

Attorneys React To DOL's Final Overtime Exemption Rule

Law360, New York (May 18, 2016, 8:51 PM ET) -- The U.S. Labor Department on Wednesday issued the final version of the overtime exemption rule raising the minimum salary threshold to qualify for the Fair Labor Standards Act's white collar exemption. Here, attorneys tell Law360 why the new rule is significant.

Joshua Alloy, Arnold & Porter LLP

"By more than doubling the minimum salary threshold for exemption from overtime to \$47,476, and increasing the highly compensated threshold to \$134,004, the DOL's final overtime rule will have an immediate and significant impact on most employers. Companies and non-profit organizations must begin — or continue — to carefully analyze their workforce and make difficult business decisions before December 2016. This includes deciding whether to increase salaries for exempt employees earning less than \$47,476, or instead reclassify them and begin paying overtime and carefully tracking their hours. Because the salary thresholds will be updated every three years, employers must also continue monitoring this issue."

Tawny Alvarez, Verrill Dana LLP

"What is most significant about the rule, is its timing. The rule is now subject to the Congressional Review Act, as there are fewer than 60 'session days' left in the Senate calendar and fewer than 60 'legislative days' remaining in the House calendar. Accordingly, the Congress seated in January 2017 will be able to review the rule and have any potential disapproval resolution considered by the new president. Aside from the timing, the more than doubling of the salary threshold to qualify for the FLSA white-collar exemption will create tremendous strain for many business owners — including employers in more rural areas or communities with lower costs of living. Further, while the salary-level increase is less than proposed, the increase for Highly Compensated Employees was unexpectedly \$10,000 higher than what had been included in the proposed regulations."

Christian Antkowiak, Buchanan Ingersoll & Rooney PC

"This is a potential game changer, that's not necessarily as detrimental to employers as it might appear at first glance. During the last 10 years, wage and hour lawsuits have risen to record setting levels. The change to the Fair Labor Standards Act white collar overtime exemptions may provide an opportunity for employers to stem that tide. It has some obvious drawbacks such as the loss of flexibility, new challenges to the method and manner of tracking hours worked, and additional compliance costs. But it may also provide much needed cover for employers looking to reclassify positions that no longer meet an applicable duties' test. In the end, the rule change may provide a pathway for employers to save more money over the long-run, even if the transition period is costly and cumbersome."

Michael Arnold, Mintz Levin Cohn Ferris Glovsky & Popeo PC

“The rule will impact employers differently. Some will be impacted greatly while others will barely feel its effect because of how they currently structure their workforce and pay their employees. We would encourage all employers, however, not to bury their heads in the sand on this, and instead, determine where they fall along the impact spectrum and adjust accordingly. In doing so, take a holistic view of the issue, because it affects the workplace in so many ways. Any changes should be designed not only to comply with the law, but also to align with strategic goals and organizational culture.”

Randy Avram, Kilpatrick Townsend & Stockton LLP

“There is bad news and good news for employers with the announcement of the new minimum salary requirement. The bad news is that the new minimum of \$47,476 hits a sweet-spot that will capture large swaths of employees and require an overhaul of worker classifications. Also, many employees will have to adjust to lower base pay as employers modify wages to account for new overtime requirements. The silver-lining is that the new rules allow employers to anticipate and prepare for more incremental adjustments every three years rather than being hit with another 100 percent increase.”

Rick Bange, King & Spalding LLP

“In addition to having significant impacts on day-to-day operations, the effects of the new regulations should not be overlooked by mergers and acquisitions participants. Of course, financial models used to evaluate enterprise value and internal rate of return should be adjusted to account for increased labor costs, but additionally, employers may experience higher turnover due to reclassification of employees and financial performance may suffer as a result.”

Kathryn Barcroft, Cohen & Gresser LLP

“Employers need to carefully balance the impact of the DOL’s overtime exemption rule on the financial bottom-line of the company with employee expectations. Employers may be tempted to jockey to comply with the rule in a manner that seemingly benefits the company by reducing workers’ hours or salary so as not to trigger overtime pay or limiting company perks or benefits for the newly eligible workers to offset the impact of the rule. Employers should be mindful of dissatisfaction or turnover which may result from such actions versus the potential morale boost to company employees now eligible for overtime compensation.”

