CONSIDERATIONS FOR CONSTRUCTION INDUSTRY EMPLOYERS AS THEY CONTINUE TO PREPARE FOR NEW SALARY THRESHOLDS UNDER WHITE-COLLAR OVERTIME EXEMPTIONS

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Labor, Employment and Workplace Safety Alert

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Employers in the U.S. construction industry should act now to address recent changes to the overtime exemptions for "white-collar" employees. On May 18, 2016, the U.S. Department of Labor (DOL) published its highly anticipated final rule, which more than doubles the salary threshold required for certain executive, administrative, and professional employees to qualify for an exemption from overtime pay under the Fair Labor Standards Act (FLSA). The new rule will take effect on December 1, 2016. In this relatively short time frame, employers must review their current practices, determine which positions should be reclassified and how they should be classified and paid, consider related policies that should be revised, and plan how to communicate changes to employees.

These changes to the overtime exemptions will touch almost every employer in the country, but they are likely to have a disproportionate impact on construction-related businesses, which are among the industries projected to have the most affected workers. The final rule makes it much more difficult to treat employees such as first-line construction supervisors as exempt from overtime pay, and employers are now required to make hard staffing and economic choices in their businesses.

WHAT DOES THE NEW RULE CHANGE?

The minimum salary for white-collar exemptions subject to the salary basis test will increase from $455 per week (or $23,660 annually) to $913/week (or $47,476 annually). DOL set this number based on the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently, the South). The final rule also permits employers to include nondiscretionary bonuses, incentives, and commissions to account for up to 10 percent of the required salary for these exemptions, as long as those amounts are paid on at least a quarterly basis. Catch-up payments are permitted at the end of the quarter.

The minimum salary for workers treated as exempt under the highly compensated employee exemption will be raised from $100,000 to $134,004 annually, which is the 90th percentile of full-time salaried workers nationally.

Beginning on January 1, 2020, both salary thresholds will be automatically adjusted and published every three years to keep pace with the 40th percentile and 90th percentile, respectively.

WHAT STAYS THE SAME?

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The final rule makes no changes to the current duties tests. Additionally, the required salary still cannot be pro rated for a part-time employee. Part-time employees who satisfy the applicable duties test, but do not receive at least the minimum salary, must be classified as nonexempt. Their hours must be recorded and, any time they work more than 40 hours in a workweek, employers must pay them overtime of 1.5 times their regular rate.

WHAT CAN EMPLOYERS DO TO PREPARE?

Employers should proactively audit exempt positions to review, reclassify, and correct any existing misclassifications. For employees who fall below the salary necessary to meet an exemption, employers should consider whether to classify those employees as nonexempt — and record hours and pay overtime — or increase their salaries to meet the new levels.

Economists with the National Association of Home Builders (NAHB) estimate that under the final rule, more than 110,000 first-line construction supervisors nationwide would become overtime eligible because they do not earn the minimum salary basis. If these employees are reclassified as nonexempt, employers will need to implement new timekeeping procedures, practices, or policies to record their total hours worked each day and workweek and also to train supervisors on them. Employers should also look at hours worked by currently exempt employees who might be reclassified as nonexempt to determine an appropriate new rate. Dividing their current salary by 40 (or even by their average hours worked) will increase payroll and will not be cost-neutral, so employers may want to consider a lower hourly rate for employees who typically work overtime and will now be entitled to additional overtime pay. If any functions or tasks are redistributed among employees, job descriptions should also be updated.

Construction companies commonly rely on the executive exemption for front-line supervisors. The DOL projects that there is only a 0 to 10 percent likelihood that front-line supervisors pass the standard duties test, which has not changed. Key issues include whether supervisors are engaged in hiring, firing, promoting, and demoting. Moreover, employees whose primary job duty is performing nonmanagement work involving repetitive operations with their hands, physical skill, and energy, such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, and laborers, are not exempt minimum wage and overtime under the FLSA's white-collar exemptions no matter how highly paid they might be. Employers who choose to invest money in higher salaries should be certain that they will not ultimately have to pay overtime to the employee at a much higher rate because of misclassification based on the employee's duties.

As part of any internal audit or review process to address exempt/nonexempt classifications, construction industry employers may also want to take the opportunity to review any contractor arrangements to make sure the contractors are properly classified and should not be considered employees. DOL issued guidance in July 2015 that made clear that misclassification of employees as independent contractors is a focus of DOL's enforcement efforts._ftn1Employers in the construction industry are at the top of its target list and routinely audited. Employers who misclassify individuals as independent contractors face potential liability for various unpaid employee expenses in addition to overtime liability, such as payroll taxes, workers' compensation, and unemployment insurance premiums.

Construction industry executives will also need to decide how to adjust estimating, bidding, and billing to reflect the impending changes in labor costs. Scheduled overtime is seldom found on competitively bid firm-price

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contracts, as most contractors are mindful of overtime's effect on costs and productivity. The NAHB reports that 25 percent of builders reported that the proposed DOL change would make some projects unprofitable and 19 percent reported that the change would cause their business to turn down some projects. Moreover, if salaried employees who previously worked more than 40 hours a week are sent home prior to earning overtime, many projects will take longer to complete.

WHAT OTHER ISSUES SHOULD EMPLOYERS CONSIDER?

