CTR™

Payroll Services

Your Irreplaceable Workforce Management Partner

Today's Presenter:

Anne M. Lavelle
CTR Compliance Specialist

FLSA

and

Pregnant Workers Fairness Act

Proposed Regulations

OVERVIEW OF TOPICS:

- Fair Labor Standards Act (FLSA) – Proposed increase to salary basis test
  - FLSA Current Regulation
  - FLSA Proposed Regulation
  - When will this be effective?
  - DOL Estimated Impact
  - Can Proposed Regulation Survive a Court Challenge?
  - How to Prepare Now

- Pregnant Workers Fairness Act (PWFA)
  - Current Enforcement
  - PWFA Proposed Regulations
  - What Else Does the PWFA Prohibit?
  - Reasonable Accommodation Examples
  - Predictable Assessments
  - PWFA Examples

FLSA Current Regulation:

The Executive, Administrative and Professional (EAP) Exemptions (the most common FLSA exemptions) REQUIRE that the employee meet BOTH the duties test and salary basis test to be exempt from overtime pay.

- Current salary threshold is $684 week.
- This was effective January 1, 2020
- (Prior to January 1, 2020, the salary per week threshold was $455.)
- Historic problem of U.S. Department of Labor (DOL) FLSA regulations not keeping pace with inflation or cost of living. No automatic increase.

FLSA Proposed Regulation:

- Long awaited and much delayed
- Issued September 8, 2023
- increase the standard salary level to the 35th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South), which would be $1,059 per week ($55,068 annually) based on current data;
- increase the highly compensated employee (HCE) total annual compensation requirement to the annualized weekly earnings of the 85th percentile of full-time salaried workers nationally, which would be $143,988 per year based on current data (currently $107,432); and
- automatically update these earnings thresholds every 3 years with current wage data to maintain their effectiveness.

When will this be effective:

- 60 day comment period on Proposed Regulations ends November 7, 2023 at 11:59 p.m.
  - https://www.regulations.gov. Mail: Address written submissions to Amy DeBisschop, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210.
- Unknown time for DOL to read and evaluate comments and possibly make changes.
- Minimum 30 days (often longer) effective date after publication of Final Rule.
- At the very earliest 2024 (mid to late).

DOL Estimated Impact:

1.What are the estimated costs, benefits, and transfers of the proposed rule? The Department estimates that in Year 1, the proposed rule would impose $1.2 billion of direct costs on employers, including $427.2 million in regulatory familiarization costs, $240.8 million in adjustment costs, and $534.9 million in managerial costs. The Department estimates that the proposed rule would result in a Year 1 income transfer of $1.2 billion from employers to employees, predominantly from new overtime premiums, or pay raises to maintain the exempt status of some affected employees. Beyond these wage transfers, the proposal could reduce the risk of misclassification, increase worker productivity, reduce employee turnover, and increase personal time for workers.

2.How many employees would be impacted by the proposed salary level increase? In the first year, the Department estimates that 3.4 million workers exempt under the current regulations who earn at least the current weekly salary level of $684 but less than the proposed salary level of $1,059 would, without some intervening action by their employers, become newly entitled to overtime protection under the FLSA.

3. Similarly, the Department estimates that an additional 248,900 workers who earn at least $107,432 per year (the current HCE total annual compensation level) and who meet the minimal HCE duties test but not the standard duties test, would, without some intervening action by employers, become eligible for overtime if the HCE total annual compensation level were increased to the proposed level of $143,988 per year.

Can Proposed Regulation Survive a Court Challenge?:

Prior attempt at a large “jump” in salary threshold shot down by Texas Federal Court.

- Obama Administration - 2016 attempted increase from $455 to $913 per week
- BUT that was the 40th percentile of workers
- That percentile was a major focus of the case
- Court found percentile was too high and essentially eliminated the duties test.