Rodney L. Bean, Steptoe & Johnson PLLC

“The strain caused by the salary level hike is going to be borne disproportionately by some industries and businesses, and it won’t be just financial. Small businesses and their employees — even those at the lowest levels — are going to be hit particularly hard. As companies like retailers and restaurants transition managers to hourly pay and put a cap on their hours, other employees will be scrambling to get the extra work done. I also think many employers will have workers who are fantastic as exempt employees, but who struggle to be sufficiently productive as non-exempts.”

Kristin Berger Parker, Stinson Leonard Street LLP

“This rule is a game-changer for many employers, even with the reduction in the final salary basis threshold. One unanticipated change is the allowance of up to 10 percent of the salary amount to come in non-discretionary incentive payments, bonuses or commissions. Employers in manufacturing and retail will make use of this provision to ease the transition. What remains to be seen is how this will affect employees below the minimum threshold. A significant number may see no increase in pay, as employers cut their hours or restructure compensation plans to comply with the new rules.”

Rachel Bien, Outten & Golden LLP

“In the long term, this overtime change will eliminate costly, time-consuming disputes and litigation. In the near term, it will clarify the process of classifying workers for employers. It will be much easier for employers to determine who is exempt from overtime pay and who should be paid those wages.”

Joanna Bowers, Verrill Dana LLP

“By increasing the number of employees who need to be classified as non-exempt, the Department of Labor’s new rule not only impacts employers financially, but it also requires that employers analyze whether they will need to make additional changes to their policies and procedures. Are employers’ policies regarding after-hours email use adequate? Do managers need additional training to ensure that employees are paid properly? Do employee benefits based on exempt/non-exempt status need to be updated? Employers will be confronted with these issues and more in the coming months as they are forced to reclassify certain employees from exempt to non-exempt.”

Mitchell Boyarsky, Gibbons PC

“Raising the minimum salary threshold will have a profound impact on the group of employees who currently are classified as exempt, but whose regular base wage falls well below the new threshold of \$913/week. Unless such employee’s wages increase to achieve the new threshold, the employee will be reclassified as non-exempt. An employer of this group must decide whether to increase the base weekly wage or to incur overtime costs. Other considerations involve additional record-keeping obligations, possible additional wage costs, such as for compensable travel time, and the inclusion of bonus payments in an employee’s regular rate of pay to calculate overtime liability. Practical considerations also involve continuing the practice of additional work done after hours and on weekends, such as answering phone calls and emails.”

Jeffrey W. Brecher, Jackson Lewis PC

“The salary level for the white collar exemptions has doubled and no longer will require separate rulemaking to permit updates. Historically, decades can pass between updates to the salary level. Now, updates will occur regularly every three years. If employers are not providing their exempt employees a raise, the government may require it. And there may be a ripple effect — employees already above the salary level will also want a salary increase to maintain parity with workers they manage. Employers likely are not planning for those increased costs. While the administration claims the final rule will lead to less litigation, the changes likely will lead to increased litigation as employers and previously exempt employees adjust to recording time, particularly workers who rely increasingly on technology and working remotely.”

Cathleen Bell Bremmer, Carlton Fields

“There are a few key provisions that provide relief to employers. First, the final rule permits employers to count non-discretionary bonuses, incentive payments, and commissions to meet up to 10 percent of the required salary threshold. In addition, the final rule settled on a threshold adjustment every three years instead of annually. The adjustment will be tied to the salary level at the 40th percentile of earnings of full-time salaried employees in the lowest-wage Census region, a key departure from the proposed rule.”

Jeremy Brenner, Armstrong Teasdale LLP

“While the DOL positions the final rule as a ‘compromise’ with employers, the changes remain very significant and heavily favor employees. This unabashed effort by the government to force the transfer income from employers to employees leaves employers of all sizes with the difficult choice of having to give potentially huge raises, do more in less time, or hire more workers, all of which will prove to be expensive, and in some cases impossible, for employers. This is perhaps the most significant change to the employment landscape in this country in decades.”

