

March 18, 2014

## President Obama Directs the Department of Labor to Revise Federal Overtime Regulations

By Tammy D. McCutchen and S. Libby Heninger

On Thursday, March 13, President Obama directed U.S. Secretary of Labor Thomas E. Perez to “modernize and streamline” the Department of Labor’s (DOL) “white collar” overtime exemption regulations at 29 C.F.R. Part 541.<sup>1</sup> The regulations define the scope of the executive, administrative, professional, outside sales, and computer exemptions under the Fair Labor Standards Act (FLSA). This initiative took many employers by surprise because it was not previously included in the DOL’s semi-annual regulatory agenda. In addition, during the Obama Administration, the DOL’s regulatory and enforcement focus has been on independent contractor misclassification. However, this move to revise overtime exemption regulations is in step with President Obama’s message of “giving America a raise” and comes on the heels of the President’s February Executive Order raising the hourly minimum wage for federal contractors to \$10.10 an hour.<sup>2</sup>

### Expected Changes

Although it is hard to predict what the final changes to the current regulations will be, the White House focus seems to be on three areas: (1) raising the minimum salary level, (2) revising the duties requirement for the executive exemption, including eliminating the concept of concurrent duties, and (3) refining the definition of a computer professional. A White House fact sheet outlines key agenda points, set out below:<sup>3</sup>

- *Minimum salary level:* Although we do not know the amount or percent of increase contemplated, the proposed regulations will increase the minimum salary level for white collar exempt employees. The current salary level was set at \$455 per week, or \$23,660 per year, in 2004. It is likely that the DOL will tie any increase to inflation indexes and may propose adopting regulations that automatically raise the minimum salary level

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1 Executive Office of the President, *Updating and Modernizing Overtime Regulations*, 79 Fed. Reg. 15209 -15212 (Mar. 18, 2014), available at <https://www.federalregister.gov/articles/2014/03/18/2014-06138/updated-and-modernizing-overtime-regulations>.

2 Executive Order 13658 of Feb 12th, 2014, *Establishing A Minimum Wage For Contractors*, 79 Fed. Reg. 9849 -9854 (Feb. 20, 2014), available at <https://www.federalregister.gov/articles/2014/02/20/2014-03805/establishing-a-minimum-wage-for-contractors>.

3 The White House, Office of the Press Secretary, *FACT SHEET: Opportunity for All: Rewarding Hard Work by Strengthening Overtime Protections* (Mar. 13, 2014), available at <http://m.whitehouse.gov/the-press-office/2014/03/13/fact-sheet-opportunity-all-rewarding-hard-work-strengthening-overtime-pr>.

annually, based on the cost of living index. Additionally, the highly compensated test for employees earning over \$100,000 per year, also adopted in 2004, may be increased or eliminated altogether.

- *Duties test:* The DOL will most likely remove or significantly revise the “concurrent duties” section under the executive exemption test, which provides an exemption to managers even if they are simultaneously performing the same duties as their direct reports. Indeed, we may see an attempt to replace the “primary duty” test under all of the exemptions—which does not require that an individual spend a specific percentage of time performing exempt work—with a quantitative test similar to California law that requires an exempt manager to spend more than 50% of his time supervising employees.
- *Computer professional exemption:* The computer professional exemption was specifically delineated as a separate exemption in 2004. In the past 10 years, the technology field has expanded and developed significantly, particularly in terms of automation. Therefore, based upon these developments, it is likely the DOL will further clarify the duties and positions that do—and do not—qualify for the computer professional exemption under the FLSA. However, the DOL could face a legal challenge if it attempts to narrow the computer employee exemption because the duties test for this exemption is set forth in the statutory provisions of the FLSA. In 2004, the DOL declined to expand the computer exemption, stating in the preamble to the final rule that the agency does not have authority to depart from the statutory definition of an exempt computer employee.

## Next Steps

All revisions to the Part 541 regulations must go through notice and comment rulemaking. Once proposed regulations are prepared, the DOL will publish a notice of proposed rulemaking, giving the public between 30 and 90 days to file comments. After the close of the comment period, the DOL reviews and responds to comments before publishing final regulations. In 2004, the DOL received over 75,000 comments to its proposed regulations, and spent 13 months reviewing the comments before publishing the final rule. The entire process—including drafting the proposed regulations, reviewing the comments, and publishing the final regulations—is likely to take from 12 to 18 months to complete. Congress can step in to prevent the DOL from moving forward (e.g., by denying funding), so the fall mid-term elections could play a part in this process as well.

Employees in many industries are expected to be impacted significantly by the proposed changes, including those working in the following sectors:

- Retail
- Restaurant
- Hospitality
- Healthcare
- Information Technology
- Financial Services

Employers can help shape the final regulations by participating in the regulatory process—either directly or through trade associations. Littler will be publishing updates on such efforts throughout the process. Whatever shape the proposed and final regulations take, the Presidential Memorandum serves as a reminder that employers must remain vigilant about FLSA exemptions, particularly with how they will impact positions falling in the “gray areas” of the law.

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