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Day In Washington

Supermarkets Oppose Dramatic Changes to Overtime Pay Regulations or Changes to Duties Test

Supermarket Industry Impact

On March 13, 2014, President Obama issued an executive order directing the Department of Labor to “modernize” the regulations regarding overtime pay for salaried workers contained in the Fair Labor Standards Act (FLSA). The Department of Labor (DOL) issued a proposed rule in July 2015 that more than doubled the current salary threshold for exempt workers, from \$23,660 (\$455 per week) to \$50,440 (\$970 per week). FMI and NGA expressed our strong concerns about any modification to the duties test, and we will maintain our strong opposition to modification to the duties test when the final rule is released in the next few weeks.

While we agree that the salary level needs to be adjusted, this 113% increase with no geographic considerations, automatic adjustments and only partial consideration of incentive pay will have a significant negative impact on the supermarket industry – a place where many associates receive their first management positions and no longer have to punch a time clock.

In addition to a potential reduction in hours, workers that are reclassified as non-exempt employees will lose additional benefits; such as flexible scheduling, predictable take home pay, and an increased opportunity to climb the ladder.

Position

The supermarket industry strongly opposes such a dramatic increase in the salary threshold for exempt workers, in conjunction with an automatic annual increase and without adequate consideration of incentive pay and geography. Once the final rule is released and our concerns can be verified, the supermarket industry urges Congress to take prompt action to pass the *Protecting Workplace Advancement and Opportunity Act*, as introduced in the House and Senate (H.R. 4773 and S. 2707, respectively).

The *Protecting Workplace Advancement and Opportunity Act* would provide relief from this burdensome regulation and provide the DOL with much-needed additional information on the impact that the proposed rule would have on small businesses.

Specifically, the legislation would:

- Require the Secretary of Labor to conduct a study on the effects the overtime rule would have on small businesses
- Prevent the use of automatic updates to the salary threshold
- Address regional, state and metropolitan cost of living differences

- Provide an analysis of the cost of changing human resource systems and reclassifying employees
- Require that any changes to the duties test be subject to the full rulemaking process, including a public comment period

Background

Following an executive order issued in 2014 by President Obama, the DOL published a proposed rule open for public comment on July 6, 2015. The DOL received nearly 300,000 comments on the proposed rule during the comment period. The proposed rule would make changes to the Fair Labor Standards Act “white collar” exemption; including a 113% increase in the salary threshold used to determine exempt status, from \$23,660 (\$455 per week) to \$50,440 (\$970 per week). Coupled with the prospect of automatic adjustments on an annual basis, achieved through indexing the threshold to either changes in CPI or the 40th percentile in wages, the proposed rule poses a sizable challenge to the supermarket industry.

This massive increase in the salary threshold is expected to have an outsized effect on smaller businesses, particularly those in geographic regions of the country that have lower salaries and lower cost of living. The DOL changed their methodology for setting the wage threshold when creating the proposed rule, moving away from past methodologies that took into greater account the average salaries in low salary regions and industries. The DOL acknowledged this lack of inclusion, noting that using these prior methodologies would have resulted in a threshold closer to \$577 (\$30,004 per year) or \$657 (\$34,164 per year), which it deemed to be an “inappropriately low salary level.”

The supermarket industry has voiced its concerns to the DOL since the proposed rule was released, including filing comments during the public comment period. One area where we have been pleased with the response from DOL has been the exclusion to this point, of any type of adjustment to the duties test. If any changes to the duties test are included in the final rule, we would strongly oppose from the standpoint that they have not been vetted in any form. Of particular concern would be any change that included a quantitative requirement or any modification to the concurrent duties provisions that allows managers to perform both managerial and non-exempt tasks over the same time. This might include jumping in to run a checkout lane when the lines are long while supervising the staff.

On March 14, 2016, the DOL sent the proposed final rule to the Office of Management and Budget (OMB) Office of Information and Regulatory Affairs (OIRA) for review and approval before its final release. With the rule likely to go into effect 60 days after final publication, a time period we believe is way too tight given both the scheduling and budgeting impact, the supermarket industry encourages the House and Senate to act quickly in passing the *Protecting Workplace Advancement and Opportunity Act*. Without modification of the level of increase, a variation for regional differences, elimination of the automatic increases, an implementation time of at least one year, along with more reasonable consideration of incentive pay; this change will have a very significant impact on the supermarket industry and the associates in both non-exempt and exempt positions.