Leslie Selig Byrd, Bracewell LLP

“Businesses must quickly evaluate the challenging legal and business implications of compliance with the increased salary threshold. In considering options, businesses may begin by asking: Will the budget permit the increased salary to maintain exempt status? Will converting the employee to non-exempt

status result in savings in view of the anticipated overtime hours? Is conversion to a non-exempt salary using the fluctuating workweek 'half-time' overtime method a viable and lawful transition? How best may businesses minimize the adverse business/human resources effects of converting an exempt employee to non-exempt status? With thoughtful review, businesses may develop best practices to address these regulations."

Michael S. Cohen, Duane Morris LLP

"The massive increase of the minimum salary requirement for exempt employees under the new FLSA regulations will require, among other things, that many employers undertake an auditing process to determine which employees now will be eligible for overtime. This audit will assist employers in determining which employees, heretofore considered exempt under federal wage and hour law, now will be non-exempt and subject to overtime requirements. Once that decision is made, employers will have to consider various options — including increase in pay, payment of overtime, modification of hours, etc — in how to handle these employees."

Britt-Marie K. Cole-Johnson, Robinson & Cole LLP

"The U.S. DOL has finally tackled an issue that has long been in need of significant, critical review. By the time this final rule takes effect, employers will have had well over a year of lead time to strategize to minimize any impact to their bottom line, which may translate to a loss of exempt status and a reduction in hours to avoid overtime costs. For those employers unable to do so, I suspect that a market correction will occur."

Keelin Curran, Stoel Rives LLP

"Here are three important questions for employers to consider. First, how do employers continue to instill the expectations, trust and other qualities of exempt workers in those made hourly nonexempt under the final rule? Second, if currently exempt employees with an annual salary under \$47,476 receive bonuses or incentives, can those incentives be adjusted to include a non-discretionary component to help meet up to 10 percent of the threshold? Third, are there exempt positions paid under \$47,476 where burnout is a frequent problem, and is this a chance to address that by increasing hiring and reducing hours to 40 or less?"

Timothy Davis, Chamblee Ryan Kershaw & Anderson PC

"One of the aspects of the rule that, I think, is getting overlooked is the requirement to establish a mechanism for automatic increases. This didn't happen before, of course, and employers will have to be even more plugged-in to the regulatory changes to ensure continued compliance with the regulations. This rule change got a lot of attention because of how watershed it was. Future changes aren't likely to get as much press but the penalties will still be the same. "

Lindsey L. Dunn, Williams Parker Harrison Dietz & Getzen

"The DOL's rule, while potentially extending overtime protections to 4.2 million more employees, may also have adverse effects for certain employees. In an effort to offset costs businesses may incur as a result of the new rule, both in terms of the expense associated with ensuring compliance, as well as having to pay overtime to formerly exempt employees or sufficiently increasing an employee's salary so as to maintain the exemption, certain employers may reduce rates of pay, cut back scheduled hours to reduce risk of overtime, or offer less generous benefits to non-exempt employees."

David Eisenberg, Baker Sterchi Cowden & Rice LLC

"The regulation takes effect on December 1. Between now and then, employers have an important decision to make for their white collar employees whose earnings are near the new threshold. Be prepared to reclassify the employee as non-exempt and start paying overtime for hours worked in

excess of 40 per week; or increase the employee's salary to \$47,476 or more, to keep the employee exempt."

Jeffrey P. Englander, Morrison Cohen LLP

"When one considers that a minimum-wage worker in New York currently earns \$18,720 at the annualized rate for a 40-hour week — with some other states at or above the \$9-per-hour threshold — the Obama administration felt it necessary, despite opposition from most business groups, to raise the threshold overtime exemption by more than 100 percent of its 2004 level so as to ensure that those who were intended to benefit from working more than 40 hours a week — as contemplated in 1938 — could do so again in the 21st century. Savvy business owners, despite these drastically increased thresholds, will still have the ability to curb employees' compensation by reducing straight-time rates to account for the new calculus. This stratagem, however, will not be available to those whose workforces are covered by collective bargaining or other agreements."

