptions:** In order to qualify for the exemption, employees must perform primary duties associated with (1) executive, (2) administrative, or (3) professional functions. Primary duty means “the principal, main, major, or most important duty that the employee performs.” Determining an employee’s primary duty should focus on the “character of the employee’s job as a whole.”

• Factors which are helpful in evaluating the character of the employees job include
  1. relative importance of the exempt duties as compared with other types of duties;
  2. the amount of time spent performing exempt work, such that employees who spend more than 50% of their time generally satisfy the primary duty test;
  3. the employee’s relative freedom from direct supervision; and
  4. the relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

• **Executive employees**
  o Executive employees are those employees: (1) whose primary duty is management of the company or subdivision; (2) who customarily and regularly direct the work of two or more employees; and (3) who have the authority to hire and fire employees or make recommendations as to hiring and firing which are given particular weight.
  o An employee whose primary duty is management of a company or subdivision participates in various management activities, including (but not limited to)
    ▪ Interviewing, selecting, and training employees;
    ▪ Setting and adjusting rate of pay and hours;
    ▪ Maintaining production or sales records for use in supervision or control;
    ▪ Handling employee complaints and grievances;
    ▪ Disciplining employees;
    ▪ Determining the type of materials, supplies, machinery, equipment, or tools to be used or merchandise to be bought, stocked and sold;
    ▪ Providing for the safety and security of employees or the property; and
    ▪ Monitoring or implementing legal compliance measures.
  o An employee who customarily and regularly directs the work of two or more other employees means the work of two full-time employees or their equivalent—i.e. one full-time and two half-time employees, or four half-time employees. The phrase “customarily and regularly” is defined as “a frequency that must be greater than occasional but which, of course, may be less than constant.” Work which is done customarily and regularly is work performed every work week, not “isolated or one-time tasks.”
  o An employee’s decisions are given “particular weight” if it is part within the employee’s job duties to make such recommendations, the employee makes the recommendations frequently, and the employer frequently relies upon the decisions.
• **Administrative employees**
  - Administrative employees are those employees “whose primary duty is the performance of office or non-manual work directly related to the management or general business operations,” and whose primary duties include the exercise of discretion and independent judgment.
  - Employees within this field generally include employees in the financial services, tax, insurance, human resources, and legal compliance departments.
  - Employees at educational establishments whose primary duties relate to academic instruction or training are also administrative employees.

• **Professional employees**
  - Professional employees are those employees whose primary duties require:
    - (1) advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (the learned professional exemption); or
    - (2) “invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor” (the creative professional exemption).
  - Employees who have completed studies in professional teaching, law, medicine, accounting, actuarial science, nursing, physical therapy, and computer science or programming generally fall under the learned professionals exception.
  - Employees such as actors, musicians, composers, conductors, painters, novelists, and in some circumstances journalists, generally qualify for the creative professional exception.

**Recent Federal FLSA Cases and Pending Litigation:**

• **Integrity Staffing Solutions, Inc. v. Busk, 135 S. Ct. 513 (2014).**
  - **Holding:** Neither the time that workers spend waiting to go through security screenings before leaving work and the time during the screenings is compensable under the Fair Labor Standards Act (FLSA) and Portal-to-Portal Act.
  - **Analysis:** The plaintiffs in this case were former warehouse workers that would retrieve and package products for Amazon.com customers. The workers were required to submit to a security screening before leaving at the end of the day in order to make sure they had not stolen any of the warehouse’s products. These screenings would take about a half hour each day, including the time waiting to undergo the screening and the actual screening itself. The plaintiffs contended that this time should be compensated under the FLSA, but the Supreme Court disagreed. The unanimous Court held that under its interpretation of the FLSA and Portal-to-Portal, activities that are preliminary or postliminary to the principal activities of an employee’s occupation are not compensable under the FLSA. Those principal activities are those activities that are integral and indispensable to the occupation. The Court found that these screenings and the time waiting to undergo the screenings were not principal activities of the employees’ occupations; rather they were non-compensable postliminary activities.
• **Beauford v. ActionLink, LLC, No. 13-3265 (8th Cir. 2015).**
  
  o **Holding:** The Eighth Circuit affirmed in part and reversed in part. The court held that the employees were non-exempt under the FLSA, because they performed non-exempt promotional work and were not considered outside salesmen or administrative employees. However, the court found that merely cashing a proposed settlement check was not sufficient under 29 U.S.C. § 216(c) to discharge the employees’ future claims.