Will undoubtedly be legal challenges

- Amount/percentile
- No DOL Secretary
- Are annual increases authorized
- Same TX judge still on bench

But courts did allow Trump Administration 2019 jump from $455 to $684 (20th percentile)

Every court challenge took employers right up to the implementation deadline before deciding the regulation was a “go” or “no go”.

How to Prepare Now:

- Audit employees – who is in the “gap” between current and proposed salary basis.
- BUT don’t use the $1059/week number
  - Why?
- Footnote in proposed regulations that the number will likely be higher when final rule is published because DOL will use current numbers for 35th percentile then in effect (2024 or possibly 2025) – which the DOL estimates to be between $55,068 and $60,000.
- Three buckets of folks – newly nonexempt; possibly nonexempt and exempt
- Options: Manage overtime by policy, increase pay (might be a good option for employees close to new threshold), hire more (look at cost of new hire with benefits vs. cost of new overtime).

Pregnant Workers Fairness Act:

The Pregnant Workers Fairness Act (PWFA) is a new law that requires covered employers (with 15 or more employees) to provide “reasonable accommodations” to a worker’s known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an “undue hardship.”

Sounds like the ADA….

The House Committee on Education and Labor Report on the PWFA provides several examples of possible reasonable accommodations including the ability to sit or drink water; receive closer parking; have flexible hours; receive appropriately sized uniforms and safety apparel; receive additional break time to use the bathroom, eat, and rest; take leave or time off to recover from childbirth; and be excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy. Employers are required to provide reasonable accommodations unless they would cause an “undue hardship” on the employer’s operations. An “undue hardship” is significant difficulty or expense for the employer.

Current Enforcement:

EEOC began taking Charges of Discrimination based on the PWFA on June 27, 2023 for conduct occurring on or after that date.

Employees are ALSO protected by Title VII, the ADA and all other applicable Federal, state and local civil rights laws

- Some states/localities have more generous pregnancy protection laws.

PWFA Proposed Regulations:

- Proposed regulations issued on August 7, 2023
- 60 day comment period; review and then final regulations issued.
- However, proposed regulations show the EEOC thought process and how current Charges of Discrimination under the PWFA are likely being evaluated.
- Defined certain terms in the law
  - “Limitation”
    - Limitation” means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The physical or mental condition that is the limitation may be a modest, minor, and/or episodic impediment or problem. The physical or mental condition also may be that a worker affected by pregnancy, childbirth, or related medical conditions has a need or problem related to maintaining their health or the health of their pregnancy. The definition also includes when a worker is seeking health care related to pregnancy, childbirth, or a related medical condition itself.

- “Related Medical Conditions”
  - Includes current pregnancy, past pregnancy, potential pregnancy, lactation (including breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, or having or choosing not to have an abortion, among other conditions.[51] The Commission emphasizes that the list in the regulation is non-exhaustive, and to receive an accommodation an employee or applicant does not have to specify a condition on this list or use medical terms to describe a condition.

- “Temporary” or “Near Future”
  - The Commission proposes using “generally forty weeks”
  - Possibly an additional 12 weeks (comments sought)
  - Also seeking comments on how to “count” intermittent need for accommodations

What Else Does the PWFA prohibit?

Covered employers cannot:

- Require an employee to accept an accommodation without a discussion about the accommodation between the worker and the employer;
- Deny a job or other employment opportunities to a qualified employee or applicant based on the person's need for a reasonable accommodation;
- Require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working;
- Retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
- Interfere with any individual’s rights under the PWFA.

Reasonable Accommodation Examples:

- Frequent breaks. The EEOC has long construed the ADA to require additional breaks as a reasonable accommodation, absent undue hardship. For example, a pregnant employee might need more frequent breaks due to shortness of breath; an employee recovering from childbirth might need more frequent restroom breaks or breaks due to fatigue because of recovery from childbirth; or an employee who is lactating might need more frequent breaks for water or food.

- Sitting/Standing. The Commission has recognized the provision of seating for jobs that require standing and standing for those that require sitting as a potential reasonable accommodation under the ADA. Reasonable accommodation of these needs might include, but is not limited to, policy modifications and the provision of equipment, such as seating, a sit/stand desk, or anti-fatigue floor matting, among other possibilities.

