December 2, 2016

Blog: Overtime Law Leads to Uncertainty for Contractors

Contractors across the nation are scrambling to figure out what to do about overtime—even after an injunction blocking the Department of Labor's new overtime rule, which was scheduled to go into effect Dec. 1.

Officially titled 29 CFR Part 541, the DOL's new rule would change exemptions to the Fair Labor Standards Act (FLSA)'s requirement for employers to pay overtime wages. Exempt employees include certain salaried white-collar workers, including executive, administrative, outside sales and computer employees. The rule would more than double the limit over which an employee may be exempt from the current level of $23,660 to $47,476.

In other words, if you have salaried workers earning less than $47,476 per year, you will need to pay them time and a half for all hours worked over 40 in a week, starting Dec. 1, 2016—if the rule is allowed to stand.

Earlier this month, 79 percent of contractors surveyed said they weren't prepared. Now, many are wondering if it really matters, especially in light of the election of a new president who could alter the rule.

Let's take a look at what the new rule would mean for contractors and what they can do to prepare, if and when it takes effect.

How would the new rule affect contractors?

Many construction companies employ salespeople on a salary-plus-commission basis. Under the new rule, any salaried salesperson whose base salary is less than $47,476 and who were previously not exempt would be affected. Other types of employees such as construction office workers may also be included.

At first glance, the new rule may not seem like a big deal. When you examine the practical implications, it can get knotty—which is why the National Association of Home Builders and a number of other business groups joined forces in September to file a lawsuit challenging the overtime rule.

In many companies, employees who were exempt in the past are used to making phone calls at night, or checking emails on weekends or on vacation. Now those behaviors fall under compensable time—and the company suddenly will have to pay for hours it may not previously have been aware were being worked.

“What it really does is make employers in construction companies have to analyze all their policies and procedures and make sure they’re up to date,” says Alyssa Peters, an attorney with Constangy, Brooks, Smith & Prophete LLP in Macon, Georgia. “The main thing is, all of a sudden you’ve got these individuals who’ve spent their career being exempt. Anyone now in the nonexempt bucket will have to be taught how to track their time and realize they don’t need to come in on weekends without prior approval or check their emails at home.”

While this may sound straightforward, it’s a case of easier said than done. It takes time and money to retrain employees, and employees who are not used to being paid hourly may resent the obligation. Companies may also find themselves scrambling to come up with an appropriate way to track the hours.

To complicate matters, what constitutes overtime pay may not be immediately apparent. “A lot of employers think if they pay $10 per hour that overtime is $15. But if the employee has nondiscretionary benefits like bonuses, you have to pay overtime on those bonuses, too,” says Peters.

What are the consequences of noncompliance?

Opponents of the new regulations fear they may lead to increased litigation, such as class action lawsuits. Companies that don’t follow the rules, knowingly or unknowingly, would be subject to penalties. They may also face wage and hour lawsuits with costly attorney fees and back overtime wages.

What can a contractor do to prepare?

While there is no certainty that the rule will stand there is also no guarantee that the U.S. District Court will strike it down. As with any other business uncertainty, it pays to be prepared for any outcome.

“The first step is ensuring every employee is accurately classified as either exempt or nonexempt, so it’s clear who is eligible for overtime under the new laws,” advises Michael Silvio, CPA, tax director at Irvine, California-based Hall & Company CPAs. “A CPA should also work with businesses to determine how the changes will affect payroll and payroll taxes, project and plan for future wage increases, determine the impact to the company’s financial health and help implement hour-tracking systems.”

Next comes running the numbers. If the new rule will affect a number of employees at your company, it is especially important to determine how best to make the transition without breaking the bank. Possibilities include:

- Raising salaries above the new rule’s threshold. If current salaries are close to the limit, it might be cost-effective for an employee to simply receive a raise rather than have to make all the changes required for compliance.

- Hire more full-time workers. If you have a number of affected workers, you may find it worthwhile to hire additional employees in order to avoid overtime.

- Use more part-time workers. The rule only applies to full-time employees, so companies that don’t need enough hours to justify additional full-time help may choose to keep salaried workers off of overtime and hire part-timers to fill in as necessary. This solution also results in a more flexible workforce.

- Bite the bullet and pay the overtime. If you don’t expect your employees to work much overtime, it probably makes sense simply to leave things as they are and follow the rule.

When calculating what to do, it’s important to consider the long-term consequences. Employee turnover is extremely costly, and employee satisfaction and morale correlate to productivity levels. “There’s a very strong human side to this. People don’t want surprises in their pay, except for big fat bonuses,” cautions Adam Calli of Arc Human Capital, a human resources consulting firm based in Woodbridge, Virginia. “Not communicating it well can really damage your level of employee engagement.”

Contractors need to evaluate how cost-saving measures will affect employees as well as how new policies will be perceived by potential new hires. “In the long run, paying more for overtime may be the least expensive solution,” Silvio says.

Communication is essential. Calli offers the following suggestions for a smooth transition:

- Talk to the management team first. People know about the new rule, but many are not clear about what to expect, especially now that the rule has been challenged. Supervisors need to be up to speed about why, what and when it’s happening so that they can keep

everyone calm and informed. Encourage them to keep the channels of communication open and be willing to answer questions and concerns honestly and as clearly as possible.
- Have very clear conversations with payroll people. Bookkeepers, accountants and office workers need to understand the rule. They will also need to be informed immediately of changes to it. Mistakes can add fuel to the fire in companies where the new rule is unpopular with employees. Errors can also result in penalties.

- Put it in writing. People don't always understand what they hear. Make sure every affected employee has in writing what to expect, including effective dates, amounts and expected protocol.

"It may be in your best interest to reach out to someone who can get you the guidance you need," Calli adds. "(If the rule goes into effect,) you have to be compliant by Dec. 1, so you need your answers now. The DOL won't cut you slack."

--