U.S. Department of Labor Proposes to Restrict Scope of FLSA 'White-Collar' Overtime Exemptions

By Paul DeCamp, Richard I. Greenberg and Craig S. Roberts of Jackson Lewis LLP, June 30, 2015

After more than 15 months of waiting, the U.S. Department of Labor has issued a Notice of Proposed Rulemaking ("NPRM") announcing the Department's intention to shrink dramatically the pool of employees who qualify for exempt status under the Fair Labor Standards Act.

Despite its length, the 295-page NPRM, released June 30, contains few specific changes to existing DOL regulations: more than doubling the salary threshold for the executive, administrative, and professional exemptions from $455 a week currently to $921 a week (with a plan to increase that number to $970 a week in the final version of the regulation), as well as raising the pay thresholds for certain other exemptions, and building in room for future annual increases. More ominously, the Department invites comment on a host of other issues. This opens the door to many further significant revisions to the regulations in a Final Rule after the Department reviews the public's comments to the NPRM.

Background

On March 13, 2014, President Barack Obama directed the Secretary of Labor to modernize and streamline the existing overtime regulations for exempt executive, administrative, and professional employees. President Obama said the compensation paid to these employees has not kept pace with America's modern economy since the Department last revised the pertinent regulations was in 2004. The President noted that the minimum annual salary level for these exempt classifications under the 2004 regulations is $23,660, which is below the poverty line for a family of four.

Since the President issued his memorandum, the Department has held meetings with a variety of stakeholders, including employers, workers, trade associations, and other advocates. The Department has raised questions about how the current regulations work and how they can be improved. The discussions have focused on the compensation levels for the exempt classifications as well as the duties required to qualify for exempt status.

The NPRM represents the culmination of this initial phase of the regulatory process.

The NPRM

The NPRM expressed the Department's intention to increase the salary basis threshold for the white-collar exemptions from $455 a week (or $23,660 a year) to $921 a week ($47,892 a year), which the Department expects to revise to $970 a week ($50,440 a year in 2016) when it issues its Final Rule. By the Department's own estimate, under this single change to the regulations, which appears at part 541 of Title 29 of the Code of Federal Regulations, 4.6 million currently exempt employees would lose their exemption right away, with another 500,000 to 1 million currently exempt employees losing exempt status over the next 10 years as a result of the automatic increases to the salary threshold.

The NPRM acknowledges that roughly 25 percent of all employees currently exempt and subject to the salary basis requirement will be rendered non-exempt under the proposed regulations. The Department recognizes that employers are likely to reduce the working hours of currently exempt employees reclassified as a result of these regulations, and that the reduction in hours will probably lead to lower overall pay for these employees. The NPRM tries to predict how much money these employees will lose, though, in the end, the Department recognizes that it is unable to do so with any precision.

Related changes in the regulations include increasing the annual compensation threshold for exempt highly compensated employees from the present level of $100,000 to a proposed $122,148, as well as raising the exemption threshold for the motion picture producing industry from the present $695 a week to a proposed $1,404 a week for employees compensated on a day-rate basis. In addition, the NPRM proposes an increased salary level for exempt employees in American Samoa of $774 per week ($40,248 a year).

Perhaps not surprisingly, given the likely impact of the proposal, almost all of the NPRM is devoted to economic analysis and justification for the steep increase in the salary thresholds. Nevertheless, the NPRM touches on some other topics as well. The Department states that it is considering, and invites comment on, a wide range of topics, including:

- Whether to allow nondiscretionary bonuses to satisfy some portion of the required salary level (the Department suggests up to 10 percent), including the appropriate frequency of such bonuses (the Department suggests not less than monthly);
- Whether to allow commissions to satisfy some portion of the required salary level;

- Whether to modify the current duties tests for exempt status, including the “primary duty” standard, by such means as:
  - Adopting the California model requiring that exempt employees spend more than half of their working time on exempt tasks;
  - Placing quantitative limits on the amount of time exempt employees may spend on non-exempt duties; or
  - Modifying or eliminating the concept of concurrent duties whereby exempt employees can maintain exempt status when performing exempt and non-exempt activity simultaneously; and
- The best way to determine annual updates to the salary levels in the regulations.

What Comes Next?

The proposed regulations are subject to a 30-day public comment period. Now is the time for any employer or trade association dissatisfied with the proposed regulatory text, or concerned about changes the Department is weighing for inclusion in a Final Rule, to submit comments. The Department has put the regulated public on notice: it is considering sweeping changes to the regulations not described specifically in the proposed regulatory text, such as altering the duties tests for exempt status. Employers may not have another opportunity to comment on the content of a Final Rule.

Following the public comment period, the Department will issue a Final Rule that may add, change, delete, or affirm the regulatory text of the proposal. The Office of Management and Budget will review the Final Rule before publication. This process is likely to take at least six to eight months. A Final Rule is not expected before 2016.

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