KANE RUSSELL COLEMAN LOGAN

One Mission. Your Mission.

The Overtime Poltergeist: New DOL Regulations Are on the Horizon

Energy Law / October 19, 2015 / Andrea Johnson

The concept of overtime has not been a kind one in the energy sector in recent years. See my earlier posts on this topic here and here.

Numerous Fair Labor Standards Act (the "FLSA" or the "Act") lawsuits (and Department of Labor audits) have targeted gobs of well-intentioned energy companies, from the largest service companies (such as Baker Hughes) down to the "mom and pop" shoestring provider of wellhead services. These FLSA cases always follow where employers, employees, and the money are – and the energy industry, in boom times, had all three in spades.

In reaction, there has been fear and anger in the industry, as companies, generously paying (overpaying?) folks already, have faced the extreme prospect of double damages and attorneys' fees in scores of class action-style lawsuits. Emotions aside, over the years compensation has slowly evolved, these lawsuits are being resolved, and current industry fortunes may make these lawsuits less attractive in the future (anyway).

However, there is no rest for the weary. Like the poltergeist from the cult classic, overtime is *ba-ack* (if it ever left).

Aside from the lawsuits and audits, the industry now must take into account proposed changes to Department of Labor ("DOL") overtime regulations, which will issue sometime in 2016. These new rules will modify the salary levels for exempt workers. The changes may seem simple, but in effect they will be significant, in fact, *transformative*. And now is the time for the industry to prepare to avoid a second round of litigation or audits.

New salary level regulations on the horizon

The proposed change will jack up the salary requirement for exempt workers from today's minimum of $455 per week to "about" $970. "About" meaning that the offered regulation is not pegged to a certain, reliable number by which employers can craft budgets; instead, the draft law will be attached to the 40th percentile for earnings, probably as articulated by the U.S. Bureau of Labor Statistics ("BLS"), and, thus, that number will adjust annually – meaning those earning below the 40th percentile, *as recalculated every year*, will be subject to overtime. Right now, the BLS's 40th percentile is $50,440 (so, if finalized by the DOL, the new rule will double the current requirement of $23,660). To put this into perspective, today's proposed 40th percentile is already a notable increase from the 40th percentile in 2013, which was $47,892 per year (or $921 per week). Consequently, there will be a scramble every year for employers to review, modify earnings, re-categorize workers, and adjust overtime internally – based on the government's moving target of the 40th percentile.

Short primer on overtime

Almost all American workers are subject to the FLSA and, under the Act, they should be paid overtime (1.5 times the "regular rate" for all hours over 40 in a workweek) – <u>unless</u> the employees are "exempt." To be exempt, the employee must fit into a category such as one of the "white collar exemptions," an "executive" or a manager/supervisor or an "administrative" position (running a core portion of the non-production-side of the business), or a "professional" (such as doctors, lawyers, accountants, and the like). Those are the main carve outs, and there are numerous other exempt categories (*e.g.*, outside sales, those set forth in the Motor Carrier Act, and certain computer positions).

The key is this: to be exempt under the **executive** or **administrative** exemption, a person must also be paid **a guaranteed weekly salary** (as noted above, that amount right now is $455 but soon will be $970 per week).

Reminder

In many cases involving overtime claims, energy employers often rely on either the executive or administrative exemption (and sometimes other exemptions) in order to try to avoid liability. Thus, the issue of what salary level applies is critical. And that litigation concern is an aside from the real havoc the new rules will cause practically in day-to-day industry business.

With the coming new regulations, the concept of "who is exempt" must be closely scrutinized again.

"High earner" increase

The DOL has also proposed to modify what is called the "high earner" defense or the regulation concerning "Highly Compensated Employees." Since 2004, that regulation has essentially presumed that workers making $100,000 or more annually are likely exempt (employers have a lower burden to prove one of the white collar exemptions in this scenario). In many of the energy-industry overtime lawsuits, this defense has played a major role, as many workers, well paid, often exceeded the $100,000 mark with ease. The new "high earner" proposal (as with the other one invoking the BLS's 40th percentile) does not settle on a static salary number, but instead ties the regulation to a shifting "90th percentile" figure, or what would have been $122,148 in 2013.

Other adjustments to the "duties tests"?

Finally, while nothing specific has yet to be released, the DOL indicated that it may tweak the duties tests for white collar exemptions. In short, while what's specifically on the table for now are the increased salary thresholds noted above, the DOL *may* also tighten up the exemption-category duties tests, too. This analysis waits for when the regulations are finally announced in 2016.