Rosemary Enright, Barclay Damon LLP

"The long-awaited overtime exemption regulations present a significant opportunity to reassess long-neglected updates to workplace policies, procedures and staffing requirements to create a more productive and profitable organization. The rule, which will take effect seven months from now, provides managers ample opportunity to develop an effective transition plan with a broad focus to include review of: job descriptions, job titles and salary bands. Do the descriptions actually reflect what your employees do day-to-day? Overtime policy. Is it documented and enforced? Current overtime expenses. Can workloads be reorganized or schedules adjusted to maximize efficiency? Staffing levels. Are you overstaffed? Understaffed? Timekeeping methods to ensure accuracy and completion."

Kyle Ferachi, McGlinchey Stafford PLLC

"An increase in the salary level was expected, but now companies can take action. Many clients expect minimal effects since they've already adjusted salaries based on economy. Retail and service industry clients note difficult decisions lie ahead, including whether to raise exempt employees' salaries to meet the threshold, employ more employees at lower hourly wages, or create systems to limit overtime exposure. Employee morale is a concern, as employees in salaried management positions may become hourly and lose some benefits and flexibility that come with a salaried position. We are monitoring these rules closely and are counseling on best practices."

Angelo M. Filippi, Kelley Kronenberg

"The Department of Labor has effectively legislated fundamental changes to law regulating wages, by essentially doubling the threshold level of salary needed to qualify for an overtime exemption. The change will result in businesses scrambling to assess their compensation practices in a competitive market. Employers who employ supervisory staff whose duties qualify for an exemption will be forced to pay overtime to such employees unless they raise salaries to the new threshold of \$47,476. The new rules come into effect on Dec. 1, 2016, giving employers seven months to overhaul their compensation programs."

Mitchell Fishberg, McCarter & English LLP

"Anyone who thinks that businesses are going to absorb the added labor costs is kidding themselves. Companies that allocate a percentage of budget to labor costs will do what it takes to keep that number static or nearly so — an achievable goal. Employers have six months to work through multiple scenarios, with advice from counsel, accountants and financial experts. Items under consideration will surely include reducing employees' benefits and/or increasing their contributions; and changing from salaried to hourly the workers who would fall below the new threshold, and limit them to 40 hours weekly. The law is the law, but pragmatic considerations will — and must — prevail."

Tim K. Garrett, Bass Berry & Sims PLC

“The DOL’s final rules are significant as employers will now face a choice that could impact millions of workers. While most employers recognized the salary level needed to be raised, businesses were hopeful for a gradual implementation over time. An immediate increase by more than 100 percent will be especially difficult on small businesses and nonprofits, and employers in certain industries, such as retail and food service. Some fear that businesses will continue the move toward automating certain job functions, resulting in less job opportunities among lower-skilled workers and that the built-in automatic increase in the salary level every three years is a self-perpetuating inflation trigger.”

Tom Gies, Crowell & Moring LLP

“DOL’s regulations will impose significant financial costs on most U.S. employers. The decision to double the minimum salary and index it to inflation will be a major compliance headache. The new overtime eligibility rules, like many regulatory initiatives, is subject to the immutable law of unintended consequences. The new rules may have the perverse effect of impeding the ability of many junior-level managerial employees, particularly women, to earn more money and advance their careers. Plaintiffs’ lawyers are probably popping champagne corks today. The new rules all but guarantee another wave of expensive class action litigation filed against U.S. employers.”

Ryan A. Glasgow, Hunton & Williams LLP

“Aside from the significant expense and organizational disruption employers will incur, the rule’s most problematic feature is the automatic updating process that will occur every three years using the same 40 percent threshold used to set the salary level at \$47,476. When the DOL updated the salary requirement in 2004, it said it lacked the authority to provide for automatic updating. Now, the DOL thinks it has that authority. Such double-speak makes the automatic updating requirement ripe for judicial challenge. Moreover, using the 40 percent threshold for each update means the salary level will increase at a far greater rate than inflation. As employers reclassify from salary to hourly those employees making less than the new salary level, earners currently below the 40 percent threshold will disappear, meaning that with each update, the 40 percent threshold will be applied to an exponentially increasing average salary.”

