

RECENT DEVELOPMENTS

June 30, 2015

DOL Releases Proposed Revisions to "White Collar" Overtime Exemptions

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On June 30, 2015, President Obama and Secretary of Labor Perez released a 295-page Notice of Proposed Rulemaking (NPRM), seeking public comments on proposed changes to the "white collar" overtime exemption regulations. The NPRM, along with a Fact Sheet and FAQs, are available on the Department of Labor's [website](#).

Salary Levels

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. Currently, based on 2013 data from the Bureau of Labor Statistics (BLS), this would amount to a minimum salary of \$921 per week or \$47,892 annually. However, the DOL expects that the 40th percentile will increase to \$970 per week or \$50,440 annually by the time a Final Rule is issued in 2016;
- Increase the total annual compensation requirement needed to exempt highly compensated employees (HCEs) to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers (\$122,148 annually); and
- Establish a mechanism for automatically updating the salary levels annually based either on the percentile or inflation.

The Department seeks comments on the "possibility of including nondiscretionary bonuses to satisfy a portion of the standard salary requirement."

In his statement on the proposal, President Obama claims that under the new salary level, five million additional workers will be eligible for overtime pay if they work more than 40 hours per week. The NPRM states that the proposed increases to the salary levels will result in the transfer of income from employers to employees of between \$1.1 and \$1.2 **billion** per year. The NPRM also states: "[A]t the proposed salary level, the number of overtime-eligible salaried white collar employees paid at or above the salary level would be reduced by more than 50 percent."

Duties Tests

Surprisingly, with respect to the duties tests, the DOL “is not proposing specific regulatory changes at this time.” Rather, the DOL only “seek[s] to determine whether, in light of our salary level proposal, changes to the duties tests are also warranted” and “invites comments on whether adjustments to the duties tests are necessary, particularly in light of the proposed change in the salary level test.”

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 Department 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 Department reconsider our decision to eliminate the long/short duties tests 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?

In addition, “the Department is also considering whether to add to the regulations examples of additional occupations to provide guidance” on “how the general executive, administrative, and professional exemption criteria may apply to specific occupations.” In particular, while stating help desk employees cannot qualify for an exemption, the DOL “requests comments from employer and employee stakeholders in the computer and information technology sectors as to what additional occupational titles or categories should be included as examples in the part 541 regulations.”

The Department’s failure to propose specific regulatory changes to the duties tests may create an argument that the DOL is precluded from making regulatory changes to those tests as part of this rulemaking. However, the DOL may attempt to shoehorn changes to the duties tests, including the concurrent duty test, into final regulations.

Comments

Once the NPRM is published in the *Federal Register*, employers will be able to provide input electronically by accessing the Federal eRulemaking Portal at <http://www.regulations.gov>, where interested parties can find, review, and submit comments. The deadline for comments will be established once the NPRM is published in the *Federal Register*.