

July 2, 2015

Salary Minimum for Overtime Pay Exemption to More than Double under New Department of Labor Rule

On Tuesday, June 30, 2015, the Department of Labor (“DOL”) announced a Notice of Proposed Rulemaking that would more than double the minimum salary necessary for employees to qualify for the “white collar” exemption from the overtime requirements of the Fair Labor Standards Act (“FLSA”), and increase the minimum salary threshold on an annual basis in future years. Following publication of the proposed regulations in the Federal Register, currently scheduled for July 6, 2015, the regulations will be subject to a 60-day public notice and comment period before the DOL issues the final, revised regulations.

White Collar Exemption Salary Requirements to Increase

Currently, employers who are subject to the FLSA’s requirements must pay employees overtime premiums (1.5 times the employee’s regular hourly rate) for all hours above 40 hours worked by an employee each week, and keep detailed records regarding, among other things, each employee’s daily hours worked, unless the employee satisfies an exemption provided by the FLSA and the employer has properly classified the employee as exempt. The so-called “white collar” exemption permits employers to classify an employee as exempt from overtime pay if the employee’s primary duties are “executive,” “administrative,” or “professional” in nature, as defined by federal law (the “duties” test), and the employee: (1) is paid a minimum of at least \$455 per week or \$23,660 annually (the “salary level” test); and (2) is paid a fixed salary that is not subject to deduction based on the quantity of work produced or the hours worked, with limited exceptions (i.e., the “salary basis” test).

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The DOL's proposed rule would more than double the minimum salary necessary for employees to qualify for the white collar exemption to an estimated \$970 per week (\$50,440 annually) following the first quarter of 2016. The proposed rule would also increase the salary threshold on an annual basis, linking the minimum salary required to qualify for an overtime exemption to the 40th percentile of aggregated annual compensation paid to full-time salaried workers nationwide in a given year, as compiled by the Bureau of Labor Statistics. The DOL has alternatively proposed tying increases in the minimum salary level to the Consumer Price Index.

The DOL has not announced a precise date when these proposed amendments would become effective; the notice indicates that the final rule will "likely rely on data from the first quarter of 2016" to fix the initial minimum salary threshold under the new rule. The FLSA's salary level test does not currently apply to outside salespersons, or to professional employees such as teachers, doctors, or lawyers, and the proposed regulations retain these exceptions.

It is important to note that the FLSA's salary level test does not distinguish between full- and part-time employees. Although part-time employees do not typically earn overtime pay, the proposed rule may expand the class of part-time employees for whom the employer must maintain daily time records pursuant to the FLSA's recordkeeping requirements.

In addition, employees working in the motion picture production industry may be subject to a unique, more flexible "base rate" test to determine whether they qualify for exemption from the FLSA's overtime compensation requirements if they are not paid on a salary basis. The proposed regulations would also increase this minimum "base rate" compensation requirement for certain employees working in the industry from \$695 per week to \$1,404 per week, updated annually.

Highly Compensated Employee Exemption Salary Requirement also Increasing

Under the current regulations, employers may classify “highly compensated employees” as exempt from overtime if they earn \$100,000 or more annually and qualify for exemption under a less-restrictive “duties” test. The DOL’s proposal increases the minimum salary required for employees to be classified as “highly compensated” employees, and therefore exempt, to the 90th percentile of earnings for salaried employees across the country. The DOL’s proposal indicates that the threshold annual salary required for an individual to qualify as a “highly compensated employee” would currently be \$122,148 under the proposed rule. The regulations appear to provide a 60-day grace period for employers to adjust to any annual increases in the minimum salary requirements. It remains to be seen what pressure, if any, such rules impose on wages if they are adopted.

DOL Considering Additional Changes to Duties, Salary Level Tests

The DOL has also requested public comment on two other contemplated changes to the current FLSA regulations, although it has not yet advanced specific proposals on either subject.

Currently, under the “duties” test, an employee’s “main, major, or most important” duties must be executive, administrative, or professional – as defined by federal law – for the employee to qualify for the white collar exemption from the FLSA’s overtime pay requirements. Although the DOL’s proposed rule does not expressly modify the current “duties” test, the DOL has requested comment on whether federal law should adopt the duties test currently applied in California (or a modified version), which requires that employees spend at least half of their work time performing executive, administrative, or professional duties to qualify for state law overtime exemptions.

In addition, the FLSA's current salary threshold test for exempt employees does not take into account non-discretionary bonuses or incentive payments to employees. The DOL has indicated that it is considering permitting employers to include a portion of employees' non-discretionary bonuses or incentive payments in calculating their employees' effective weekly salaries for purposes of satisfying the overtime exemption, and has requested public comments on the proposal.

Conclusion

The DOL's proposal to raise the minimum salary needed for an employee to qualify for the FLSA's overtime exemptions will have a significant impact on many employers. Although the proposed rule may not take effect until an unspecified date in 2016 – and may undergo significant revisions before it is finalized – employers should begin preparing for these changes. Among other things, employers should consider how increases to overtime costs or employee salaries will affect their operations, and anticipate the training and other adjustments that will almost certainly be required to adapt to the new regulatory framework. The proposed amendments also provide employers with an opportunity to reexamine their current classification of employees as qualifying for the executive, administrative, or professional overtime exemptions to ensure compliance with state and federal law, and determine whether the DOL's contemplated changes to the "duties" test would affect these employees' exempt status further. If you have any questions, or would like more information about the proposed regulations, please contact Nick Bauer at (212) 758-7793 or any other attorney at the Firm.

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