Jeremy Glenn, Cozen O'Connor

“Although employers have been bracing for the changes since the DOL released its proposed rule last summer, the final rule confirms a more-than-doubling of the salary threshold and promises to raise the salary threshold every three years, with an unpredictable upper limit as predicted by my colleagues in the Wage and Hour Defense Institute. In the immediate future, employers have to consider what effect, if any, the Dec. 1, 2016, effective date will have on their standard cycle for awarding salary increases. For those companies that typically make such increases in December, this effective date should not present a problem, but those that make increases at other times of the year might want to reconsider that schedule.”

Richard Glovsky, Locke Lord LLP

“The workplace impact of this rule rests upon how employers adapt to it. On its face, the rule is simple: an employee earning less than \$47,476 is not exempt. Given the roughly 4 million employees who will no longer be exempt as a result of these new regulations, however, this seemingly straightforward rule raises a series of complex business options for employers. To name a few, do employers raise salaries to ensure certain employees remain exempt? Do they change the compensation of salaried employees to hourly? How do they treat employees who take pride in not punching a clock?”

Scott Green, Rivkin Radler LLP

“While the changes certainly upend the long standing status quo, the significance of the impact from a labor cost standpoint can be limited or even eliminated by employers. If you have a class of exempt

employees that do not meet the salary basis test, you can simply increase their salary. However, where that option is not realistic, employers can simply pay those employees an hourly wage. The key to controlling cost is to find an hourly wage, that, when accounting for overtime, pays the employee a wage this is on average equivalent to their prior earnings as a salaried employee. For employers exploring this path, the analysis must start now.”

Mike Griffaton, Vorys Sater Seymour and Pease LLP

“The DOL’s salary threshold increase will profoundly affect employers and employees. Employers must analyze their workforce and then reclassify employees, adjust wages, reduce hours, pay overtime, and/or reorganize workloads, while also deciding whether to shift benefit costs to employees or eliminate certain benefits altogether. Employees who become hourly will lose the flexibility inherent in exempt status. Against all this, employers must balance employee morale and turnover. And while the DOL dismisses this concern, tracking and recording hours for employees who have not done so previously represent a sea change to a workplace’s culture.”

Kevin J. Hamilton, Perkins Coie LLP

“The new regulations announced today by the Department of Labor, updated for the first time since 2004, double the minimum salary requirement for workers to qualify for a white-collar overtime exemption, from \$23,600 to \$47,476. This will require reclassification of approximately 4.2 million workers currently exempt from overtime. Significantly, however, the rule now allows employers to include nondiscretionary bonuses and incentive payments to satisfy up to 10 percent of the new salary threshold. As a result, employers should review their employee compensation packages in order to restructure salary and bonus compensation as needed to meet the new salary test.”

James Hammerschmidt, Paley Rothman

“The new regulations announced today are going to have a dramatic impact on businesses of all sizes and particularly on many small businesses that currently have many exempt employees whose salaries will need to be significantly increased or who will suddenly become overtime eligible. Employers with newly classified overtime eligible employees will have to decide whether to pay the overtime, not pay the overtime, lower base salaries to offset anticipated overtime, hire more employees to do the work, not do the work, or re-allocate or automate the work — the latter of which may require costly capital investments. Some employers may cut benefits to offset wage increases. If an employer has conducted a wage and hour audit before now to analyze the impact of the regulations and its options, the Department of Labor is giving it until Dec. 1 to do so. No time to waste! If there is a silver lining in all of this, it is that an employer who has misclassified employees in the past can use this opportunity to conduct a wage and hour audit and get things straight.”

Clayton Hearn, Roberts Markel Weinberg Butler Hailey PC

“The U.S. Department of Labor finalized its revisions to the overtime regulations, more than doubling the salary threshold for the executive, administrative, and professional exemptions, and significantly boosting the compensation threshold for the highly compensated employee exemption. These increases will require many employers to restructure the way their employees are paid, resulting in higher administrative costs to the employer, and higher prices for the consumer. Increased awareness of the new regulations will be essential to curb a deluge of collective-action lawsuits against unsuspecting small businesses, company officials and HR directors.”

