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**“U.S. DEPARTMENT OF LABOR ISSUES SWEEPING OVERHAUL OF
OVERTIME REGULATIONS”**

by

Bernard M. Lesavoy, MBA, JD

Attorney at Law

Lesavoy Butz & Seitz LLC

One Windsor Plaza

7535 Windsor Drive, Suite 200

Allentown, PA 18195-1034

Phone: 610-530-2701

Fax: 610-530-2727

Email: blesavoy@LesavoyButz.com

Website: www.LesavoyButz.com

On April 23, 2004, the United States Department of Labor (“DOL”) published final rules updating the regulations governing an employer’s obligation to pay overtime. The updated regulations, which are scheduled to take effect on August 21, 2004, interpret the Fair Labor Standards Act (“FLSA”). The FLSA, passed in 1938, is very general and gives the DOL wide latitude to promulgate regulations and enforce the law. The original regulations have been updated only sporadically since 1938, the last revision occurring in 1975.

Brief Overview Of Revised Regulations

The final regulations submitted by the DOL for publication are over 60 pages long, with explanatory comments exceeding 275 pages. One of the stated purposes of the new overtime regulations is to reduce litigation caused by ambiguity within the regulations. Overtime-based class actions have tripled since 1997. The new overtime regulations seek to reverse that trend. The following is a summary of some of the more significant changes:

- Currently, the only employees guaranteed overtime, regardless of their duties, are those earning under \$8,060 per year (on a 40-hour work week basis). Under the new regulations, any employee earning less than \$23,660 per year is eligible to receive overtime. This is estimated to make 1.3 million additional workers eligible for overtime pay.
- Currently, any employees earning between \$8,000 and \$13,000 yearly are exempt from overtime if they meet the requirements of a “long duties test.” Employees earning over \$13,000 annually are exempt if they meet the “short duties test.” Those earnings thresholds have been changed in the new regulations. Employees earning \$23,660 to \$100,000 yearly will be exempt if they meet a “standard duties test.” Employees earning over \$100,000 will be exempt if they meet the requirements of a “highly compensated test.”

- The tests for exemption of executive, administrative, and professional employees have also changed. Among other changes, (a) exempt executive employees must now have the authority to make or significantly influence employment decisions; (b) the primary duty of exempt administrative employees must include the exercise of discretion and independent judgment regarding matters of significance; and (c) exempt professional employees may have primary duties of performing work in not only artistic, but also creative, endeavors.
- Exemptions for a variety of specific professions, e.g., insurance claims adjusters, financial services industry employees, nurses, and technologists/technicians, have been created or modified.
- The new regulations provide that the docking of pay for disciplinary reasons does not necessarily jeopardize an exemption for a salaried employee, even if the suspension is for under one week.
- The new regulations provide that “blue collar workers,” such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers, are not exempt from overtime.
- The new regulations also specifically provide that “first responders,” such as police, firefighters, and EMT’s, are not exempt from overtime.

On May 4, 2004, the Senate approved two amendments to an otherwise non-controversial export tax bill which would prevent major aspects of the new DOL regulations from taking effect. The first, proposed by Senator Gregg, would amend the FLSA to mandate overtime pay for any worker earning less than \$23,660 yearly and would freeze overtime eligibility regulations as presently enforced for 55 specific types of positions, including blue collar workers, nurses, oil and gas workers, steelworkers, teachers, technicians and EMT’s. The Gregg amendment passed by a vote of 99-0.

The second amendment, by Senator Harkin, blocks any portion of the final DOL regulations from taking effect if their application would result in the loss of overtime eligibility. The Harkin amendment passed by a 52-47 vote. If the House of Representatives passes a similar bill, the legislation will move to a House-Senate Conference Committee to determine the future of these amendments.

Notwithstanding these legislative maneuvers, employers should anticipate the new regulations becoming effective in August 2004.

Analysis

The new regulations are the most wide-ranging changes in the DOL’s enforcement of the FLSA since 1975, and probably since its enactment in 1938. They are also one of the most controversial regulatory issues in recent memory, and now appear to be caught up in Presidential election politics.

What Employers Should Do Now

Many employers are not in compliance with the current overtime regulations, and are vulnerable to legal action. In the next few months, employers should do what was a wise idea even before the new regulations were promulgated: conduct a thorough self-audit, ideally with the assistance of legal counsel. This audit should include an examination of positions currently treated as exempt and those treated as non-exempt, and should analyze whether those designations are legally correct. Where discrepancies are found, legal advice should be sought to devise a corrective action plan.

[Note: The above article is written for general purposes, and not as legal advice. Consult your attorney for legal advice appropriate to your particular circumstances.]