

CLIENT ALERT

Proposed FLSA Regulations More Than Double Salary Threshold for Exempt Employees

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Employees earning less than \$47,892 per year will be automatically eligible for overtime, if the Department of Labor's new Fair Labor Standards Act (FLSA) regulations take effect as expected later this year. The new figure of \$921 per week more than doubles the current threshold of \$455 per week, and is expected to rise to \$970 per week (\$50,440 annually) in the first quarter of 2016.

This change is the centerpiece of the DOL's long-awaited changes to the FLSA's overtime regulations, which were released today. This change validates the concerns of the employer community following President Obama's directive to DOL last year to "modernize and streamline" the existing overtime regulations. Yet DOL surprised many of us by not proposing changes in the existing "duties" test for determining whether particular employees satisfy one of the "white collar" exemptions to the FLSA's overtime requirements. But language in the proposed rule suggests changes to the "duties" test may still find their way into the final rule.

The proposed regulations consume almost 300 pages of text. The principal provisions of interest to employers include:

Salary Level Test Rises to \$47,892. The proposed regulations revise the salary threshold below which employees are automatically deemed eligible for overtime. The regulations propose to more than double the current threshold of \$23,660 (\$455 per week) and to set the bar at the 40th percentile of full-time salaried workers, which is currently \$921 per week (\$47,892 annually). DOL estimates this number will jump to \$50,440 (\$970 per week) in the first quarter of 2016. This new minimum salary threshold is expected to impact millions of workers across the country, especially in the retail, hospitality, and non-profit industries. DOL estimates that 5 million employees will automatically become eligible for overtime by virtue of this change. Some commentators have suggested that this number was intended to bring the overtime eligibility salary threshold (and the percentage of employees thus eligible for overtime irrespective of their job duties) in line with the threshold applicable in 1975. DOL proposes that the new salary level test will be indexed to inflation, to be permanently tethered to either the salary level at the 40th percentile or changes in the consumer price index.

Highly Compensated Employee Threshold Rises from \$100,000 to \$122,148 Annually. DOL also proposes to raise the "highly compensated employee" threshold to approximately \$122,148 (with a final figure to be determined closer to the date of implementation). This figure is tied to the 90th percentile of full-time salaried workers. This figure would also fluctuate annually based on the applicable percentile and/or the consumer price index. DOL estimates that the new threshold would impact approximately 40,000 workers.

DOL Invites Comments on the White Collar Exemptions Criteria; Suggests Changes May Be Made in Final Rule. Defying DOL-watchers' expectations, DOL opted not to propose specific changes to the "primary duty" analysis, which, since 2004, has defined the FLSA's "duties" test for most white collar exemptions. DOL is inviting public comment on this issue, because it is "concerned that in some instances the current tests may allow exemption of employees who are performing such a disproportionate amount of nonexempt work that they are not [exempt] employees in any meaningful sense." In so doing, DOL

stated that it was seeking such comments "for consideration in the Final Rule," which suggests it may yet make changes to the "duties" test in the final regulations claiming such changes are a "logical outgrowth" of the proposed regulations. If the DOL takes that approach, the changes to the "duties" test in the final regulations may well be challenged as a violation of the Administrative Procedure Act. For now, employers must continue to base their classification decisions—at least those for employees earning more than \$47,892 in 2015—on the primary duties of the position. Employers would be smart, however, to monitor developments on this issue in the coming months.

DOL Invites Comments on Inclusion of Bonuses in Salary Level. In its notice of proposed rulemaking, DOL is inviting comment on whether to allow nondiscretionary bonuses, such as certain production or performance bonuses, or bonuses tied to profitability, to satisfy a portion of the salary threshold requirement. This would constitute a significant change in the current calculation methodology for employers in many industries.

Next Steps. The publication of the proposed regulations launches a 60-day period of notice and comment. The last time the FLSA regulations were updated (in 2004), DOL received more than 75,000 comments in a 90-day notice period regarding its changes to the FLSA regulations. This time, the proposed regulations will set up battle lines between the administration, labor unions and employee rights groups on the one hand and business groups on the other. Commentators have already been active in the media arguing that the updates to the wage-hour regulations will impede job growth.

For example, the Wall Street Journal recently quoted Doug Holtz-Eakin, economist and president of the American Action Forum, as saying, "the new rules will guarantee that millions of workers will lose jobs and wages to make sure that the government can transfer a politically-motivated payoff" to a few million workers. By contrast, the AFL-CIO said in a recent statement, issued before the specifics of the proposed regulations had been published, that "this will begin a critical process to take real action that will provide a much needed boost to America's workers and our economy as a whole."

Takeaways for Employers. Employers should expect these proposed regulations to be implemented in final form, largely in the substance summarized here. This is because many of the comments and arguments that will be submitted to the DOL in the weeks ahead are already known to the DOL and have already been taken into account.

Legal challenges to the final regulations are likely, especially if the final regulations include changes to the "duties" test. It is difficult to assess now whether any such claims would be successful. Prior court-based challenges to FLSA regulations have not been effective in preventing their implementation.

The proposed regulations confirm recent advice that employers should review their employee classifications and prepare to adapt to the coming rules. Preparations should include the reclassification of certain employees to non-exempt status and the training of formerly-exempt employees on the rigors of timekeeping systems and overtime compliance policies.

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