What the new overtime rules will mean for businesses and employees

Major changes to the federal overtime rules are going into effect on December 1, and this could mean big changes in the workplace.

Some 4.2 million employees who aren't eligible for overtime now will become eligible under the new rules. This could prompt many businesses to reduce overtime hours, hire new workers, raise or lower salaries, convert salaried employees to hourly employees, and adjust bonuses and commissions. It could also mean changes for workers who telecommute or have flexible schedules.

In general, employees must be paid time-and-a-half if they work more than 40 hours in a week, unless the employee is "exempt." Currently, employees are "exempt" if they earn at least $23,660 per year; are paid on a salary basis; and perform managerial, professional, or administrative tasks. Employees who do *not* have managerial, professional, or administrative jobs are exempt if they earn more than $100,000.

Here's what's changing on December 1:

- The minimum salary for exempt employees will more than double, to $47,476. That means anyone making less than $47,476 annually will be entitled to overtime, no matter what kind of job they have.
- Employees who don't have managerial, professional or administrative jobs will be eligible for overtime if they make up to $134,004 a year.
- The new figures ($47,476 and $134,004) will be indexed to keep up with inflation. They will be adjusted every three years based on salaries in the 40th percentile in the census region with the lowest wages.
- In determining whether an employee earns enough to be exempt, an employer can now count bonuses and commissions. However, these payments can be included only up to 10% of the threshold. Also, they must be paid at least quarterly, and they must be "nondiscretionary" – meaning they're paid according to a formula or incentive plan set in advance. Unannounced bonuses or spontaneous rewards won't count.

Almost all businesses will want to consult with an employment lawyer and consider whether it makes sense to adjust their compensation scheme and employment practices in light of the new rules.

Here are some changes that businesses will likely be considering – some of which will benefit employees overall, and some of which might not:

- Workers who earn just under the $47,476 threshold might be given a raise to $47,476 in order to avoid overtime.
- Salaried workers who earn between $23,660 and $47,476 and regularly work more than 40 hours a week might be converted to hourly workers, with their hourly rate determined by their current salary and the average number of hours they currently work. The result would be that these employees' overall compensation would stay the same, even though they will now be receiving overtime pay.
- Businesses that regularly ask employees to work more than 40 hours a week might find it advantageous to reduce these employees' hours and instead hire part-time workers or temps.
- Some companies might try to turn employees into independent contractors – although this is difficult and can get a business into a lot of trouble if it's done incorrectly.
- Companies will need to train many white-collar employees who have never tracked their hours before on how to do so. This could be tricky, since some managers might find the

idea demeaning or consider it akin to a demotion. Businesses might need to communicate that the change is required by the new law and show how it's a net benefit to employees.

- The same is true for employees who work from home or have highly flexible schedules, and who might be resistant to the idea of tracking their hours.
- Companies might need to adopt clearer policies about what constitutes "work." For instance, businesses might want to prohibit employees from checking their work e-mail at home if doing so could trigger overtime.

Any changes a company makes will also need to take into account *state* overtime regulations, which are still in effect despite the federal change. And remember, companies that fail to follow the new rules can be subject to stiff fines as well as back pay and other penalties.

Should companies buy wage-and-hour insurance?

Wage-and-hour lawsuits under the Fair Labor Standards Act have increased by 30 percent in just the last five years, and with the huge changes taking place on December 1, that number is expected to increase even further.

Some companies are buying specific insurance policies to protect them against these claims.

If a business already has an employment practices liability insurance (EPLI) policy, this might not be necessary because these claims may already be covered. However, many EPLI policies specifically exclude coverage for wage-and-hour violations. Other general liability policies might in theory cover wage-and-hour suits, but these insurers are often very aggressive in contesting their obligation to cover such claims after they arise.

Businesses that are concerned might want to review their policies with an employment attorney.

Workers' 'right to gripe' gets another boost

The National Labor Relations Board is cracking down on workplace rules that are designed to promote harmony and civility, but that restrict employees from complaining about their working conditions.

All employees (even those who don't belong to a union) have a right under federal labor law to talk to each other about their pay and conditions and to agitate for improvements. Here are some examples of workplace rules that the NLRB thinks might violate that right:

► T-Mobile's employee handbook required employees to "maintain a positive work environment by communicating in a manner that is conducive to effective working relationships." That might sound like a good idea in general, but the NLRB found that the requirement was illegal because it limited workers' right to complain.

