Rochester Business Journal

Major changes for OT: New federal rules to affect most employers

By WILL ASTOR - 5/20/2016

New federal employment rules slated to take effect before this year's end promise to bring a tsunami of change to a broad swath of employers.

Announced this week by the U.S. Department of Labor, the new rules give employers of white collar workers a choice: pay salaried workers at least $47,476 a year or pay them by the hour and pay overtime for any hours worked over 40 in a week.

The new regulations, which are slated to take effect Dec. 1, double the minimum allowable annual amount that lets employers classify workers as salaried versus hourly employees, raising the threshold from its current $23,660 level to $47,476.

The change will affect local businesses and organizations ranging from restaurants and retail businesses to non-profits and educational institutions as well as scores of service-sector, manufacturing, distributing and construction companies. In short, it will hit a majority, if not most, of the region's employers, said Katherine McClung, an employment attorney in Bond, Schoeneck & King PLLC's Linden Oaks office.

There are some carve-outs: Locally focused businesses and non-profits that do not derive at least $500,000 of their annual revenues from interstate commerce would not fall under the new rules. Some categories of professionals—doctors, lawyers and teachers, to name a few—would continue to be exempted regardless of how much they are paid.

Businesses whose workers do not come under such carve-outs and are paying managers and other white collar workers less than $913 a week will have to fall into line, however, McClung said. Affected employers can choose one of two paths: They can give lesser paid salaried workers raises or start paying them by the hour.

In the works for months, the controversial new rule faced heavy opposition by business groups.

The regulation will have unintended consequences, motivating employers to cut employees' hours, automate or make other adjustments that would end up reducing workers' earning power, predicted Christopher Wiest, vice president of public policy and advocacy at Greater Rochester Chamber of Commerce.

Coupled with the state's recent moves to up the minimum wage to $12 hour upstate and $15 downstate, the Labor Department rule could have a chilling effect on the local economy, Wiest added.

The Business Council of the State of New York Inc. has called for passage of a bill proposed by U.S. House Republicans that would put the rule on hold while the Labor Department conducts a full review of the regulation's economic impact.

Whether the House measure, proposed in March by Republican U.S. Reps. Tim Scott of South Carolina and Michigan's Tim Walberg, would make it through the Senate or survive a presidential veto is not clear.

The Office of Advocacy, an arm of the U.S. Small Business Administration formed to speak for small business, cautioned the Labor Department against the new rule's passage last year, when the department was proposing to raise the minimum to $50,400.

Aside from the direct costs in higher wages the regulation would entail, the rule would have the unintended consequence of overburdening many small businesses by adding paperwork, the Office of Advocacy warned in a 10-page 2015 email to the secretary of labor.

The roughly $3,000 a year reduction from the originally proposed $50,400 resulted from the method the Labor Department used to calculate the amount: the lower figure matches the lowest average regional U.S. wage, an amount earned by workers in the Southeast.

The reduction has assuaged few of the regulation's critics.

The overtime rule's opponents are crying wolf, labor lawyer Nelson Thomas maintained.

The new rate is the first raise Department of Labor has made in the overtime threshold in a dozen years, said Thomas, a partner in Thomas & Solomon LLP, a Rochester labor and employment boutique that represents workers.

The upward adjustment reflects changes that should have been made year-by-year and would have been more easily swallowed had they been, but are still a well-deserved reward for workers whose wages have too long been flat or falling, Thomas said.

A sticking point for critics: In a new twist on its wage and hour rules, the Department of Labor will henceforth adjust the overtime minimum every three years. It plans to use the same methodology, matching the new minimum figure to the lowest average regional wage.

The new rule's carve-out for organizations with revenues of $500,000 a year in interstate commerce or less makes the rule's impact less than critics claim, Thomas said.

There is less to that carve-out than meets the eye, however, said Todd Shinaman, a labor and employment attorney in Nixon Peabody LLP's Rochester office. Well-settled wage-and-hour-law rules state an employee whose job entails contact of any sort with out-of-state sources would fall under the new rule regardless of the company's revenues or whether it actually engages in interstate commerce.

A carve-out easing the new rules for non-profits and educational institutions or exempting them had been discussed. That it did not turn out to be part of the regulation that came down this week could be worrisome for some, said Linda Prestegaard, a labor and employment attorney in Phillips Lytle LLP's Rochester office whose clients include several area colleges and universities.

For non-profits, the new $47,476-a- year floor would be a two-edged sword, said Jennifer Leonard, president of the Rochester Area Community Foundation.

"It's the right thing to do economically (for workers), but non-profits operate on a very lean budget," she said.

Many human services agencies and other non-profits would have to redirect resources or limit staff time, Leonard predicted. Some would not be able to avoid added expense. And while businesses might be able recoup extra costs by raising prices, non-profits such as social service agencies cannot, she added.

Many non-profits depend on government grants for much of their funding, Leonard said. She wondered: Would government agencies take added expenses the new regulation will add into account?

Rochester-based Pathstone Corp. is a $65 million non-profit that provides housing and services to low-income clients in New York, Ohio, Indiana, Pennsylvania, New Jersey, Virginia and Puerto Rico.

Raising salaries of the slice of its 598 workers affected by the new rule would cost the agency $300,000 a year, said Anne Babcock-Stiner, senior vice president of human resources.

After analyzing its payroll, the agency decided to put workers whose pay falls more than a couple thousand dollars short of the new threshold on an hourly basis. Babcock-Stiner is not sure whether that cost less than $300,000. Pathstone also does not yet know how much administrative expense tracking newly minted hourly workers' time sheets will cost, she said.

Despite its likely downsides, the agency is embracing the new rule, she said, "because it's the right thing to do. Our mission is to serve low-income people, so how could we not?"

On Wednesday, Pathstone participated in a call-in, signaling its support directly to U.S. Labor Secretary Thomas Perez as the White House announced the change.

Babcock-Stiner took the opportunity to point out to Perez that government funders supply 95 percent of Pathstone's revenues with the Department of Labor as the single biggest contributor. Would the department be adjusting its funding levels to account for the new rule? she asked.

Perez's answer: The department is kicking off studies to examine how the policy is affecting its own workers and how it would affect agencies such as Pathstone.