Labor Department proposes wider overtime rule

On June 30, the U.S. Labor Department issued a proposed rule that would greatly expand the number of workers who are eligible for overtime. The announcement represents the first potential change to regulations in this area since 2004.

The proposal is an outgrowth of a memorandum President Barack Obama issued in March 2014 directing the secretary of labor to “modernize and streamline” the regulations pertaining to exemptions from overtime for white-collar employees covered by the executive, administrative and professional exemptions.

Under the proposed rule, the minimum salary threshold for exemption from overtime will essentially double, from $455 per week to $921 per week. On an annualized basis, this equates to an increase from $23,660 to $47,892.

Furthermore, the proposal contemplates that the salary threshold will be adjusted annually to account for changes to Labor Department data. Under this proposal for annual indexing, for example, the salary threshold for 2016 is projected to be as high as $970 per week ($50,440 annually). These proposed changes to the minimum salary requirement are expected to affect nearly 5 million workers nationwide, including 200,000 employees in Illinois. The employment sectors likely to be most affected include the service sector generally, including retail, as well as nonprofit organizations.

In addition to the increase in the minimum salary test, the Labor Department also is proposing that the annual salary threshold for the “highly compensated employee” exemption be increased from $100,000 to $122,148. Interestingly, the department has proposed no changes to the “duties” test for the white-collar exemptions.

Many legal observers had expected that the proposed rule would announce a stricter mathematical test requiring that an employee’s exempt duties amount to no more than a set percentage of the employee’s total time worked. Although no such rule has been proposed as of yet, the Labor Department has solicited comments as to whether changes to the duties test should be incorporated in the final rule-making.

The proposed rule does not require any immediate changes by employers. After the proposal is published in the Federal Register, there will be a 60-day period for public comment. Afterward, the Labor Department may further alter or tweak its proposal, presumably incorporating such input. Most observers anticipate that a final rule will not be issued until later this year or early 2016.

In the meantime, Illinois employers should be taking a close look at any positions currently classified as exempt to determine whether they are likely to be affected by the new rule. For some positions close to the new proposed salary threshold, a small increase in pay might be considered. For other positions, employers may want to consider reclassification to nonexempt hourly status, with hourly pay adjusted to match, as nearly as possible, the annualized salary taking into consideration anticipated overtime.

Other options might include implementing a fluctuating workweek method of pay, which does not have a minimum salary requirement, but can dampen the economic effect of overtime for workers whose hours vary from week to week. Another option to consider is whether the workweek measuring period could be adjusted (e.g., instead of measuring from Monday to Sunday, perhaps Wednesday to Tuesday) to minimize the incidence of overtime depending on patterns in hours worked.

Finally, employers should examine the duties performed by their white-collar exempt employees, as it is still possible that the Labor Department will promulgate a stricter duties test.

Although nothing is set in stone yet, employers should seek legal counsel now for assistance in how to prepare themselves for the coming changes to the white-collar exemptions.

Copyright © 2015 Law Bulletin Publishing Company. All rights reserved. Reprinted with permission from Law Bulletin Publishing Company.

BY JOEL W. RICE

Joel W. Rice is an attorney with Fisher & Phillips LLP, a national labor and employment law firm that represents employers. He can be reached at jrice@laborlawyers.com.