  o **Analysis:** Actionlink, LLC, a marketing company, was alleged to have misclassified some employees as exempt under FLSA overtime regulations. During the investigation, Actionlink agreed to reclassify the employees and pay them back-wages. It issued checks with a disclaimer that they represented full payment for wages earned; the employees cashed the checks, and then sued the company alleging they were entitled to additional pay.

  o The Eighth Circuit held that although the employees did promotional work, they were not outside sales employees, because the actual “sales” derived from the promotions were made by someone else. Further, the employees did not qualify as administrative employees because they did not have a primary duty which “includes the exercise of discretion and independent judgment with respect to matters of significance.” The employees merely followed set scripts and techniques to conduct promotions, and had to get prior approval before deviating from procedure.

  o Finally, the Eighth circuit concluded that the Appellants did not waive their rights to pursue additional claims by cashing their proposed settlement checks. As an issue of first impression, the court held that order to be a settlement, there must be an agreement of the employee to accept a certain amount of back wages. Merely tendering a check and the employee cashing that check was not an “agreement” under the law. Additionally, because the checks did not include sufficient language informing them of the consequences of cashing their checks, the employees were not on notice they were entering into a settlement.

• **Guyton v. Tyson Foods, Inc., 13-2036 (8th Cir. 2014).**
  
  o **Holding:** Where employees did not distinguish between donning and doffing unique and non-unique gear, jury’s decision that time spent doing these activities was not compensable was valid and supported by sufficient facts.

  o **Analysis:** Compensable time for a production line is calculated by “gang time,” time when the employees are at their working stations and the production line is moving. Employees claimed that employer failed to provide FLSA overtime for donning and doffing personal protective equipment throughout day. Employer paid 20 to 22 minutes per day in order to compensate for these types of activities without actually recording time that employees did them. A jury stated that while this was “work” under the FLSA, it was not an integral and indispensible activity that should be compensated. Employees appealed, alleging that whether it was indispensible was not a question for the jury and that the jury’s response was inconsistent.

  o Previous Supreme Court cases had determined that time walking to the production floor, and time donning and doffing unique, knife-associated gear was
compensable. Conversely, time donning and doffing non-unique gear was not compensable. This matter included all employees, both with unique and non-unique gear. In light of this, employees contend this was not an issue for the jury. The court held that the party did not object to the jury deciding this question during trial, and that the verdict was supported by sufficient evidence. Further, the court held the jury’s verdict was consistent, given that the two inquiries were separate, and in order be compensable the employees must meet both.

  - **Holding:** The FLSA preempts state-law wage claims that would allow a plaintiff to bring FLSA collection actions and Rule 23 class actions in the same case.
  - **Analysis:** In a class action suit, a group of employees sought compensation for unpaid overtime under the Iowa Wage Payment Collection Act and the Fair Labor Standards Act. The defendant moved to have the IWPCA claim dismissed because it is preempted by the FLSA. The issue was whether there was conflict preemption between the FLSA’s and the IWPCA. There are differences between the laws, including that the FLSA only allows employees to make claims on other employees’ behalf if the employee gives consent in writing, while the IWPCA does not contain such a provision. But the district court, finding that the Eighth Circuit had not ruled on this issue before, held that the FLSA preempts the IWPCA when a claim is brought on behalf of similarly situated employees. The court found that this is the general holding of the majority of circuits, and specifically disagreed with the Northern District of Iowa’s finding that the FLSA does not preempt duplicative state-law claims.

- **Allen v. City of Chicago**
  - **Class action lawsuit by nearly 50 Chicago police officers claiming they should be paid overtime for off-duty work-related use of the Blackberries they were issued by the City.** The plaintiff estimates that he received 1-2 off-duty, work-related phone calls each day and 1,500 emails per month. The case is now in trial. Since the complaint was filed, the City has revised its technology policy to provide that the Blackberries are issued only as a convenience and that officers are not obligated or required to respond or carry the devices off duty and that time spent using the devices off duty will only be compensated if the officer is on a call-back assignment directed by a supervisor and overtime has been authorized.