New issues may arise when previously exempt positions are classified as nonexempt because employers must begin to record and pay for any work suffered or permitted by those employees. Employers will have to address what constitutes hours worked and how they will track and pay for time spent in certain activities, including:

- Activities at the start and end of the workday and unauthorized work time.
- Travel time, especially between worksites.
- "On-call" time and duties.
- Attendance at meetings or training sessions.
- Responding to email or other work performed away from the job site.

Activity at the Start and End of the Workday and Unauthorized Time

Construction employees may perform a myriad of tasks before and after their scheduled shifts. Although some of these activities may be considered preliminary and postliminary activities that are excluded from hours worked under the Portal-to-Portal Act of 1947, most are work time that must be compensated. For example, if first-line construction supervisors (who are no longer exempt) spend time discussing workplace issues (pass downtime) at the transition between shifts, employers must be certain that both supervisors are on-the-clock regardless of their scheduled shifts. Very short exchanges may be *de minimis* (and therefore not compensable), but longer exchanges are compensable work. Employers rely too heavily on the *de minimis* rule at their peril. Similarly, time spent repairing equipment, checking in and returning tools, transporting equipment to the jobsite, stocking and assembling materials, receiving safety instructions and performing various safety activities, and donning and doffing protective clothing is often compensable time. To the extent any of these responsibilities are assigned to supervisors who will be reclassified as nonexempt, employers must evaluate how such activities will be tracked and compensated.

Even if an employer does not specifically authorize work performed (or requires "prior authorization for overtime"), the employer must pay for any work it "suffers or permits." Employers may discipline, and even terminate the employment of, employees who work unauthorized overtime, but that discipline cannot include failure to pay for the time worked. When the employer knows or has reason to believe that an employee is continuing to work, or benefits from the time worked, the time is compensable. Employers should be cognizant of and monitor work employees perform before or after their scheduled shifts and include any such hours in the calculation of overtime.

Travel Time

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Because employees in various occupations in the construction industry frequently travel, employers will likely need to review policies and practices regarding compensation of travel time to ensure proper payments are made. Indeed, construction workers who incur a lot of travel time to and from jobsites can easily exceed a 40-hour workweek. Employers typically do not have to pay employees for time spent in ordinary travel between home and work in the employee's personal vehicle. Similarly, if an employee's worksite changes daily and the travel is a normal occurrence for the position, time spent commuting between home and the first worksite of the day (and returning home from the last worksite of the day) may not need to be compensated.

However, if a nonexempt employee is traveling out of town for a job that keeps him or her away from home overnight, the general rule under the FLSA is that the employer must compensate the employee for any travel that takes place during what would otherwise be his or her normal work hours, including those corresponding hours on regularly scheduled days off (e.g., Saturday and Sunday). If the employee is traveling outside of his or her normal work hours, travel time spent driving must be paid, but time spent as a passenger in a plane, train, bus, boat, or car generally need not be paid.

If an employee has to travel between job sites during a workday, the travel time is compensable. Similarly, if an employee has to report to the shop to load tools or equipment, for example, travel from the shop to the first job site would be compensable. If an employee goes home after the regular work day ends and is called back to work and required to travel a substantial distance to handle a customer emergency, the time spent traveling may also need to be compensated.

Waiting/On-Call Time

Employers are required to pay for time that a nonexempt employee spends on-call if the employee is unable to use the time effectively for his or her own purposes. The key question is whether the employee is "waiting to be engaged" (likely not compensable) or "engaged to wait" (compensable). If the employee is required to remain on the employer's premises, the employer is most likely required to pay the employee for that time. A construction employer should also consider the frequency and duration of any calls, how quickly the employee needs to respond when called, and whether the employee can conduct personal activities during the on-call period.

Meeting/Training Time

The time that nonexempt employees spend in meetings, lectures, or training is considered hours worked and must be paid, unless all four of the following criteria are met:

- Attendance is outside regular working hours.
- Attendance is voluntary.
- The course, lecture, or meeting is not job-related.
- The employee does not perform any productive work during attendance.

Employers will have to evaluate how it will handle employees who are reclassified to nonexempt status. Will it prevent those employees from attending management training programs and committee meetings, thus losing a

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key pipeline for career advancement? Or will employers absorb the additional cost of developing nonexempt workers into management?

Email/Remote Access

First-line construction supervisors and other employees who may be reclassified as a result of the final rule may be contacted at home (by email or otherwise) and may be called on to complete paperwork or other work outside of their normal work hours. Keep in mind that an employer may be required to pay nonexempt employees for time reading and responding to work-related email messages after hours and for work-related phone calls or other work employees perform remotely. Some of this time may be considered *de minimis*, but it can easily become compensable. Employers who do not want to pay for after-hours work should consider methods for restricting remote access and limiting the ability to perform work away from the business location. Employers should be also be certain that they have an exception time reporting system in place so that they can effectively track time spent on work-related matters away from the worksite and outside of normal working hours.

ADDITIONAL RESOURCES

For a more in-depth discussion of how employers can use the new rule as an opportunity to evaluate and make changes in their practices, *see* K&L Gates Webinars "Leveraging the USDOL's Proposed White Collar Exemption Changes: What Employers Should Be Doing Now" (April 2016) and "Implementing USDOL's New Minimum Salary Requirements for White-Collar Exemptions" (June 30, 2016).

Notes:

[1] *See* K&L Gates Legal Insight, "DOL Issues New Guidance on Independent Contractors," (July 23, 2015); *see also* K&L Gates Webinar, "Assessing Independent Contractor Relationships: Can They Survive the USDOL's Interpretation?" (September 2015).

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