



Obama administration seeks changes to overtime rules to make more workers eligible for overtime pay: possible changes include altering salary basis, primary duties tests for 'white-collar' exemptions

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In a move that could affect nearly all employers, President Barack Obama signed a presidential memorandum last week directing the U.S. Department of Labor (DOL) to update its overtime regulations to make more employees eligible for overtime pay. Although the proposed changes have not been released yet, it is clear the move is designed to cause more employees to be classified as nonexempt under the Fair Labor Standards Act (FLSA) and thus eligible for time-and-a-half overtime pay.

Assuming the new regulations are enacted, a seismic shift in labor relations could ensue. Employers would have to ensure employees are correctly classified under the new regulations. In addition, if employees become eligible for overtime pay, management issues may emerge, as employers who previously didn't have to worry about certain employees' hours would have to start watching the clock.

Enacted during the Great Depression, the FLSA requires employees working more than 40 hours per week to be paid time and a half for each hour worked over 40. The law and its regulations, however, have certain exemptions—notably, white-collar exemptions, which generally exempt executives, managers, professionals, and other administrative personnel from the law's overtime and minimum wage requirements so long as certain elements are met. The DOL says the exemptions haven't kept up with the "our modern economy," and it plans to change the regulations to move more employees from the exempt to the nonexempt classification.

"By updating who qualifies for overtime pay, we are expanding opportunity and making sure hard work pays," DOL Secretary Tom Perez stated in a release on the DOL's website last week. "Today's announcement will give millions more people a fair shot at getting ahead, a better chance of realizing their dreams."

Some conservative groups have fired back, arguing that raising labor costs—in some cases, dramatically—ultimately will cost jobs. “There’s no such thing as a free lunch,” Daniel Mitchell, a senior fellow of the Cato Institute, told *The New York Times*. “If they push through something to make a certain class of workers more expensive, something will happen to adjust.”

The details of the proposed changes have not been presented yet, but the Obama administration is sure to target the salary-basis test, a required element for employees to meet the administrative, executive, and professional exemptions—the three main white-collar exemptions to the FLSA. The current minimum pay required is \$455 per week, or \$23,660 annually. President George W. Bush’s administration was the last to raise the salary basis. That was in 2004, which was the first time it had been changed since the 1970s.

According to news reports, some predict that the minimum salary threshold may more than double—to about \$970 per week, or \$50,440 annually. If that happens, anyone who earns less than \$970 per week and was previously classified as exempt under one of the white-collar exemptions would likely be required to be reclassified as nonexempt, regardless of the individual’s actual job duties or the realities of the position.

Another potential change is altering the “primary duties” test, a requirement for the executive exemption and other exemptions. To meet the primary duties test under the executive exemption, the employee’s primary duty must be “managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise.” The employee also must supervise at least two or more employees. One change to the primary duties test could require the employee to spend a certain percentage of his time performing “executive” work. This potential change is in response to some critics who say workers are being classified as exempt under the executive exemption, even though they spend a small percentage of their working time actually supervising other employees.

Once the new overtime rules are proposed, employers will of course have a chance to comment on how the changes would affect their business. Whatever is proposed will surely spur a flurry of comments, both from worker advocates and the business community. When the overtime regulations were last updated in 2004, the DOL received some 75,000 comments, according to reports.

The Obama administration is also proposing increasing the minimum wage from \$7.25 per hour to \$10.10 per hour. Raising the minimum wage, however, requires congressional action. The FLSA empowers the DOL to promulgate regulations regarding the elements required for an employee to meet certain exemptions under the FLSA.