DOL's Revised Overtime Regulations Warrant Caution, Especially For Fluctuating Workweek And Tip Credit Employees

On April 5, 2011, the Department of Labor's Wage and Hour Division finalized changes to several Fair Labor Standards Act regulations. The Division initially published its proposed regulations in July 2008, and allowed public comments on the rules for 60 days. Yet the Division did not publish the regulations until this week. The regulations appear in the *Federal Register* and will be effective 30 days after publication.

The revisions are of particular significance to employers with salaried non-exempt employees who are compensated under the fluctuating workweek method of payment, as well as to employers who take advantage of the FLSA's tip credit provision to meet their minimum wage obligations.

Bonus Or Premium Payments May Invalidate Fluctuating Workweek

One of the most significant developments in the regulatory package is the Wage and Hour Division's decision to reject proposed clarifying language regarding the fluctuating workweek method of payment. *See* 29 C.F.R. § 778.114. Under the fluctuating workweek method, an employee is paid a fixed salary for fluctuating hours. If the employee works in excess of 40 hours in a workweek, the salary is divided by the number of hours worked, and the resulting rate is divided in half. The half-time rate is then paid (in addition to the salary) for all hours worked in excess of 40. The proposed clarifying language would have made clear that, in addition to a fixed salary, an employee also could be paid bonuses and other non-overtime premiums without invalidating the fluctuating workweek pay method.

Yet the Division rejected this proposal, stating in the Preamble to its revised regulations that "bonus and premium payments . . . are incompatible with the fluctuating workweek method of computing overtime . . . ." The Division acknowledged that bonus payments and other forms of premium pay benefit employees, but the Division ultimately concluded that the proposed clarifying language "could have had the unintended effect of permitting employers to pay a greatly reduced fixed salary and shift a large portion of the employees' compensation into bonus and premium payments . . . ." This unintended effect, according to the Division, could have resulted in a "wide disparity in weekly pay that the fluctuating workweek method was intended to avoid . . . ."

The Division's stated position may make the fluctuating workweek pay method invalid for employees who receive bonuses and other non-overtime premium payments. Under the Division's interpretation, payment of such bonus or premium amounts would eliminate an employer's ability to use the fluctuating workweek method. (*i.e.*, the employer will have to calculate the

overtime rate based on 40 hours and a time-and-one-half overtime rate). Given this recent development, management should ensure that their fluctuating workweek employees do not receive any bonuses or non-overtime premium payments, such as attendance or safety bonuses and shift-differential pay.

Employers Taking Tip Credit Must Provide Specific Information To Employees; Changes Also Made To Tip Pooling Requirements

The final rule also implements significant changes for employers who take tip credits to offset their minimum wage obligations. The Wage and Hour Division's 2008 proposal attempted to resolve a common debate on whether an employer must "explain" to its employees how the tip credit provisions work, or merely "inform" employees of the provisions. The proposal would have clarified that an employer need only "inform" employees of the provision, and that the notice need not be provided in writing. The proposal also would have clarified that the disclosure should be provided in advance of the employer's use of the tip credit, and that the employer must advise its employees that it intends to treat tips as satisfying part of the employer's minimum wage obligation.

The final rule adopts some of the proposed language, but it also adds new requirements. Under the final rule, an employer is required to "inform" its employees that it intends to use the tip credit, but it also must inform the tipped employees (before it utilizes the tip credit) of the following:

- the direct cash wage the employer is paying a tipped employee;
- the additional amount the employer is using as a credit against tips received, which cannot exceed the difference between the minimum wage and the actual cash wage paid by the employer to the employee;
- that the additional amount claimed by the employer on account of tips as the tip credit may not exceed the value of the tips actually received by the employee;
- that the tip credit shall not apply with respect to any tipped employee unless the employee has been informed of the tip credit provisions; and
- that all tips received by the tipped employee must be retained by the employee except for the pooling of tips among employees who customarily and regularly receive tips.

The Division is not requiring employers to provide written notification of these terms to their employees, but the Division notes that "employers may wish to do so, since a physical document would, if the notice is adequate, permit employers to document that they have met" these requirements.

In another significant development for employers with tipped employees, the final rule clarifies that there is no limitation on the maximum amount an employer may require an employee to contribute to a tip pool. However, employers must notify employees of tip pool contribution amounts, limit the use of a tip credit to the amount of tips the employee ultimately receives, and "may not retain any of the employees' tips for any other purpose."

Division Addresses Other Issues

Among the other issues addressed in the final rule, the Division has decided to:

- Update numerous references to the federal minimum wage to reflect the current minimum wage of $7.25
- Add reference to the statutory conditions under which commuting in an employer-provided vehicle will not be compensable under Employee Commuting Flexibility Act of 1996;
- Adopt a statutory amendment regarding employees engaged in fire protection activities and eliminating existing 20% tolerance rule for such employees (but maintaining it for law enforcement personnel);
- Decline to adopt a proposed rule to exempt from overtime service managers, service writers, service advisors, and service salesmen of automobiles (and certain other vehicles);
- Clarify that tips are in all cases the property of the employee (except in connection with a valid tip pool);
- Commit to "study" issues related to employers' ability to take a wage credit for employer-provided meals where employees have religious or dietary restrictions and/or do not have adequate time to eat; and
- Decline to adopt a proposal that stated that the compensatory time rules for public sector employers do not require a public agency to allow the use of compensatory time on the day specifically requested, but only require that the agency permit the use of the time within a reasonable period after the employee makes the request, unless the use would unduly disrupt the agency's operations; instead, the current rule simply requires use on the specific day requested, unless the request is unduly disruptive.

What The New Regulations Mean For Employers

Given the Division's position on the use of the fluctuating workweek method to account for overtime payments, employers should review their payroll practices to determine whether their fluctuating workweek employees receive any bonuses or non-overtime premium payments, such as attendance or safety bonuses and shift-differential pay. For those who do, employers should consider the risks arising from the Division's stated position that the provision of such payments will invalidate fluctuating workweek practices. In the alternative, management may want to consider moving away from a fluctuating workweek practice, at least until the judiciary has an opportunity clarify the law regarding use of the fluctuating workweek method. In addition, employers who rely on the FLSA's tip credit provision should review and perhaps revise their protocols for informing tipped employees about their use of the tip credit.

For more information, please contact the Seyfarth attorney with whom you work or any Labor & Employment attorney on our website.

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