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DOL Proposed Rule on White-Collar Overtime Exemption

More than 5 million additional workers would have to be paid for their overtime hours under a long-anticipated proposed rule unveiled by the White House June 30 to ensure than an exemption intended for highly paid executives is not used to underpay low-level supervisors.

The proposed rule would more than double the salary workers must be paid before they can be considered exempt from the Fair Labor Standards Act requirement to be paid one and one-half times their normal pay rate for work hours exceeding 40 in a workweek. The current salary threshold for overtime eligibility is $455 a week, or $23,660 per year. The proposal would set the salary threshold at the 40th percentile of earnings for full-time salaried workers, as determined by DOL's Bureau of Labor Statistics. That amount is projected to be $970 per week or $50,440 per year in 2016, when the threshold increase likely would occur.

The proposal also calls for indexing “to guard against the erosion” of the salary threshold, Perez said. The Labor Department is asking for input as to whether the threshold should be indexed to a fixed percentile of earnings or the consumer price index.

The department left open the question whether the duties tests in the current regulations should be revised. The so-called white-collar exemption, found in Section 13(a)(1) of the FLSA, provides an exemption from overtime pay for workers in bona fide executive, administrative, professional and outside sales positions.

Also in this Issue:

LINCOLN LUTHERAN OF RACINE and SERVICE EMPLOYEES INTERNATIONAL UNION HEALTHCARE WISCONSIN, SEIU-HCWI; Case 30-CA-111099; 362 NLRB No. 188;

The NLRB ruled prospectively that dues check-off provisions survive contract expiration and overrules Bethlehem Steel, 136 NLRB 1500, 50 LRRM 1013 (1962), and its progeny. The Board ruled that cancellation of dues checkoff undermines union's status as employees' bargaining representative and that dues checkoff provisions must be maintained after contract expiration as part of maintaining the status quo. It further ruled that dues checkoff is not a waiver of statutory rights that would automatically expire with contract., contrary board precedent regarding union-security agreements does not apply, unambiguous language of the NLRA does not make dues-checkoff arrangements dependent on existence of contracts, and it would be “manifestly unjust” to apply this new precedent in this case or in other pending cases.

Understanding the Administrative Exemption

Both federal law (Fair Labor Standards Act or FLSA) and state law (New York Minimum Wage Act and applicable regulations) generally require the payment of overtime wages for work performed after 40 hours per week. The FLSA and the State Minimum Wage Act exempt employees who work in a bona fide administrative capacity from the overtime pay requirements. The employee must meet all of these tests to qualify for the Administrative employee exemption:

- Employee must be paid for their services on a salary basis of not less than $656.25 ($675.00 on or after 12/31/15) per week inclusive of board, lodging, or other allowances . Being paid on a “salary basis” means an employee regularly receives a predetermined amount of compensation each pay period. This can be on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee’s work. An exempt employee must receive the full salary for any week in which they perform any work, regardless of the number of days or hours worked.
- The Employee’s primary duty consists of the performance of office or non-manual field work directly related to management policies or general operations. "Primary duty" has been interpreted to mean the principal, main, major, or most important duty that the employee performs. A determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. To meet the “directly related to management or general business operations” requirement, the employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment. Examples of such work include activities that relate to taxes, finance, accounting, budgeting, auditing, insurance, quality control, purchasing procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations, computer network, Internet and database administration, legal and regulatory compliance. It is important to note, however, that the mere performance of such activities does not, by itself, bring an employee within the administrative exception
- The Employee customarily and regularly exercises discretion and independent judgment. In general, the exercise of discretion and independent judgment involves the comparison and evaluation of possible courses of conduct and acting or making a decision after consideration of the various possibilities. In general, such an employee must have the authority to make an independent choice, free from immediate direction or supervision. Factors to consider include (but are not limited to): Does the employee formulate, affect, interpret, or implement policies or practices? Does the employee carry out major assignments in conducting the business? Does the employee’s work affect business operations to a substantial degree? Can the employee commit the employer in matters that have significant financial impact? Does the employee have authority to waive or deviate from established policies and procedures without prior approval? If an employee’s decisions are revised or reversed after review, it does not mean that the employee is not exercising discretion and independent judgment. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.
- The Employee regularly and directly assists an employer, or an employee employed in a bona fide executive or administrative capacity or who performs under general supervision, work along specialized or technical lines requiring special training, experience or knowledge.

Labor Board Adopts New Joint Employer Standard

In a long-awaited ruling, the National Labor Relations Board Aug. 27 held 3-2 that a company can be the joint employer of workers provided by another organization if the two firms share or codetermine matters governing the essential terms and conditions of employment of the employees in question (Browning-Ferris Indus. of Calif., Inc., 2015 BL 278454, 362 N.L.R.B. No. 186, 8/27/15).