Malcolm A. Heinicke, Munger Tolles & Olson LLP

“I have heard some employers joke as a general matter that as long as they are in compliance with California laws, they must be compliant everywhere else. Here, however, while the DOL did not move toward California’s duties test in this new rule, it has adopted a salary minimum that is higher than

California's, and so employers all over the country will need to review and in some instances adjust compensation levels or exempt status accordingly."

Meghan Hill, Squire Patton Boggs

"There are very few regulations that impact virtually all employers. This is one of them. First, the regulations have a monetary cost to employers for both compliance and paying increased wages. Second, employers need to re-think the responsibilities of mid-level, formally exempt employees. In today's connected world exempt employees are consistently checking email, texting and taking calls outside of traditional work hours. Reclassifying these positions as non-exempt can cause potential off-the-clock liability and can have an impact that goes beyond the individual employee."

Jay Holland, Joseph Greenwald & Laake PA

"The new regulations are an enormous change, with an additional 4.2 million workers who will potentially become newly eligible for overtime. The last change in the cut-off was in 2004, and that was set at \$23,660. The new cut-off of \$47,476.00 will certainly reach into the lower levels of management in certain industries, especially in retail and food-service. One of the most significant aspects of the new regulation is that it will be updated every three years to keep up with changes in pay. I suspect that the animated reactions to a roughly 100 percent increase in the threshold would have been far more muted had it been incremental over the past 12 years, and would likely have given employers both the time and the inclination to make appropriate adjustments. In contrast, this one increase seems rather dramatic. However, the regulation was toned down from the original proposal which would have raised the cut-off to \$50,440.00, and would have included annual indexing, rather than every three years. And, the regulation leaves the 'duties test' intact, a change to which would have resulted in a complete upheaval of the way employees are classified for overtime purposes. So, like most new regulations, while a victory for employees, it is also the sum of its compromises."

David James, Nilan Johnson Lewis PA

"The final overtime rule throws the business community a bone by permitting limited consideration of bonuses and performing threshold adjustments every three years rather than annually. But the thrust of the rule still substantially burdens employers by forcing them to consider raising salaries to the new threshold to remain in compliance. Employers ought to consider alternative strategies to manage their payroll. Two often overlooked solutions include the fluctuating workweek method and Belo agreements, both of which permit employers to continue to pay salaries in some form. Employers might also consider increasing headcount and reducing schedules to preclude overtime hours."

Eric A. Johnston, McGinnis Lochridge & Kilgore LLP

"Last night, the White House announced its long anticipated and much commented on final overtime rules. The final rules raise the salary threshold for employees entitled to overtime from \$23,660 to \$47,476. This embodies President Obama's initiative to raise the overtime salary threshold from an 'outdated' amount to the 40th percentile of all earners. The Department of Labor estimates that a total of 4.2 million American workers will be affected, with largest number of employees located in Texas and California. The White House is continuing its strong push to enact regulatory change through the DOL prior to the expiration of this administration's final term."

Marc Katz, Andrews Kurth LLP

"The DOL released its final rule regarding overtime compensation, which could expand overtime pay requirements to over 4 million employees. Going forward, salaried employees can only be exempt from overtime pay by earning at least \$913 per week — up from \$455 per week — and this will increase every three years to track the 40th percentile from the lowest-wage Census Region. Also, for the 'highly compensated' exemption, an employee will have to earn \$134,004 annually. Employers must be in compliance by Dec. 1, 2016, and all employers are well advised to immediately review their employee

classifications and overtime pay practices. Employers with currently classified exempt employees making less than \$913 per week will have to be reclassified as non-exempt or receive a raise. Similarly, employees classified as exempt under the highly compensated exemption making less than \$134,000 will also have to be reclassified or provided salary or bonus increases. Finally, all of this will have to be done before Dec. 1.”

