

May 6, 2004

**Senate Actions Create Uncertainty on New Overtime Rules;
Unless and Until Ratified by House and Signed by President,
Employers Still Expected to Comply With DOL's
New Exempt Status Regulations**

On May 4, 2004, the United States Senate approved two amendments to an export tax bill that, if they become law, would limit the Department of Labor's new exempt status regulations. Neither amendment would block the rules in their entirety. Furthermore, it remains unclear whether these amendments will become law because they may not even be considered or adopted by the House of Representatives, or they may be vetoed by the President.

The New Regulations Become Effective August 23, 2004

The DOL's new regulations – the first major revisions to the regulations governing who is exempt from the overtime requirements of the Fair Labor Standards Act in nearly 55 years – update, clarify, and in some cases, redefine what workers may be classified as exempt. They are scheduled to go into effect on August 23, 2004, and the DOL has promised to vigorously enforce the new regulations at that time. The final regulations have been regarded by many as a retreat from the exempt status regulations the DOL proposed in March 2003. Those proposed regulations would not only have updated and clarified the exemptions for a modern economy, but also, on the whole, rendered a greater number of employees eligible for exemption from the FLSA's overtime requirements than were eligible under the old, existing regulations which were last updated in 1949. Following criticisms by employee and union advocates inside and outside Congress, however, the DOL issued its final regulations last month. While those regulations update and clarify several ambiguous areas of the exempt status definitions, they are a substantive compromise and, in more areas than not, likely will result in a greater number of employees being rendered non-exempt, and thus having to be paid overtime compensation, than the number of employees who were non-exempt under the old regulations.

Senate Votes, If Enacted, Would Add Confusion to the Regulations

This compromise, however, did not satisfy Senate Democrats. They continued their efforts to block the DOL's regulations. The amendment offered by Senator Tom Harkin (D-Iowa), which passed 52-47, provides that "any portion of the [DOL's final regulations] that exempts from the overtime pay provisions. . . any employee who would not otherwise be exempt if the [old regulations] remained in effect, shall have no force or effect and that portion of such regulations. . . that would prevent such employee from being exempt shall remain in effect." The increased salary requirements found in the new regulations – which raise the minimum salary level for exempt employees to \$455 per week – would remain in effect. The effect of this amendment would be that any portion of the new regulations that would render a formerly exempt employee non-exempt would remain in effect, but any portion of the new regulations that would render a formerly non-exempt employee to be exempt, would be null and void. What the Harkin amendment would mean for the portions of the DOL's regulations that merely update and clarify, but do not necessarily change, the exempt status definitions remains an open question that likely would have to be decided by the courts.

Senator Judd Gregg (R-N.H.) offered an alternative amendment, which passed by a surprising 99-0 vote. Senator Gregg stated that he believed his amendment would merely make clear that the DOL's new regulations will not make blue-collar workers exempt from overtime pay requirements. His amendment appears to do more than that, however. Like the Harkin amendment, the Gregg amendment maintains the DOL's new \$455 minimum salary level, and would have a similar effect of retaining provisions of the new regulations that result in the conversion of an employee from exempt to non-exempt, but limiting the use of provisions that result in a formerly non-exempt employee becoming exempt. Specifically, the Gregg amendment states that the DOL "shall not promulgate any rule. . . concerning the right to overtime pay that is not as protective, or more protective, of the overtime pay rights of employees in [certain] occupations or job classifications. . . as the protections provided for such employees under the [old regulations]" and that "any portion of rule promulgated. . . after March 31, 2003 that modifies [exempt status definitions in a way that is not as protective of overtime pay rights for employees in those occupations or job classifications] shall have no force or effect as it relates to the occupation or job classification involved." The Gregg amendment lists 55 such occupations or job classifications. None of them are defined. The bulk of them already are clearly understood as being obviously exempt, or obviously non-exempt. Some of them, however, would in effect repeal portions the DOL's new regulations that provide helpful guidance. These include: team leaders, journalists, chefs, funeral directors, athletic trainers, outside sales employees, grocery store managers, financial services industry workers, and assistant retail managers. As with the Harkin amendment, the ultimate effect of this amendment probably would have to be decided by the courts.

House, Conference Committee and Presidential Action Are Uncertain

Neither of these amendments have been addressed by the House. While currently the House generally is more pro-employer than the Senate, passage of at least an equivalent of the Gregg amendment appears a real possibility given the *unanimous vote* for it in the Senate. The export tax bill, with any of these amendments affecting the overtime rules, would then proceed to conference between representatives of both chambers of the Congress. There, either of these amendments could be revised or even dropped. The bill then would be sent to the President for signature or veto. The Bush Administration has pledged a veto of any bill that would thwart its new exempt status rules, but election-year politics and the importance of the export tax bill may preclude such a veto, or the Bush Administration could compromise by accepting the Gregg amendment, but not the Harkin amendment. This process could take weeks, or several months. There is a possibility that the August 23, 2004 effective date of the new regulations could be postponed in light of this activity. Unless and until that occurs, however, employers are expected to make sure their workforces are in compliance with the new rules by August 23.

Do Not Assume the Political Maneuvers Will Delay DOL Enforcement

Despite this uncertainty, two things remain clear: (1) unless the Department of Labor simply withdraws its regulations (which is highly unlikely), there will be new exempt status regulations of some sort, at least those portions that entitle more employees to overtime than under the old regulations, and (2) with the increased political attention on exempt status from inside and outside the Department of Labor, compliance with those regulations will be more important than ever. It is noteworthy that today the Solicitor of Labor – the DOL's chief enforcement officer – stated that the DOL fully expects the regulations to become effective on August 23, 2004.

As the new regulations take more twists and turns, Seyfarth Shaw LLP will continue to advise you of further developments. In the meantime, please do not hesitate to seek further guidance from us through our seminars or by calling your Seyfarth Shaw attorney.

