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NEWSLETTER

The Administration's Proposed Overtime Rules Could Significantly Affect the Pool of Employees Eligible To Be Solicited for PACs

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By Carol A. Laham and D. Mark Renaud

The Department of Labor's recent proposal to modify the rules governing which executive, administrative, and professional employees are "exempt" from the Fair Labor Standards Act's (FLSA) minimum wage and overtime pay requirements could potentially impact the scope of a corporation's "restricted class" for purposes of soliciting contributions to the corporation's PAC and sending partisan internal communications.

Federal campaign finance law allows a corporation to engage only a small group of salaried employees known as the "restricted class" for political activities. This class includes a corporation's stockholders as well as salaried employees in policymaking, managerial, professional, or supervisory roles. The Federal Election Commission's (FEC) regulations note that FLSA and its regulations may serve as a guideline in determining whether employees have policymaking, managerial, professional, or supervisory responsibilities.

Under FLSA, employers are not required to provide overtime pay to employees who are "exempt." Currently, this exemption applies to full-time salaried employees who perform executive, administrative, or professional duties and earn more than $455 a week ($23,660 annually). The Department of Labor's proposed rule raises the threshold to qualify for this exemption to $921 per week ($47,892 annually), which will adjust annually for inflation.

Authors

D. Mark Renaud
Partner
202.719.7405
mrenaud@wiley.law

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This proposed rule, if implemented, could potentially impact the scope of a corporation's restricted class in several ways.

First, many corporations use FLSA as a guideline for determining whether employees fall within the restricted class and automatically exclude employees who are not "exempt." Because the proposed rule increases the salary threshold for qualifying as an "exempt" employee, executive, administrative, and professional employees whose salaries are above $23,600, but below $47,892, will become non-exempt employees if the rule is implemented. For corporations that use FLSA as a guideline for determining whether employees fall within the restricted class, this means that these employees would no longer be part of the corporations' restricted class under this approach. (It is worth noting, however, that whether an employee is exempt or non-exempt under FLSA is not dispositive for purposes of determining whether an employee is in the restricted class. It is possible that some of these non-exempt employees can still qualify for the restricted class if they are salaried and serve in policymaking, managerial, professional, or supervisory roles.)

Second, corporations could respond to the FLSA rule change by converting the employees affected by the rule from "salaried" employees into "hourly" employees. Although non-exempt employees can be paid on a salaried basis, they are subject to FLSA's minimum wage and overtime requirements—which means that employers must track these employees' work hours. Because corporations typically have the infrastructure to track the time of hourly employees (and may not necessarily be prepared to track the time of newly non-exempt salaried employees), it is possible that some corporations might convert impacted employees from salaried to hourly. As noted above, an employee must be paid on a salaried basis in order to fall within a corporation's restricted class. Thus, individuals who are converted from salaried employees to hourly employees would no longer fall within the restricted class.

The Department of Labor is accepting comments on the proposed rule until September 4, 2015, and it is possible that the Department may make additional changes to the rule once the notice-and-comment period closes. It is expected that the Department of Labor will finalize the rule by 2016.