Michael S. Katzen, Goldberg Segalla LLP

“Businesses and organizations with currently exempt employees on the cusp of the \$47,476 annual salary level can take some solace in knowing that for the first time, employers may count nondiscretionary bonuses, incentive payments and commissions toward up to 10 percent of the required salary level so long as they are paid at least quarterly. Additionally, employers that nevertheless need to make changes based on the final rule should consider using this period of flux between now and the Dec. 1 effective date as an opportunity to address any other wage and hour compliance issues that may be lurking in the workplace.”

Thomas R. Kaufman, Sheppard Mullin Richter & Hampton LLP

“The only part of the rule that should have immediate impact is the large increase in the minimum salary requirement. In certain industries, especially the retail industry, this will invalidate the executive exemption for many frontline managers. The changes to the highly compensated exemption should make little difference in practice, as the exemption was always difficult to establish beyond the salary minimum and most people earning \$100,000 meet another exemption. The automatic indexing to the salary minimum does not kick in until 2020, so it could be rescinded if a more business friendly administration takes over in 2017.”

Mark L. Keenan, Nelson Mullins Riley & Scarborough LLP

“Only time will tell if the final rule will accomplish the administration’s announced goal of boosting worker compensation. While some employers may raise salaries to meet the new requirements, others may respond by decreasing exempt employees’ pay and capping those employees at 40 hours per week — a de facto pay cut. Employers are also likely to take proactive steps such as redistributing work and outsourcing to respond to the new salary requirements. Either way, we expect to see a spike in FLSA litigation following implementation as employers struggle to ensure previously exempt employees are complying with timekeeping requirements imposed on non-exempt employees.”

Jon Keselenko, Foley Hoag LLP

“While the Department of Labor did make some compromises to help employers, the meat of the original proposed rule remains. The new rule represents a seismic shift in how employers can classify employees. On Dec. 1, over 4 million employees — by DOL’s own estimate — will become misclassified unless employers take action. Most employers will likely choose to make these employees hourly, which many employees will view as a demotion. While employers can calculate their new hourly wage rate taking into account how much overtime they work, ultimately, these employees may well end up making less than they currently do if their overtime hours get cut during a future round of budget cutbacks.”

Staci Ketay Rotman, Franczek Radelet PC

“There is no question that the impact of the new rule will be significant, but perhaps not in the way the DOL intended. Instead of the \$1.2 billion pay increase for millions of workers the DOL predicts, the impact will be felt mostly by employers, who will need to determine how to staff their workplaces in light of the higher salary threshold while still meeting their budgets. As the DOL’s own guidance points out, this may result in lay-offs, a reduction in hours, the replacement of full-time employees with part-time employees, and other changes to reduce labor costs.”

Mike Killeen, Davis Wright Tremaine LLP

“The DOL’s final regulation is a form of wage control that will have an immediate, traumatic effect on small businesses, nonprofits, higher ed, public agencies, local businesses and other organizations that have no excess revenue to pay for these changes. Consequently, they will be forced to reduce compensation rates, work hours, services and benefits to insure they can comply in a cost neutral way. In the process, many formerly exempt employees will view conversion to non-exempt status as a ‘demotion,’ thus creating significant employee relations and payroll administration issues, which is a lose/lose proposition. To the extent that it doesn’t have immediate traumatic impact on all employers and employees, this regulatory change creates a chronic condition with pernicious effects, including increased wage/hour litigation, that will not be apparent for several years at which time it will be so much a part of the regulatory web it will be hard to untangle.”

Gary Klotz, Butzel Long PC

“The Department of Labor’s final regulation contains some concession to employers — increasing the salary threshold to \$47,476, not \$50,440; updating the salary threshold every three years, not annually; and not revising the ‘duties’ tests, which would have decreased the number of employees who qualify as exempt from overtime premium pay. But the final regulation will convert millions of currently exempt employees into non-exempt employees, which is expected to increase employers’ compensation expenses considerably. At least the final regulation will not take effect until Dec. 1, so employers will have time to decide how to respond to the final regulation’s changes and how to minimize the financial impact of the final regulation on their businesses.”