Why did all of this start?

In the spring of last year, President Obama tasked Labor Secretary Thomas Perez with devising new regulations. The last overhaul of the FLSA was in 2004 (the adjustment before that was in the 1970s). The administration's pronouncement had one simple goal – pay more overtime to people (which, naturally, would likewise produce more taxes). *Period.* So, with a wave of a magic wand, the administration may transform 5 to 15 million workers (depending on expert estimates) into hourly workers subject to overtime. *Poof*.

After the salary proposals were published this last summer, a comment period followed. Oh, and there were comments – like 247,068 comments. So many, it is said, the DOL has had a hard time getting them all posted (or perhaps the agency is uncertain about posting comments that were probably along the lines of "*are you out of your freaking mind?*"). Fair to say, numerous business groups have vociferously objected to the regulations. Not a surprise. The reasons are easily discerned:

- The increase to $970 is far above what *might* be necessary to deal with the "problem" of the salary level being "too low" at $455 a week.
- Pegging salary to a floating percentile will result in chaos and uncertainty in business and will not be good for the economy.
- The change will effectively eliminate certain management levels, damaging employee morale.
- The new regulations will create a greater divide between salaried management and hourly workers.
- There will be higher wage costs, through likely higher overtime rates, which the public will be burdened with ultimately.
- The rule would undermine flexibility in adjusting the rules in the future – preventing future discussions about appropriate salary levels.
- The rule will also likely put an end to the modern movement toward workers performing their work at home – as the need for "time clock" punching and recording of time will grow and probably force workers to be "at work."

When will the rules be finalized?

The regulations are expected to be finalized "mid-2016." No one can predict exactly when the DOL will finalize them, but the agency has indicated that it wants to see the first quarter employment and earnings data before the regulations are issued. Presumably, there will be a 120-day window before the regulations are enforced, so employers have a chance to prepare for the new law.

Is it certain these regulations will go into effect?

Probably, though there is a slight hope that Congress will act, as it can, to either stop or at least slow down the process. There is actually a way Congress could delay the issue (through the Congressional Review Act) at least until the November elections, but I wouldn't hold my breath given Congress's track record.

Assuming that Congress does not get its act together and assuming the final regulations are close to what we have seen, despite the hue and cry of business leaders in all fifty states, energy employers will have to grapple with a very different overtime world. And so will their employees.

Net result?

While the government seeks to increase overtime amounts, as if by magic, and although there is sure to be some increase in overtime and business costs, what I believe will actually happen is that employers will simply have to adjust workforces to avoid what might otherwise be a huge hit. The bottom line is the bottom line – there is only so much money in the pot to pay workers. We can clamor for overtime all we want, but the reality is that budgets are what they are, and the public will pay only so much.

What does "adjust workforces" mean?

First of all, this means that folks who worked hard to earn resume-building, entry level (and mid-level) managerial positions and got the distinction of moving into a "salaried" position may suddenly find that they are effectively demoted – salaries may be cut or eliminated with new hourly pay, positions may be reclassified as "assistants" or "hourly coordinators" or something like that. They will be put on the clock. Essentially pay and workforces will be flattened. They have to be. Companies will find ways to comply, as they must, and they will do so while keeping the business on budget, as shareholders demand. Second, the search for less expensive overseas workers may intensify, which would put further pressure on employment here.

And the fallout will not be pretty internally. Rather than the stated ideal of supposedly raising workers up, I believe the result will be the direct opposite – but perhaps that is the goal?

Risks

The stakes for noncompliance are high. As I alluded to above, in overtime lawsuits, not only are "back wages" due to a complainant, but that amount is generally doubled in court as "liquidated damages," and attorneys' fees are recoverable, too. And employer risks increase exponentially with the use of "collective actions" (the FLSA class action) in order to recoup the most money for groups of employees.

One can expect that with the new regulations there will be new lawsuits, too. When the FLSA was last revamped in 2004, lawsuits spiked, as if lawyers rediscovered a law (that had been on the books since 1938). Without question, that will happen again with these new regulations, too, and employers who are unaware may be caught flat-footed.

Planning for the future

That is why it is worthwhile for energy employers to get ready for these changes, which may be final in less than six months, with an additional 120 days (maybe) before actual enforcement. This means sometime in the latter half of 2016 the new rules will probably have to be reckoned with. So, now is the time to start to plan, to review positions, and to audit compensation. *Or to call your Congressman.*

Related Attorneys

Andrea Johnson