NLRB Chairman Mark Gaston Pearce and Members Kent Y. Hirozawa and Lauren McFerran reversed a regional office finding that Browning-Ferris Industries of California Inc. was not the joint employer of workers provided by a labor contractor, Leadpoint Business Services. Overturning several long-standing precedents, the board said it will consider whether a "user" firm indirectly controls the employment relationship or has reserved the right to do so. Pearce, Hirozawa and McFerran said the board's standard had not kept pace with the expanded use of contingent workforces provided by employment agencies. Members Philip A. Miscimarra and Harry I. Johnson joined in a lengthy dissent.

"Most significantly," Pearce, Hirozawa and McFerran wrote, "the Board's decisions have implicitly repudiated [the board's] earlier reliance on reserved control and indirect control as indicia of joint-employer status. The board's approach since 1984 focused exclusively on a putative employer's actual control over workers, without considering its right to control them, they added. The board cited Bureau of Labor Statistics survey findings that contingent workers accounted for 4.1 percent of all employment in 2005, while temporary employment has expanded into more occupations than ever before. "This development is reason enough to revisit the Board's current joint-employer standard," the board said. The board members said the existing joint employer standard followed by the board was "out of step with changing economic circumstances," causing a "disconnect [that] potentially undermines the core protections of the Act for the employees impacted by these economic changes."

Pearce, Hirozawa and McFerran said that under common law principles, an organization may be considered an employer if it has the right to control the performance of work. Common law precedent has not required the actual exercise of that right, the board majority said, but the board's "current joint employer standard is significantly narrower than the common law would allow." "The result," the board said, "is that employees covered by the Act may be deprived of their statutory right to bargain effectively over wages, hours, and working conditions, solely because they work pursuant to an arrangement involving two or more employee firms, rather than one. Such an outcome seems clearly at odds with the policies of the Act."

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Stating it was returning to the “traditional test” used by the board and endorsed in the Third Circuit's 1982 decision, the board wrote “The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating the allocation and exercise of control in the workplace, we will consider the various ways in which joint employers may “share” control over terms and conditions of employment or ‘codetermine' them, as the Board and the courts have done in the past.”

The board cautioned it was not suggesting that a user firm would be considered a joint employer based on its “bare rights to dictate the results of a contracted service or to control or protect its own property.” “Instead,” the board said, “we will evaluate the evidence to determine whether a user employer affects the means or manner of employees’ work and terms of employment, either directly or through an intermediary.”

At the California recycling plant, the board said, Browning-Ferris communicated precise directives concerning work performance through Leadpoint supervisors to the workers who were supplied by the labor service. “We see no reason why this obvious control of employees by BFI should be discounted merely because it was exercised via the supplier rather than directly,” the board said. The board members said Local 350 had the burden of proving Browning-Ferris was a joint employer with Leadpoint at the California plant, but the evidence showed that Browning Ferris “shares and codetermines” employment terms for the workers Leadpoint provides at the recycling plant. “In many relevant respects,” the board said, “its right to control is indisputable.”
The board said BFI does not participate in Leadpoint's hiring process, but “codetermines the outcome” of the process by setting conditions on hiring.

BFI argued that it is Leadpoint supervisors who direct the employees, but the board said BFI exercises complete control over the speed of sorting lines and other productivity standards. Given BFI's control, the board said, “it is difficult to see how Leadpoint alone could bargain meaningfully about such fundamental working conditions as break times, safety, the speed of work, and the need for overtime imposed by BFI's productivity standards.” Leadpoint is responsible for setting employee wage rates, but its contract with the recycling company prohibits wage rates higher than those paid by BFI. The board concluded, “BFI's role in sharing and codetermining the terms and conditions of employment establishes that it is a joint employer with Leadpoint.”

Business groups and management lawyers are already looking to Congress to combat what they say is an expected, but harmful decision that could change the way that the franchise and contingent employers do business.

Paid Sick Leave Expansion

President Obama signed an executive order September 7, 2015 that gives an estimated 300,000 workers new access to paid sick leave. The executive order is the next step in Obama's labor agenda, which saw him expand paternal leave in January and expand overtime eligibility in June. In January, he issued a Presidential Memorandum directing the federal government to advance up to six weeks of paid sick leave in connection with the birth or adoption of a child, or for other sick leave eligible uses, and called on Congress to pass legislation giving federal employees six additional weeks of paid parental leave. The President's Fiscal Year 2016 budget also includes over $2 billion in funds to encourage states to establish paid family and medical leave programs that would ensure new parents can stay home to care for their children and allow for caregiving leave like eldercare or self -care related to a serious illness.

Obama announced the executive order at the annual Greater Boston Labor Council Breakfast. "Right now you have parents who have to choose between losing income or staying home with a sick child," Obama told the group.

The order will require federal contractors to give their workers the ability to earn up to seven days (56 hours) of paid sick leave each year. Employees will earn an hour of paid leave per every 30 hours of work when the policy begins with 2017 federal contracts. They can use that time to care for themselves as well as family members.

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