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DOL issues proposed rule seeking to expand overtime protections to "white collar" workers

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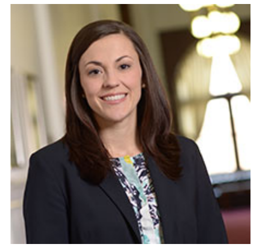

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On June 30, 2015, the Department of Labor (DOL) issued its much-anticipated proposed rule that would revise the "white collar" exemptions contained in the Fair Labor Standards Act (FLSA). If adopted, the rule is expected to expand overtime protection within the first year alone to nearly five million white collar workers who are currently exempt. The DOL estimates that the proposed rule will transfer income from employers to employees in the form of higher earnings in the amount of anywhere between $1.18 and $1.27 billion.

White collar exemptions

Currently, to qualify for exemption, a white collar employee generally must:

1. be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed;
2. be paid more than a minimum specific amount (currently, $455 per week, or $23,660 annually); and
3. primarily perform executive, administrative or professional duties, as defined by DOL regulations ("duties tests").

Additionally, certain highly compensated employees are exempt from overtime if they are paid total annual compensation of at least $100,000 and if they customarily and regularly perform at least one of the exempt duties or responsibilities of an executive, administrative or professional employee identified in the standard tests for exemption.

Key provisions of the proposed rule

Salary levels

The DOL's rule focuses primarily on updating the salary levels needed to qualify for the white collar exemptions. In summary, the DOL proposes to:

- Set the minimum salary required for exemption at the 40th percentile of weekly earnings for full-time salaried workers. Based on 2013 data, this would amount to a minimum salary of $921 per week or $47,892 annually. By the time the rule would become effective in 2016, the DOL expects these numbers to increase to $979 per week or $50,440 annually.

- Increase the total annual compensation requirement needed to exempt highly compensated employees to the 90th percentile of earnings of full-time salaried workers, which would amount to $122,148 annually.

- Establish a mechanism to automatically update the salary levels on an annual basis based either on a percentile (40th/90th) or inflation.

The DOL is also seeking comments on whether to allow nondiscretionary bonuses, such as certain production or performance bonuses, to satisfy a portion of the standard salary requirement.

Duties tests

While the DOL "is not proposing specific regulatory changes at this time" to the duties tests, it is seeking comments on whether changes to the tests are necessary, particularly in light of the proposed changes to the salary level. Specifically, the DOL seeks comments on the following issues:

- What, if any, changes should be made to the duties tests?

- Should employees be required to spend a minimum amount of time performing work that is their primary duty in order to qualify for exemption? If so, what should that minimum amount be?

- Should the DOL look to the State of California's law (requiring that 50% of an employee's time be spent exclusively on work that is the employee's primary duty) as a model? Is some other threshold that is less than 50% of an employee's time worked a better indicator of the realities of the workplace today?

- Does the single standard duties test for each exemption category appropriately distinguish between exempt and nonexempt employees? Should the DOL reconsider its decision to eliminate the long/short duties test structure?

- Is the concurrent duties regulation for executive employees (allowing the performance of both exempt and nonexempt duties concurrently) working appropriately, or does it need to be modified to avoid sweeping nonexempt employees into the exemption? Alternatively, should there be a limitation on the amount of nonexempt work? To what extent are exempt lower-level executive employees performing nonexempt work?

Comment Period

Once the rule is published in the Federal Register, there will be a 60-day public comment period. All affected employers concerned or dissatisfied with the proposed rule should consider submitting comments to the DOL, which can be done electronically here. Following the public comment period, the DOL will issue a Final Rule that may revise the proposed rule or implement it as-is. A Final Rule is not expected to be issued before 2016.

