

LABOR & EMPLOYMENT ALERT

DEVELOPMENTS IN LABOR RELATIONS & EMPLOYMENT LAW FOR PUERTO RICO

July 2015

Proposed Overtime Rule: Greater Hardship for Employers in Puerto Rico

On June 30, 2015 the Obama administration officially proposed a new regulation to increase the minimum weekly salary required to exempt an employee from the minimum wage and overtime pay rates under the Fair Labor Standards Act ("FLSA"). Commonly referred to as the "white collar" exemption rules, the proposal focuses on increasing the minimum guaranteed salary for managerial (executives and administrators) and professional employees, in order to avoid triggering the FLSA overtime pay obligations.

Presently, these exemptions require payment of a minimum salary of \$455 per week (\$23,660 annualized salary). Upon approval of the regulation, in order to maintain the exemption and not be required to pay overtime, the employer will need to increase the minimum guaranteed salary to \$921 weekly (\$47,892 yearly); and \$970.00 weekly (\$50,440 annually) in the year 2016. The yearly compensation required to qualify under another exemption category known as "highly compensated," will increase from \$100,000 to \$122,000. In all cases, automatic yearly salary increases are also proposed.

Under the contemplated change to the FLSA, most salaried employees who earn less than \$50,440 per year will automatically be eligible for time-and-a-half pay when they work more than 40 hours a week. The U.S. Department of Labor ("DOL") has justified raising the bar to \$50,440, concluding said threshold represents only the 40th percentile of weekly earnings for full-time salaried employees, according to the statistics provided by the U.S. Bureau of Labor Statistics ("BLS").

According to the DOL, it is expected that by increasing the salary threshold over 5 million workers will become newly entitled to overtime under the FLSA.

In Puerto Rico, the operational and financial consequences of increasing the minimum guaranteed salary requirement will have a greater impact. Wages for both hourly and salaried employees are generally lower in Puerto Rico in many industries and occupational classifications, when compared nationwide.

For example, according to the BLS, the average wages for "all management" workers in Puerto Rico is 63% of the national average for the same general occupational category. Only 53% of the average wages paid to workers under the "all management" classification *exceed* the contemplated salary threshold, while nationwide 99% of the

positions averaged higher than the required minimum salary. Moreover, *none* of the first-level supervisor major occupational categories in Puerto Rico presently average more than contemplated \$50,440 minimum threshold.

As a result, when compared with the situation nationwide, a far greater percentage of the managerial (executives and administrators) and professional employees in Puerto Rico *will not* qualify for continued white collar exemption, unless significant- and above market- salary increases are granted.

Generally, employers in Puerto Rico will be required to grant significantly greater salary increases to their first and mid-level supervisors than employers in the states, in order to maintain a desired exemption. Since the prevailing wages are primarily market and productivity driven, in many cases the proportionally greater salary increase required to maintain an exemption will foreseeably impose a greater financial burden on local employers.

Financial constraints may impede salary increase remedial action in many industries. Hence, another foreseeable consequence on the horizon is that employers in Puerto Rico, more likely than those in the United States, will be compelled to change the current status of their exempt employees- to hourly.

But far more challenges lie ahead for employers in Puerto Rico, given that local law follows the federal definitions for executive, administrator and professional exemptions for more mandatory wage and benefit purposes.

On the mainland, loss of the white collar exemption basically only requires the employer to pay an hourly employee time-and-a-half the regular rate of pay for hours worked in excess of 40 in week. The economic consequences are compounded in Puerto Rico, where local law requires a premium rate of up to double time for *daily* overtime; double rate for working during the designated *meal period*; double rate for work during the *7th consecutive day*; and double rate for work performed while a retail store subject to Puerto Rico's Closing Law must remain closed to the public. Also, hourly employees are granted statutory sick and vacation leave benefits, with monetary penalties if there are excessive vacation leave accruals.

Although discussed in the Proposed Regulation, the DOL did not propose changes to the applicable "duties test," which are also part of the exemption definitions. Rather, the DOL requests comments on "whether, in light of our salary level proposal, changes to the duties tests are also warranted." The DOL included several questions for comment. For example, the DOL has asked for comments on whether there should be changes in the "duties tests" for the exemptions; whether exempt employees should be required a minimum percentage of exclusive exempt work; and whether bonuses and other pay incentives should be taken into consideration in the guaranteed salary test.

The Proposed Rule was officially published in the Federal Register on June 6, 2014 and the deadline for interested parties to provide written comments expires on September 4,

2015. Thereafter, it is expected the DOL will move forward with a Final Rule. O'NEILL & BORGES, LLC presently estimates a Final Rule will issue early to mid-2016.

What should local employers do?

Confronted with these probable changes, O'NEILL & BORGES, LLC recommends employers in Puerto Rico develop a multi-level strategy, which should be fine-tuned in accordance with their particular circumstances. Several initial recommendations follow:

- Individually and thru business interest organizations *submit comments* to the DOL and *lobby* in Congress, requesting the guaranteed salary test for Puerto Rico be set with a lower threshold. The DOL has recognized that wage averages in American Samoa are much lower than the national average and proposed rule continues its practice of establishing the salary test in said territory at approximately 84% of the level applicable in the states, which would initially amount to a special salary level test of \$774 per week.
- Under the advice of legal counsel, start analyzing and auditing your exempt employee rosters to determine how many of them will be potentially affected by the proposed rules. But do not limit the audit to the salary test. The trend in misclassification litigation is expected to increase in the future, also focusing on non-compliance with the “duties” test. Accordingly, the job descriptions and actual duties should be audited, at least for the more questionable situations.
- Examine the cost of increasing the guaranteed salaries to the proposed threshold levels versus simply reclassifying the employee to non-exempt and paying for overtime and meal period violations. The operational complications of having such managerial and supervisory personnel accurately record their time, should be examined.
- If the required salary increases are not economically feasible; overtime is unavoidable but the projected overtime payments seem unsustainable, then (a) evaluate whether the present compensation rate can be *lowered* to accommodate the increased outlays for the overtime and meal period premium payments (of course the total take home pay would not change); and/or (b) evaluate whether the value of avoiding overtime premium payments justifies increased utilization of part-time employees for such positions.

Each one of the above strategies, and others, require careful consideration and implementation. O'NEILL & BORGES, LLC is available to assist you in developing and implementing such plans. For further information, please contact our labor and employment lawyers.

*Jorge L. Capó-Matos, Esq.
Dimitri González-Izquierdo, Esq.*

Note: *Because of the general nature of this Labor Newsletter, nothing herein should be considered as legal advice or a legal opinion.*

**LABOR AND EMPLOYMENT
LAW DEPARTMENT**

Jorge L. Capó-Matos
Luis A. Núñez-Salgado
Yldefonso López-Morales
José Fco. Benítez-Mier
Carlos E. George
Dimitri González-Izquierdo
Joanna Matos-Hicks



Yadhira Rodríguez-Quñones
Alberto J. Bayouth-Montes
Gittel Almonte-Duluc
Gustavo A. Pabón-Rico
Briseida Torres-Reyes
Cristina S. Tamayo-Pérez
Ivan Santos Castaldo



250 Muñoz Rivera Ave., Suite 800
San Juan, Puerto Rico, 00918-1813
Tel. 787-764-8181 • Fax. 787-753-8944