

Overtime rules might affect ag-related companies



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On May 18, the U.S. Department of Labor (DOL) announced final regulations relating to workers exempt or not exempt from overtime rules. This final rule significantly expanded who qualifies for overtime pay. While there are nuances in the job-role requirements, the greatest effect is in the minimum, or floor, salary required for a worker to be able to be considered exempt.

NCAE and many other business organizations lobbied very hard to get the initial proposal for the rule to take effect delayed to Dec. 1, 2016. We had argued in opposition to the rule as our first choice, and for a significantly lower annual minimum with a Jan. 1, 2017, implementation date as second choice, so that the new requirements would not disrupt accounting during a calendar year. DOL settled on a floor of \$47,476, as opposed to its initial proposal of \$52,660, and on a Dec. 1, 2016, implementation date.

The Fair Labor Standards Act requires all covered, non-exempt employees be paid at least the federal minimum wage (still \$7.25 an hour, since July 2009) for all hours worked, plus one and one-half times their regular rates, including commissions, bonuses and incentive pay, for working beyond 40 hours a week. Additionally, employers must maintain accurate time and payroll records.

Under the new rule, the minimum annual income required to be considered exempt from overtime will jump from \$23,660 per year to \$47,476. That equates to a change from \$455 per week to \$913 per week to be considered exempt.

Direct agricultural work is still generally exempt from overtime at the federal level, though California and Minnesota now have specific agricultural overtime requirements and it is expected that other states will attempt to pass similar measures. Immediate family members employed on farms are also exempt from overtime rules, and of course owners and children of owners do not fall under either overtime or minimum wage requirements.

So, for straight farming operations this is a non-issue, unless or until your state becomes one of those that pull farm work into the overtime requirements. Even now, for some of you, the rules will become significantly more complicated and significantly riskier if you do not completely understand them and keep perfect records. Many farm businesses include some combination of “farm” and non-farm work activities, which makes it difficult to keep it all straight.

If your business includes transportation or trucking, then trucking product from the field to the processor is still agriculture. But picking it up at the processor, commercial storage or from some other location is probably not agriculture, and then is no longer exempt. If you pack your own produce only, then that is part of your farming operation and remains federally exempt, but, as too many businesses have learned the hard way when the Wage and Hour Division audited them, if you bring in one box/bin/lug or tote from outside, you lose your exemption for any and all workers who touched that outside product. If your mechanic services your equipment, but you bring equipment in from other farmers as well, then you probably have at best a mixed situation. Hourly employees who haul for someone other than the farm would need to be paid time-and-a-half on hours that exceed 40 per week. That is true even if they worked 40 hours on the farm and 20 hours

for your trucking company.

Under the old rule, your managers were probably earning more than \$23,660 annually anyhow, so that issue was not very important. As a result, even though those managers often worked significantly more than 40 hours a week in-season, but often less in the offseason, it has become uncommon for most farm employers to keep detailed hours records for managerial employees.

Under the new rule, this is changed, so it will be important that you keep accurate and detailed hourly records for all employees who make under \$47,476 per year. Although some commission and incentive pay can count toward the \$47,476, another nuance of this new rule is that incentive commissions cannot make up more than 10 percent of the total. From the DOL website: “The Department recognizes that some businesses pay significantly larger bonuses; where larger bonuses are paid, however, the amount attributable toward the EAP standard salary level is capped at 10 percent of the required salary amount.”

Additionally, DOL Wage and Hour has made it clear that “exempt” employees must meet not only the salary/wage criteria to remain exempt but the other two tests as well, including the requirement that most of their work be “desk” work rather than labor, and that they exercise real managerial discretion on a day-to-day basis.

Employers who are not exempt now have several options, none of which may be particularly palatable: raise supervisory salaries to the higher pay rate to avoid overtime rules altogether; keep them at current salary and pay overtime; convert salaried workers to hourly workers – which may or may not include reducing a currently salaried employee’s hourly wages but paying overtime that will keep them at their current annual earnings. If a currently

overtime-exempt employee is already near the \$47,476 mark, the best option may well be to increase their salary to get them over the new bar – but remember that only works if they really are in managerial roles. The other options include potentially difficult implementation and communications issues that may arise in moving long-term salaried workers back to hourly status and requiring and maintaining audit-survivable hours-worked records (time sheets). Also, the issue of balancing hourly rates of pay with work management needs total costs when overtime is included.

For those of you balancing H-2A record-keeping requirements, the added hourly work records will not pose much added challenge. Many attorneys are now recommending that employers require all employees, even salaried employees, to complete time sheets and acknowledge their accuracy.

For agriculture, the new rules can be very complicated for those who mix enterprises. If you routinely move workers between entities, you will want to make sure to consult with your own attorney and/or accountant to assure you are paying as required and documenting it properly. One must assume that in 2017, overtime classification and compliance will be a high priority for any Wage and Hour Division audits.

For agriculture, the new rules may be more complicated than they look, especially farms with a mix of custom work and rental farms, or with ag-related businesses. Now is the time to consult your attorney or accountant to make sure your farm employees actually qualify for exemptions and that you are keeping the proper records to justify your actions with Wage and Hour.

For much more background on the rule, visit www.dol.gov/whd/overtime/final2016/overtime-factsheet.htm and www.dol.gov/whd/overtime/final2016/faq.htm. VGN