Randi W. Kochman, Cole Schotz PC

“The final rule issued by the Department of Labor, which amends the white collar overtime exemption rules for the first time since 2004, has major significance for both employers and employees alike. The effect is that certain exempt employees will likely see an increase in their pay for performing the same work. Currently, many employees in the retail and hospitality industries, in particular, are treated as exempt from overtime pay requirements, typically under the ‘administrative’ exemption. These employees often work long hours and are paid a salary below the new threshold of \$47,476 per year, without receiving overtime pay. The final rule will force employers with employees in this category to reexamine their policies and payroll practices, and make adjustments for these employees, whether by increasing their salary, changing them to hourly status and paying them overtime or hiring more workers. The final rule is expected to impact approximately 4.2 million workers.”

Mark A. Konkel, Kelley Drye & Warren LLP

“The more than 300,000 comments drawn by the DOL’s new overtime rule prove that there is a real diversity of opinion on this. But regardless of your views, it’s clear that an enormous group of workers across industries that have always been thought of non-overtime-eligible middle management are now eligible. That’s more than an administrative change for employers — it’s a change in pay philosophy, and it will effectively change the way people work. Employers now have to watch the clock on four million additional workers, so ideas about utilization and efficiency will have to change, too.”

Dana Kravetz, Michelman & Robinson LLP

"The ostensible aim of this rule is to help workers return to the middle class. Unfortunately, it is unlikely to accomplish this goal. To comply with this rule, employers will likely be forced to cut operational costs and reduce employee bonuses and benefits. Companies will reclassify workers as non-exempt and tightly monitor work schedules to avoid overtime. Thus, the unintended consequence of this action will be to turn entry level managers, who are normally incentivized to increase performance and grow with the company, into hourly workers. This is not a path toward boosting the middle class and fostering an ownership mentality within the workforce."

Robin Largent, Carothers DiSante & Freudenberger LLP

“California employers should note that the new minimum salary threshold for exempt status under the FLSA is now even higher than the exempt salary threshold under California law — currently \$41,600, increasing to \$43,680 on Jan. 1, 2017. California employers will have to ensure that their exempt employees meet the higher salary threshold under the FLSA, while also meeting California's stricter duties test, which requires an employee to spend more than 50 percent of his or her time on exempt duties. Additionally, it is not clear whether California will adopt the new federal regulation allowing employers to count non-discretionary bonuses and incentive payments toward satisfying the minimum salary threshold. Currently, there is no such provision under California law. Finally, employers are reminded that California, unlike the FLSA, does not recognize a ‘highly compensated employee exemption’ that allows an employer to treat an employee as exempt based solely on the employee’s compensation level and without regard to whether the employee spends more than 50 percent of his or her time on exempt duties. Employers should review their exempt classifications to ensure that employees meet the new minimum salary threshold. Employers may need to increase salary to retain exempt status or reclassify employees to non-exempt if their salary is below the new threshold.”

Patrick Madden, K&L Gates LLP

“No surprises with the Department’s amendments to the White Collar Overtime Exemptions. The amendments will have an enormous financial impact on small employers and various regions of the U.S. and business sectors. Recognizing this, the Department delayed implementation until Dec. 1. The Department also issued guidance documents on how to comply with the new regulations. This guidance suggests that compliance is simple, but ignores the Department’s own enforcement position on timekeeping and fails to address the serious issues that will arise when managers, supervisors and administrative employees are converted to non-exempt status. Unfortunately, the Department has planted the seeds for another onslaught of FLSA litigation.”

Scott Mario, King & Spalding LLP

“The new regulations more than double the minimum salary that an employee must be paid in order to be exempt from the FLSA's overtime requirements. Though the \$47,476 minimum salary is less than the \$50,440 contemplated when the new regulation was proposed last summer, this significant increase will make employers need to broadly reevaluate their employee compensation practices. The grace period for compliance until Dec. 1 will allow employers time to comply, but they must properly analyze their options before the grace period expires to avoid making the new rules more costly than they have to be.”

--Editing by Emily Kokoll.