



FLSA Exemption Changes: Some Compensation Alternatives For Salaried Employees

Insights

4.27.15

No one knows when the U.S. Labor Department will eventually implement revised definitions of the federal Fair Labor Standards Act's Section 13(a)(1) exemptions (we have covered these developments earlier). But whenever this happens, the new regulations are likely to:

- Substantially increase the current \$455-per-week minimum salary amount, possibly to a threshold of as much as \$1,000 a week (or maybe even more); and
- Change the duties-related requirements to make them harder to meet, such as by imposing a strict more-than-50% criterion for the amount of time spent in exempt work.

This could leave many employers scrambling to find an FLSA-compliant pay plan for employees whom they can no longer treat as exempt. For example, an employer might be financially unable to increase the weekly salary of a currently-exempt employee making an annualized \$40,000 to a new exemption minimum annualizing to \$52,000.

By-The-Hour Isn't The Only Option

Obviously, one way to proceed would be to assign an employee an hourly rate (of at least the minimum wage) and to pay the employee on an hourly basis for whatever number of hours he or she works in a particular workweek (plus any required overtime compensation at not less than 1.5 times the hourly rate). However, this might be undesirable from a payroll-cost standpoint (depending upon how it is implemented), and previously-salaried employees might find it to be demeaning.

Management could instead pay the employee a weekly salary representing straight-time compensation for his or her hours worked up to 40 in a workweek. For the employee's hours worked over 40 in a particular workweek, the employer would pay overtime compensation at not less than 1.5 times the rate obtained by dividing 40 into the weekly salary. A plan like this might be more acceptable to employees than a purely-hourly one, but it could also be cost-prohibitive (again, depending upon how it is established).

Another approach would be to pay the employee a weekly salary representing straight-time compensation for *all* of his or her hours worked in a workweek. Because the salary is the "one" of "one and one-half" in this scenario, overtime premium due for over-40 hours is computed at one-half of the rate figured by dividing *all* of the workweek hours worked (not just 40) into the weekly

that of the rate figured by dividing all of the workweek hours worked (not just 40) into the weekly salary. We have written about problematic USDOL pronouncements on these "fluctuating workweek" plans in 2011; that the current administration seems to disfavor them does not mean they are legally deficient.

Cost-Control Measures

Employers can also structure new plans so as to minimize the financial impact of an employee's becoming subject to the FLSA's overtime requirement. As USDOL said in proposing exemption revisions in 2003, "Nothing in the FLSA would prohibit an employer affected by the proposed rule . . . from implementing [a pay plan] that results in virtually no (or only a minimal) increase in labor costs." 68 Fed. Reg. 15560, 15576 (March 31, 2003).

Assume, for example, that a previously-exempt employee has been paid a weekly salary of \$800 and typically works 50 hours in a workweek. The employer decides to implement a fluctuating-workweek plan for this worker at a new weekly salary of \$725. When the employee works *exactly* 50 hours in a workweek, the total FLSA-complying pay for that workweek is:

$(\$725 \div 50 \text{ hrs.}) = \14.50 Regular Rate

$[(\$14.50 \div 2) \times 10 \text{ OT hrs.}] = \72.50 OT Premium Due

$(\$725 + \$72.50) = \$797.50$ FLSA Wages Due.

Naturally, the employer may not adjust the salary from workweek-to-workweek or in each pay period to produce a projected amount. Neither may the employer assume that the employee has worked the same number of hours each workweek. Instead, the employer must properly compute overtime compensation in addition to the salary on the basis of how much overtime the employee really works in each workweek. The employee's salary-plus-overtime total will therefore vary as his or her overtime hours worked vary each workweek, and the weekly salary stays the same until another permanent or lasting change is made.

The Bottom Line

This only scratches the surface, of course, and employers must take into account a number of other details and considerations in deciding what to do and how to do it. For that matter, these are not the only potential alternatives (including that another FLSA exemption might be a possibility in some circumstances).

Management must also be sure that whatever plan it adopts complies with other applicable laws besides the FLSA, such as state and local wage-hour requirements.

It is important to be thinking about these matters *now*, before you are facing the time-pressure of impending exemption changes.

