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Update to the Proposed Revisions to the Fair Labor Standards Act And it's Impact on Montana Law and Montana Employers

A Quick History of the Rule–

Last summer, the federal Department of Labor issued a proposed update to the Fair Labor Standards Act (FLSA). The proposed Rule recommended setting the salary threshold for exempt employees at \$50,440 annually, up 113 percent from the current \$23,660 annually. It also called for annual automatic increases to the salary threshold and suggested that the duties tests might be made more stringent, requiring managers to spend at least half of their time on managerial functions. Public comment was due in early September, 2015.

The Proposed Rule Has Been Sent To the OMB –

The DOL completed its review of the public comment and, on March 14, 2016, sent the final rule to the White House's Office of Management and Budget (OMB). OMB review is the final step before a rule is published and made public, and the request for OMB review happened a lot quicker than most people thought it would.

If the OMB follows its normal review timeline, it should be completed in four to six weeks (although, it could take months) and employers should be able to review the final rule by early- to mid-May.

What Will The New Rule Say?

The federal government doesn't have the 'sunshine' laws that Montana does, so we can't review the proposed final rule at this time. You can track the OMB process at this link:

<http://www.reginfo.gov/public/Forward?SearchTarget=RegReview&textfield=1235-AA11+>.

When Will The New Rule Take Effect?

The DOL has always said it wants the Rule to take effect 60 days after publication, so lacking some major glitch (see below) employers will need to plan to be in compliance with the new Rule this summer – most likely by the end of July.

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Who Will the Rule Apply to?

The following employers are subject to the overtime provisions of the federal FLSA: enterprises engaged in commerce or the production of goods for commerce with a gross sales volume of \$500,000.00 or more, enterprises engaged in the operation of certain hospitals or institutions, and public agencies. Even if a business is not covered by the overtime provisions of the FLSA, an employee whose job involves producing or moving goods between states is covered by the Fair Labor Standards Act. (29 U.S.C. § 207(a)(1).)

Major Glitches Are Possible

Even if OMB 'approves' the new rule, here are a couple things that could delay or stop the new rule:

- The Congressional Review Act allows Congress to disapprove "major" Final Rules. The Act states that if a major rule is submitted to Congress with fewer than 60 session days remaining, the next Congress will have a 60-day period to consider the rule. If the DOL's overtime rule isn't released by the OMB by May 16, the rule will "be at the mercy of" the next Congress and president.
- On March 17, House and Senate Republicans introduced legislation to stop the Rule in its tracks. The [Protecting Workplace Advancement and Opportunity Act](#) (S. 2707 and H.R. 4773) would:
 - Nullify the proposed rule.
 - Require the DOL to conduct a comprehensive economic analysis on the impact of mandatory overtime expansion to small businesses, nonprofit organizations and public employers.
 - Prohibit automatic increases in the salary threshold.
 - Require that any future changes to the duties test must be subject to notice and comment.

The Impact of the New Rule on Montana Law and Montana Employers

Making things sound a lot simpler than they really are, in Montana, employers who are not subject to the overtime provisions of the FLSA are subject to the State's wage and hour overtime provisions (MCA 39-3-406). The Montana Department of Labor is responsible for writing rules complying with this Code.

In order to avoid disparity between state and federal requirements, the Montana DOL adopted most of the federal overtime provisions, "*as [they were] in effect on July 1, 2009*". See Administrative Rules of Montana 24.16.101: <http://www.mtrules.org/gateway/RuleNo.asp?RN=24%2E16%2E211>

Will The New Federal Rule Apply To Montana Employers Who Are Not Subject To The FLSA?

According to Amy Smith of the Montana Wage and Hour Bureau, because Montana adopted the federal rules "*as they were in effect on July 1, 2009*", the current Montana rule would not change without a rules hearing and public comment period. That means the new federal Rules may or may not be adopted by the State of Montana.

What to do

This is the most uncertain set of circumstances I've seen in my 30+ years in human resources. Lacking clear direction and a potential 60 day compliance schedule, the minimum steps employers should be taking include:

- **Figure out if you're subject to the Federal FLSA or to Montana's equivalent** - Keep in mind an employee may be subject to the FLSA even if the employer isn't. If you're not sure about coverage, contact the Montana Department of Labor, Wage and Hour Bureau.
- **Understand employees' salaries and who is currently exempt** - Identify all exempt workers with a salary below \$50,440. Then, to the extent that your company relies on the highly compensated employee exemption, do the same for everyone earning between \$100,000 and \$122,148 per year. (Under the proposed Rule, the new salary threshold for an HCE is \$122,148.)
- **Review and update job descriptions** - In the past, exemptions were based on an evaluation of the duties an employee performs and whether those duties fell within the executive, professional or administrative exemptions. Though the DOL clearly proposed changes related to the salary threshold, the DOL also requested comments about a percentage threshold test when evaluating whether an employee's duties are primarily exempt or non-exempt. If the DOL adopts a duties test, employers need to be ready to accurately describe what their Exempt employees do on a daily basis, and not just what is outlined in a job description, and to consider whether some non-exempt tasks may be transferred to non-exempt employees.
- **Develop a strategy for managing conversions to nonexempt status** - For workers who earn close to the new minimum salary, it may make sense to raise their salaries to \$50,440. Otherwise, start planning on paying them as nonexempt employees. Start by asking these questions: How many hours do these employees currently work? If you don't know, consider tracking their time. Will post-conversion pay and working hours replicate the employee's current situation, or will you need to restrict schedules at or near 40 hours? Will you base the new hourly rate on annual salary divided by 2,080 (40 hours a week × 52 weeks) and absorb any overtime expenses? Will the hourly rate assume an employee will work a certain amount of overtime?

Supreme Court (Non)-Decision in Public Employee Union Fees Case

The March, 2016 *Cut N Paste Post* highlighted *Friedrichs v. California Teachers Association*. In this case, the Supreme Court was reviewing a 9th Circuit Court of Appeals decision requiring public employees to pay the equivalent of union dues even if they oppose the union's political activities. During oral arguments in January, it had appeared almost certain that the court would strike down the requirement in 23 states that teachers and government workers contribute to the cost of collective bargaining, even if they disagree with their unions' demands.

On March 29, the Supreme Court deadlocked on this issue. The deadlock can be directly attributed to the recent death of Justice Scalia. Rather than seeking to reschedule the case for their next term, the justices simply announced they were tied 4-4 — a verdict which leaves intact the 9th Circuit decision upholding the fee collections.

The deadlock allows the California Teachers Association to keep collecting the fees, but it does not have nationwide impact. The 9th Circuit standard applies only to states within its jurisdiction, including Alaska, Arizona, Idaho, Montana, Nevada, Oregon and Washington as well as California.