

KD Alert: President Obama to Issue Executive Order Limiting Overtime Exemptions and Expanding the Number of Employees Eligible to Receive Overtime Pay

by Keith Gutstein, Esq. and Philip R. Voluck, Esq.
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Using the sweeping power of an Executive Order, President Obama will seek this week to change the country's rules addressing overtime pay, and in the process drastically expand the number of employees eligible to receive such premium compensation.

Currently, the Fair Labor Standards Act ("FLSA") requires employers to pay all "non-exempt" employees at a rate of time and one-half their regular rate of pay for all hours worked in excess of forty (40) in any given week. While the payment of such overtime pay is mandated, the law also provides exemptions based upon the employee's salary level and job duties. Under Federal law, the current weekly salary that qualifies an employee as exempt is \$455/week. The President has indicated his intention to significantly increase that threshold, which will either compel employers to increase an employee's weekly pay to remain eligible for the exemption, or will force employers to re-classify the employee as "non-exempt" and begin tracking that employee's weekly hours and pay him or her accordingly. Notably, certain states have already increased their salary threshold. For example, New York has increased the salary threshold to \$600/week. The President has also indicated that he may seek to modify the "duties" test of the exemption analysis, which identifies certain job duties an employee must engage in to be eligible for an exemption. Depending on the nature of this change, which has yet to be disclosed, a significant number of employees currently classified as exempt could lose the exemption.

These changes, if implemented, could likely cost employers significant money and/or result in additional recordkeeping requirements. Should an employer wish to continue to exempt an employee, the employer would be forced to increase the employee's weekly pay and possibly adjust their duties to comply with the new regulations. Alternatively, if the employer elects to re-classify the employee as non-exempt, the employer will either be forced to pay the employee overtime pay (which could be costly based upon the number of hours worked), or hire other workers to work the excess hours needed. Moreover, should an employee be re-classified as non-exempt, not only will the employer be compelled to pay overtime, the employer will need to comply with the numerous FLSA recordkeeping requirements, or risk litigation and/or monetary penalties issued by the Department of Labor ("DOL").

Though the Executive Order has not yet been issued, employers should be mindful that changes to their job descriptions, time keeping, and payroll practices are just around the corner. An internal audit is, perhaps, the most reasonable manner in which an employer can determine its level of compliance. Such audits should only be performed with the assistance of an experienced employment attorney. If you have questions pertaining to the Executive Order or need assistance conducting an audit, please contact the attorneys in KD's Employment Law practice.