

# ORANGE COUNTY BUSINESS JOURNAL

## It's Obamatime! Get Ready for Changes in the Federal Overtime Laws *Obamacare is already here. Are you ready for Obamatime?*

by Bruce May and Eve Brackmann, Partners, Stuart Kane LLP

### New Federal Regulations Are Coming

New federal regulations are coming that will make it tougher for employers to qualify employees as exempt from overtime. Every employer needs to get prepared for the coming changes.



In March, President Obama issued a directive to the U.S. Department of Labor (DOL) to expand the coverage of the federal overtime laws by narrowing the exemptions from the federal Fair Labor Standards Act (FLSA.) "Overtime is a pretty simple idea," said the President, "if you have to work more, you should get paid more. Unfortunately, today millions of Americans aren't getting the extra pay they deserve."

With that, the President directed the DOL to propose new regulations that would update the overtime protections under federal law, address the changing nature of the workplace and simplify the FLSA regulations.

The FLSA, the basic federal wage and hour law, applies to most employers throughout the United States and requires overtime pay if an employee works more than forty hours in a workweek, unless the employee is paid a specified minimum salary and performs duties that are "exempt" from overtime. The most common exemptions are for bona fide managerial, professional, administrative and outside sales positions.

Congress did not spell out the specific requirements for these exemptions in the FLSA itself, but authorized the DOL to do that. With a stroke of the pen, the DOL can give millions of employees the right to overtime pay by tightening exemption requirements, such as by increasing the number of employees a manager must supervise to be exempt.

### The Likely Changes

But the DOL's most immediate target will be increasing the minimum salary requirement. This aligns with the growing movement to increase the minimum wage that is sweeping states, counties and cities, such as the increase to \$15 just adopted in Seattle. At present, the FLSA requires a salary of

\$455 per week (\$23,660 per year) for exempt status, assuming the employee performs exempt duties, which falls below the poverty line for a family of four in the U.S.

In addition to the FLSA, the states are free to enact their own wage and hour laws, and employees are entitled to the benefit of the most favorable law. California is more protective than federal law, and its exemptions are generally narrower than the FLSA. In particular, California requires a minimum salary equal to two times the state minimum wage for a full year. At present, that is \$33,280 per year, increasing to \$37,440 on July 1, and \$41,600 in 2016.

### Bruce May

Bruce May is a partner with Stuart Kane LLP. For 35 years, he has devoted his practice exclusively to advising and defending companies of all sizes in every aspect of employment litigation and employment counseling. His expertise spans the entire spectrum of employment law from recruitment and hiring to termination and post-employment misconduct, and everything in between. May can be reached at 949.791.5124 or bmay@stuartkane.com.



### Eve Brackmann

Eve Brackmann is a partner with Stuart Kane LLP where she focuses her practice on employment and real estate litigation. She routinely handles employment litigation, including wage-and-hour and class actions; discrimination, harassment, and retaliation lawsuits; wrongful termination proceedings; compensation and commission disputes; whistleblower lawsuits; as well as trade secret, unfair competition and non-compete agreement disputes. Brackmann can be reached at 949.791.5198 or ebrackmann@stuartkane.com.



# ORANGE COUNTY BUSINESS JOURNAL

---

## **The Practical Impact**

Thus, from a practical standpoint, it remains to be seen how much real impact these new FLSA regulations will have in California. But even if they do not change the legal requirements for California employers, they will draw attention to the issues of overtime pay and income disparity.

## **Recommendation: Internal Audits**

This should inspire most employers in California to conduct an internal audit of their overtime classifications. Changing job classifications from exempt to non-exempt can be tricky, since that can trigger liability for past-due overtime.

An internal audit requires an in-depth assessment of what the employee actually does on the job—the “realistic requirements” of the position. Legal counsel should be involved in such audits if for no other reason than to assure confidentiality in the process. Once an employer identifies a suspect classification, it has a range of options, including restructuring the job to assure it is exempt, converting it to hourly, and restricting the hours worked. This takes finesse, since employees may perceive the change as a demotion.

Internal wage and hour audits can be unpleasant, since they can expose significant potential liability for overtime pay. But that’s a lot better than discovering the problem after the company has been sued in an overtime class action lawsuit.