Changes in Fair Labor Standards Act Salary Threshold

Many county employees will become eligible for overtime

–Andrew T. Phillips, von Briesen & Roper, s.c.

When counties determine whether to classify a position as exempt from overtime requirements under the Fair Labor Standards Act (FLSA), the focus is usually on whether the position requires that an employee perform certain job duties that qualify for an exemption. Although the FLSA also requires an employee to be paid a statutory minimum salary to qualify for an exemption, the minimum salary threshold was set low enough that most county positions easily met the requirement. However, beginning on December 1, 2016, the U.S. Department of Labor (DOL) is raising the minimum salary requirements significantly such that many county positions will no longer qualify for an exemption from overtime requirements.

General Requirements to Qualify for an FLSA Exemption

Under the FLSA, employees fall into two categories – those who are exempt from minimum wage and overtime pay requirements and those who are not exempt.[1] Non-exempt employees enjoy all of the protections provided by the FLSA and must be paid at the rate of one and one-half times the employee's regular hourly rate for all hours worked in excess of 40 in a week.[2]

Exempt employees are not subject to FLSA overtime requirements and do not have to be paid additional compensation for hours worked over 40 hours in a week. To qualify for an exemption, employees generally must (1) meet certain tests regarding their job duties (the "primary duties test") and (2) be paid

on a salary basis at not less than a statutory minimum (the "salary basis test").

There are several classifications of employees that fall under the FLSA exemptions, including executive, administrative, and professional employees. As a general matter, such exemptions are narrowly construed.[3]

How has the Minimum Salary Requirement Changed?

Since 2004, the minimum salary that an employee must be paid to qualify for an exemption is $455 per week, or $23,660 annually. Under the DOL's Final Rule set to go into effect on December 1, 2016, the minimum salary threshold will dramatically increase to $913 per week, or $47,476 annually. This new weekly salary threshold will be automatically adjusted every three (3) years. The DOL estimates that the new salary threshold may affect as many as 4.2 million workers who are currently "exempt" but will now fall below the new salary threshold.

Additionally, the DOL will now allow employers to count non-discretionary bonuses, commissions and incentive payments for up to 10% of the minimum salary threshold. Generally speaking, a non-discretionary bonus, incentive payment or commission is one that is promised to the employee and tied to the employee meeting certain individual or group goals or standards.

In order to count the non-discretionary bonus towards the minimum salary threshold, the payment must be paid at least quarterly. If the employee fails to earn enough to satisfy the salary test in a given quarter, the employer may still claim the exemption by making a catch-up payment in the next payroll following the end of the quarter.

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In sum, counties should take a proactive approach to the new salary basis rules

How Might the Salary Threshold Increase Affect Counties?

The increase in the salary threshold under the FLSA will affect counties in several ways. First, any exempt county employee who is paid a salary of less than $913 per week, or $47,476 annually will now be considered a non-exempt employee under the FLSA as of December 1, 2016, regardless of whether that employee performs duties that would otherwise qualify for an exemption. As a result, these employees must now be compensated one and one-half (1½) times their regular rate for every hour worked over 40 hours in a workweek.

For example, the new rules may affect many county social workers who perform job duties that qualify for the professional exemption but whose salaries may be too low to satisfy the new salary requirements. For similar reasons, the new threshold may cause county employees classified as exempt under the administrative exemption, such as human resources employees and deputies to elected officials, to no longer be exempt if they are paid less than $47,476 per year.

Second, because the new DOL regulation may affect almost 4.2 million workers who, under the old regulations were classified as "exempt," counties can expect heightened scrutiny from the DOL not just for those employees whose salary now falls below the new threshold, but also for salaried employees that meet the new standard as the DOL continues to aggressively seek compensation for workers it deems have been misclassified. Consequently, counties should be diligent in reviewing current employee classifications to ensure they are in compliance with not only the new FLSA salary threshold, but also with the primary duties test to qualify for an exemption.

Finally, counties will have to decide how to respond to the new salary threshold. Counties may initially think that increasing salaries across the board for those positions that are currently "exempt" under the old threshold is the only answer. However, counties should consider how often exempt employees work over forty hours in a work week. If an exempt employee rarely works over forty hours per week, it may be more cost effective to reclassify the employee as non-exempt and pay overtime rather than to raise the employee's salary to meet the new threshold.

There are many other alternatives that counties should consider in addition to raising the salary of exempt employees, such as altering the employee's work schedule to avoid working over forty hours in a work week or using the non-discretionary bonus rules to incentivize performance. In sum, counties should take a proactive approach to the new salary basis rules and determine on a case-by-case basis whether continuing to classify a position as exempt serves the best interests of the county.

This article is for general informational purposes only and does not constitute legal advice. Counties are advised to consult with legal counsel, and if any questions surrounding this article should arise, please contact the Government Law Group at von Briesen & Roper, s.c.

Endnotes

1 *See* 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.0.

2 *See* 29 U.S.C. §§ 206, 207(a)(1).

3 *Austin v. CUNA Mut. Ins. Soc.*, 240 F.R.D. 420, 428 (W.D. Wis. 2006); *Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211 (1959)