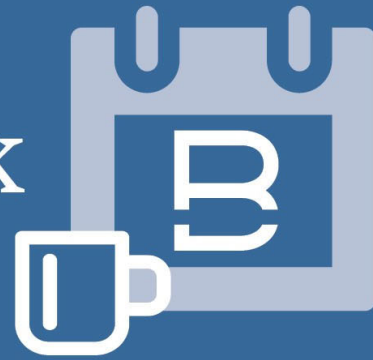


The Work Week

Bassford Remele Employment Practice Group



November 20, 2023

Welcome to another edition of *The Work Week with Bassford Remele*. Each Monday morning, we will publish and send a new article to your inbox to hopefully assist you in jumpstarting your work week.

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Thoughts, Questions, Concerns: DOL Proposed Rulemaking Change to Overtime Pay and What People Have to Say About It

On August 30, 2023, the U.S. Department of Labor (“DOL”) proposed an increase in salary threshold for exemptions to the Fair Labor Standards Act’s (“FLSA”) overtime pay requirements. Currently, the rule states that workers must earn at least \$35,568 annually (or about \$684 per week) and perform certain duties to qualify for the “white-collar” overtime exemptions. Workers that had a salary under \$35,568 would need to be paid overtime if they worked more than 40 hours per week. Under the proposed change, an employee making less than \$55,068 annually (or \$1,059 per week) would be eligible for overtime pay. This change represents about a 55% increase and would impact approximately 3.6 million workers. The change would also affect the salary level for the “highly compensated employee” exemption by raising it from \$107,432 to \$143,988 (approximately a 37% increase).

The purpose behind this change would be to assist lower-income, working Americans and ensure they are paid fairly for long hours on the job. This change, as presented, was meant to support economic growth because more people would be able to make and retain more money every paycheck.

The proposed change had been previously presented under the Obama administration in 2016 but was ultimately denied by a Texas federal court. In rebuking the proposed change, the court reasoned that “this significant increase would essentially make an employee’s duties, functions, or tasks irrelevant if the employee’s salary falls below the minimum salary level.” The court went on to conclude that the DOL exceeded its authority by raising the salary level so high.

The proposed change was published by the DOL on September 4, 2023, and open to public commentary for 60 days. The time for commentary closed on November 7, 2023. The following are a few of the public reactions to the proposed change:

- Republicans and business groups adamantly oppose this change, warning that the change will damage the economy by increasing employer's overhead costs.
- The National Federation of Independent Business ("NFIB") stated that the overall threshold increase would be detrimental to small businesses. The NFIB stated the change would burden small businesses with another expensive regulation after only recently making it out of the COVID pandemic. The NFIB asked the DOL not to adopt this change and consider the economic impact on small businesses.
- The Associated Builders and Contractors ("ABC") stated that they were "disappointed" that the DOL would even consider such a change. The ABC saw this as an unnecessary change because there are already so many businesses that are struggling with heavy economic issues like inflation, global supply chain concerns, rising material prices, and workforce shortages.
- The Leadership Conference on Civil and Human Rights ("LCCHR") stated that they supported the proposed change because it is a positive step to acknowledging individual employee's time and value. LCCHR noted that the current threshold is too low; it fails to provide employers with an incentive to balance overtime hours with the costs of overtime pay or increased salaries. The increase would ensure fairer wages for more workers, especially workers who are persons of color, low-income people, and women. LCCHR stated, "[t]hese groups have long borne the historic and ongoing burden of systemic discrimination and are among those who would benefit the most from the proposed increase to the salary threshold. Updates to the overtime regulations will make much-needed progress toward ensuring that all workers are treated with dignity and are able to enjoy basic protections in the workplace."

With this decision regarding the new rule looming, employers should be proactive and examine the current state of their business. Businesses should prepare themselves for this potential threshold increase through the following steps:

- Know your workforce. What are the current position classifications? What are the current pay structures in those classifications?
- Track your data. How many workers are currently working overtime? What are the costs associated with the overtime? What would it look like to limit those overtime hours?
- Be mindful of the individual employees. How would adjusting the overtime process and pay structures affect employee morale? Would people dislike limiting overtime hours? Would more people enjoy being salaried versus hourly?
- Review policies. What are the current timekeeping procedures? How do people get overtime approval? What is included when calculating overtime hours (e.g., travel time, breaks, remote work, etc.)?

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