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New OT Rules To Hit Retail, Hospitality Cos. Hardest

By **Braden Campbell**

Law360, New York (May 18, 2016, 11:53 PM ET) -- The U.S. Department of Labor unveiled its long-anticipated changes to the overtime exemption rule Wednesday, more than doubling the salary threshold for overtime exemptions to over $47,000 and extending wage protection to millions more American workers.

Just who these workers are is unclear, but experts say a handful of industries — hospitality and retail chief among them — will likely shoulder the lion's share of wage increases when the rule changes go into effect on Dec. 1.

The new rule sets a clear blueprint for the sort of worker who can expect to see a bump in pay: managers who now take home a salary between the old and new thresholds, or $23,660 and $47,476, respectively. Under the Fair Labor Standards Act, the minimum salary threshold sets a bar for who qualifies for a "white collar" overtime exemption.

More so than their counterparts in other industries, store and restaurant owners will be scrambling in the coming months, Fisher & Phillips LLP's David Buchsbaum told Law360.

"Those industries tend to have a higher proportion of lower-paid management," said Buchsbaum, a wage-and-hour compliance attorney who represents employers.

"We start getting into white collar businesses, and you're looking at management, in many cases, they're already making at least $50,000 a year in salary, " he added. "But when you're looking at fast food ... you have restaurant managers who may be making in the mid-30s ... well above the prior salary level of $23,660 annually but far short of the new $47,476."

In a fact sheet accompanying the announcement, the Obama administration said it expects the new rules to make 4.2 million employees — roughly 19 percent of the pool of about 22.5 million employees currently exempt — eligible for overtime, boosting wages by $12 billion over the next decade.

And government projections bear out Buchsbaum's conjecture that the new rules will little affect white collar industries, at least relative to the current pool of exempt workers. The Labor Department said it expects nearly 2 million, or 30 percent of the 6.4 million exempt workers without a four-year degree, to become eligible while just 14 percent of the more than 16 million workers with bachelor's or advanced degrees will become eligible when the new rules take effect.

The government has not broken down these figures by industry, but labor attorneys are having little trouble picking out the likely candidates.

While there are notable exceptions — including workers at finer dining establishments where higher prices mean bigger checks and high-commission salespeople who qualify for the 7(i) exemption — management pay in the hospitality and retail industries may look very different come December.

But these aren't the only industries where long hours meet relatively low salaries. Another industry set to see personnel costs rise this winter is the nonprofit sector. And just as narrow margins may force store and restaurant owners to make some hard decisions, cash-strapped charities might struggle with the additional expense.

"The belief is that they may be looking at smaller staff. They may be looking at trying to find ways to determine whether they can pay overtime for over 40 hours or try to reduce the hours of the people they have on staff," said Chris Wilkinson, Orrick Herrington & Sutcliffe LLP employment law partner and former DOL associate solicitor for civil rights and labor management.

While the health care industry is typically thought of as high-paying — and is for many workers — care facilities likewise have their work cut out for them. Hospitals aren't exactly in danger of having to pay surgeons time-and-a-half for marathon triple bypasses, but some nurses who assist may see changes to their pay. So too might clerical workers or administrators, Hunton & Williams LLP labor litigator Ryan Glasgow said.

"You have a lot of people in the billing or accounting departments who are classified as exempt because of their duties, then you also have a lot of nurses and other quasimedical professionals who, because of their medical training and licenses, probably meet the professional exemption duties test but not the salary," Glasgow said.

Buchanan Ingersoll & Rooney PC employment litigator Kelly Kolb added that the National Association of Homebuilders believes as many as 110,000 exempt construction managers and supervisors nationwide could soon qualify for overtime. Financial industry employees lower on the totem pole or at less lucrative institutions such as smaller banks could likewise see a pay bump, he said.

As the new rules affect workers differently across industries, they will also affect certain areas of the country more than others, attorneys say. A greater proportion of retail and hospitality workers are likely at or near the salary threshold in major metropolitan areas like New York City or Chicago, they say, while significant numbers of white collar workers may be paid below the minimum in other areas where wages are a lot lower.

"In the Northeast and out West and other major metro areas, there probably aren't that many exempt employees that are paid less than mid- to high 40s," **Weiss Serota Helfman Cole & Bierman PL labor and employment group chair Brett Schneider** said. "I think you're going to see a lot of [impact in] areas in the Midwest and Southeast and in the middle of the country, where pay rates tend to be lower."

With new regulations come new opportunities for workers to sue. Indeed, Kolb said he expects plaintiffs' attorneys are salivating at the chance to pounce on noncompliant employers. Any management-side attorney who can make clear the financial stakes of noncompliance is in line for some hefty business advising on the transition, he said.

"Get somebody's attention with the purse strings," Kolb said. "The first thing an employer ought to be doing, and something that should be easier to do, is evaluate what employees will be affected by these new levels, look at these levels and ask, 'Will they meet the new salary levels by the end of the year?'"

Should an employer find it needs to make changes, there are three primary options for dealing with the vast majority of workers: raising individual salaries to the threshold, paying time-and-a-half for overtime or cutting hours to 40, whether by bringing in more workers or eating the loss in productivity.

In general, attorneys expect the cheapest solution will be to pay overtime to employees who earn significantly below the new threshold and raise the salaries of those closer to the minimum. But with so many factors involved, these decisions will have to be made on a case-by-case, employer-by-employer basis.

Past the increased costs of upping the salaries of newly nonexempt employees by amounts ranging into the five figures, employers may also find themselves facing tough questions from other employees suddenly paid on par with their underlings, Schneider said. And while exempt status comes with the luxury of not having to invest resources in time-keeping, supervisors and workers alike will now need to be trained on tracking their hours, he said.

But the new rules aren't all doom and gloom: The stricter overtime requirements may lead to more efficient use of time, albeit at higher rates of pay.

"I think if a lot of employers sat down and pressed themselves, they'd be surprised at ... how inefficiently a lot of currently exempt employees are working," Glasgow said. "Once an employer realizes every minute has to count, I think they're going to find a lot of inefficiencies they can manufacture out of those duties."

As dramatic as the increase to the threshold was on Wednesday, it could have been bigger: The Department of Labor initially floated setting the threshold at $50,440, the 40th percentile of weekly earnings for full-time, salaried workers nationwide. Instead, the department set the bar relative to earnings in the South, the country's lowest-paying region.

The deadline, too, was a relief in the eyes of many who expected the rules to go into effect 120 days or less from publication. Still, there's no time to dawdle.

"Dec. 1 is more time than we'd expected, but there's a lot of work that needs to be done," Schneider said. "For employers to do this the right way, they have to be moving quickly."