

Rewarding Hard Work

With the midterm elections fast approaching, there has been much discussion in Washington about how to go about ensuring that the 99% also benefit from an economy slowly recovering from the Great Recession. The Democrats are promoting measures to ensure bigger paychecks for millions of workers. The GOP and the U.S. Chamber of Commerce are more apt to call these measures "job-killers." We know that companies listed on the Standard & Poor's 500 have had profits double since June 2009. Yet worker wages have not kept pace during this same time period. In fact, in 2012 wages fell to an all time low and represented only 42.6 percent of the share of the gross domestic income that went to workers.

One proposal set forth by the White House is to allow overtime pay for more salaried workers by increasing the threshold required to qualify for an overtime exemption. There is great appeal for employers in classifying their employees as overtime exempt. This classification allows an employer to pay a set salary to a worker without having to keep track of overtime hours or have to provide meal and rest breaks. The benefits to an employer are significant in terms of the overtime cost savings. However, the consequences of improper classification can be severe. Workers who are improperly classified as overtime exempt are eligible not only to their unpaid overtime, but also to penalties and attorney's fees and costs.

Currently, under federal law the minimum compensation threshold to qualify for an overtime exemption is \$23,660. California requires that threshold to be \$33,280. As to both federal and state law, the criteria to qualify as overtime exempt includes not only the minimum compensation requirement, but also the type of duties performed. For instance, California requires that a worker spend more than one-half of his or her work time on exempt duties whereas federal law focuses on the worker's primary duties and does not place as much significance on the amount of time spent on exempt duties. In 2004, the Bush administration adopted several exceptions to the federal law, which allowed employers to classify as exempt positions that involved largely nonexempt duties if at least a small amount of the work included "supervisory" duties. The

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White House has asked the Department of Labor (DOL) to look into revising the overtime federal overtime regulations with every indication that the revisions will focus on increasing the minimum compensation threshold and on revamping the duties requirement for overtime exemption.

The White House has noted that the minimum compensation threshold necessary to qualify for the federal overtime exemption is below today's poverty line for a worker supporting a family of four, and far below 1975 levels when adjusted for inflation. See The White House, Office of the Press Secretary, FACT SHEET: Opportunity for All: Rewarding Hard Work by Strengthening Overtime Protections (Mar. 13, 2014). If the current threshold was adjusted for inflation, the new federal threshold would total approximately \$52,000, which is significantly higher than the California threshold and more than double the current federal threshold. Such a

move has the potential of lifting millions of American families above the poverty level for a family of four, and is what economists allied with the White House have proposed. Increasing the federal threshold to \$52,000 a year would impact California as the Fair Labor Standards Act which is the federal law would require California to apply any threshold above \$33,280 as the minimum compensation threshold because it would be a more employee friendly law.

In Name Only

Notably, the incidence of worker misclassification is higher among California employers who classify their workers as overtime exempt and pay their workers the threshold amount of \$33,280 or just above. These are the workers who are putting in between 50 to 70 hours a week and typically doing almost exclusively nonexempt work during their workday yet making an effective

hourly rate of less than minimum wage. These workers are given the title of "manager" or "supervisor" and more often than not report experiencing health and relationship problems as they spend most of their weekdays and weekends at work, and still remain unable to make ends meet. In fact, in California, an income of \$33,280 is below the poverty level for a family of four.

However, the incidence of worker misclassification diminishes for California employers who classify their workers as overtime exempt and pay them at or above \$50,000. It would appear that California employers who are paying their workers at or just above the current threshold and classifying those workers as overtime exempt are more interested in cutting labor costs than genuinely providing them with the potential for career advancement.

U.S. Labor Secretary Tom Perez has noted that under the current

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duties requirement, an exempt worker can work as little as one percent of their time on management duties, but ninety percent on hourly type duties which have no managerial component but yet not qualify for overtime. He drew this example from the case of *Grace et al v. Family Dollar* (2011) 637 F. 3d 508 4th Cir.

In *Grace*, Irene Grace, a former store manager for Family Dollar Stores, Inc., alleged that while she worked at Family Dollar she worked 50 to 65 hours per week and was classified as an executive exempt from overtime pay. Grace further claimed that she spent the vast majority of her time doing nonexecutive tasks and was therefore misclassified as overtime exempt. Specifically, Grace alleged that while she worked at Family Dollar, a national discount retail chain, she spent 99% of her time putting out freight, running a cash register, doing the schematics and doing janitorial work. The district court granted summary judgment in favor of Family Dollar finding that even though Grace performed nonexecutive tasks, she was

concurrently the manager of the store and therefore her primary duties were managerial. The Fourth Circuit affirmed. *Id.* at *513.

The Fourth Circuit focused its analysis on Grace's primary duties, which it viewed as managerial. In other words, the amount of time spent on nonexecutive tasks like janitorial work was not the salient issue. Instead, the Court held that because Grace's primary duty was management, she was overtime exempt regardless of whether the majority of her time was spent on nonexecutive duties. *Id.* at *518.

Only Time Will Tell

It remains to be seen how the DOL will change the duties requirement. However, based on Perez comments describing the concurrent duties test applied in the *Grace* case as a "loophole" which allows employers to avoid paying overtime, it should not come as a surprise if the direction is to move toward an exemption test that relies on a quantitative test rather than a primary duties test.

The DOL will allow the public an opportunity to provide comments regarding any proposed revisions, including the minimum compensation threshold, which could impact California workers. The DOL will then respond to those comments before implementing new regulations. The whole process will likely take longer than a year. This effort by the White House is in line with its goal to address wage disparities and has the potential to raise wages for millions of workers, including those in California if the current threshold is adjusted for inflation and increased to \$52,000. I for one will anxiously await the revisions with the hope that California workers can benefit from an increase in the overtime compensation threshold which has up to now failed to keep up with inflation and has resulted in workers, both in California and throughout the rest of the country, working longer hours just to get by. It's time to begin rewarding hard work. **TBN**



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