► A Michigan hospital prohibited conduct that "impedes harmonious interactions and relationships," and also banned "negative or disparaging comments" about employees or physicians. Again, the NLRB said this was illegal.

► Quicken Loans had a rule against using profanity on the job. While this might be okay in general, Quicken relied on the rule to fire a mortgage broker who used foul language when complaining about his job. An NLRB administrative judge said the firing was illegal because it violated the broker's right to discuss conditions in the workplace.

► Another T-Mobile rule prohibited workers from making recordings at work. The idea was to protect employees' privacy, reduce harassment, encourage open communication and safeguard confidential information. But the NLRB said the company still had to allow workers to record conversations about wages and benefits.

New rules for company ‘wellness’ programs

Corporate wellness programs – designed to help workers quit smoking, manage stress, lose weight and address other health issues – are becoming popular with employers. Many businesses see them as a valuable perk as well as a way to reduce absenteeism and health care costs.

However, under federal law, these programs must be *voluntary* – employees can’t be forced to participate in them. Further, there are limits on how companies can obtain and use medical and genetic information about workers and their families.

The federal Equal Employment Opportunity Commission has issued new rules that clarify what’s allowed.

While a company can give incentives to employees to encourage them to participate, the EEOC says the value of these incentives can’t exceed 30 percent of the cost of employee-only health care coverage. The same limit applies to incentives to encourage a spouse to participate. And a program cannot penalize workers for failing to achieve a particular result.

A wellness program must be designed to promote health or prevent disease. That means a program can’t include a health screening unless it also provides the employee with results, follow-up information or health advice.

Businesses can receive employee medical information through the program, but only in aggregate form that doesn’t disclose the identity of any particular worker.

Finally, companies cannot give employees an incentive to provide current or past health information about their children, or to provide genetic information about themselves or their family.

Yoga teacher could be fired for being ‘too cute’

A Manhattan yoga teacher who claimed her female boss fired her because the boss’s husband thought she was attractive can’t bring a lawsuit for unjust termination, a judge has ruled.

Dilek Edwards worked as a yoga instructor and massage therapist at a chiropractic clinic owned by Stephanie Adams – a former Playboy model – and her husband, Charles Nicolai.

Edwards apparently had given Nicolai some massages, and Nicolai praised her work and told her that his wife might become jealous because she was “too cute.”

Shortly afterward, Adams sent Edwards an obscene text telling her she was no longer welcome at the clinic and to stay away from her husband.

Edwards sued Adams and the clinic. She argued that she was fired because of sex discrimination, inasmuch as the firing wouldn’t have happened if she were a man.

But the judge said that Adams’ behavior, while it might have been “abhorrent,” was nevertheless legal because she was motivated by jealousy of one specific person rather than a general dislike of women.

‘No vacancy’ is no defense in promotion lawsuit

Can an employer be sued for not promoting someone, even if there’s no vacancy in the job to which she wants to be promoted?

Maybe, according to a federal appeals court in Washington, D.C.

Janean Chambers was a blind black woman who worked for the Department of Health and Human Services. She was at a GS-9 pay grade and wanted to be promoted to a GS-11 job.

Since the only open GS-11 jobs were in a different division, and she didn’t want to switch, she instead spent four years trying to get the Department to create a new GS-11 job with her current responsibilities.

Her boss thought highly of her and supported her, but she was ultimately turned down for budget reasons. However, during this period the Department created three new positions in order to promote white and non-disabled employees from a GS-14 to a GS-15 pay grade.

Janean sued for discrimination.

In the end, she lost. The court said that Janean's supervisor did everything possible to secure a promotion for her, and there was no evidence of any race or disability discrimination.

However, the court noted that the mere fact that there was no vacancy in the job to which Janean applied – and in fact, the job she wanted didn't even exist – wasn't enough to prevent her from suing, or to prevent other employees from suing if they *could* prove discrimination.

According to the court, businesses create new positions all the time, and often do so precisely because they want to promote someone. If an employer could get out of a discrimination lawsuit simply by saying there was "no vacancy," then businesses could simply wait to create a new job until they want to promote a white employee, and never create a new job for a black employee.