- Schedule changes, part-time work, and paid and unpaid leave. The Appendix to the ADA Regulations explains that permitting the use of paid leave (whether accrued, as part of a short-term disability program, or as part of any other employee benefit) or providing additional unpaid leave is a potential reasonable accommodation under the ADA. Additionally, the Appendix recognizes that leave for medical treatment can be a reasonable accommodation. By way of example, an employee could need a schedule change to attend a round of IVF appointments to get pregnant; a part-time schedule to address fatigue during pregnancy; or additional unpaid leave for recovery from childbirth, medical treatment, post-partum treatment or recuperation related to a cesarean section, episiotomy, infection, depression, thyroiditis, or preeclampsia.

- Telework. Telework or “work from home” has been recognized by the EEOC as a potential reasonable accommodation. Telework could be used to accommodate, for example, a period of bed rest or a mobility impairment.

- Parking. Providing reserved parking spaces if the employee is otherwise entitled to use employer-provided parking may be reasonable accommodation to assist a worker who is experiencing fatigue or limited mobility because of pregnancy, childbirth, or related medical conditions.

- Light duty. Assignment to light duty or placement in a light duty program has been recognized by the EEOC as a potential reasonable accommodation under the ADA, even if the employer's light duty positions are normally reserved for those injured on-the-job and the person with a disability seeking a light duty position does not have a disability stemming from an on-the-job injury.

- Making existing facilities accessible or modifying the work environment.[108] Examples of reasonable accommodations might include allowing access to an elevator not normally used by employees; moving the employee's workspace closer to a bathroom; providing a fan to regulate temperature; or moving a pregnant or lactating employee to a different workspace to avoid exposure to chemical fumes. As noted in the proposed regulation, this also may include modifications of the work environment to allow an employee to pump breast milk at work.

- Job restructuring. Job restructuring might involve, for example, removing a marginal function that required a pregnant employee to climb a ladder or occasionally retrieve boxes from a supply closet.

- Temporarily suspending one or more essential functions. For some positions, this may mean that one or more essential functions are temporarily suspended, and the employee continues to perform the remaining functions of the job. For others, the essential function(s) will be temporarily suspended, and the employee may be assigned other tasks. For others, the essential function(s) will be temporarily suspended, and the employee may perform the functions of a different job to which the employer temporarily transfers or assigns them. For yet others, the essential function(s) will be temporarily suspended, and the employee will participate in the employer's light or modified duty program.

- Acquiring or modifying equipment, uniforms, or devices.[111] Examples of reasonable accommodations might include providing uniforms and equipment, including safety equipment, that account for changes in body size during and after pregnancy, including during lactation; providing devices to assist with mobility, lifting, carrying, reaching, and bending; or providing an ergonomic keyboard to accommodate pregnancy-related hand swelling or tendonitis.

- Adjusting or modifying examinations or policies. Examples of reasonable accommodations include allowing workers with a known limitation to postpone an examination that requires physical exertion. Adjustments to policies also could include increasing the time or frequency of breaks to eat or drink or to use the restroom.

Predictable Assessments:

- Regulations add new concept of “predictable assessments” based on the opinion that in virtually all cases a limited number of simple modifications are reasonable accommodations that do not impose undue hardship when requested by an employee due to pregnancy.

- These modifications are: (1) allowing an employee to carry water and drink, as needed, in the employee's work area; (2) allowing an employee additional restroom breaks; (3) allowing an employee whose work requires standing to sit and whose work requires sitting to stand, and (4) allowing an employee breaks, as needed, to eat and drink.

- Cannot request documentation. (Note requests for documentation can only be “reasonable” in other circumstances – generally not for uniforms/safety equipment other “obvious” needs and watch requests especially early in pregnancy.)

PWFA Examples:

[Federal Register :: Regulations To Implement the Pregnant Workers Fairness Act]

Thank you for attending!