



Impact of the DOL'S Proposed Revisions to 'White Collar' Overtime Exemptions on Retail

July 13, 2015

By Jacob Modla and Tracy Stott Pyles

The Department of Labor's long-awaited proposed revisions to the "white collar" overtime exemptions are finally here – at least, in part. On June 30, 2015, the DOL unveiled its proposed revisions to the required salary levels for many of the "white collar" exemptions to the FLSA's overtime requirements. (The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments.)

The DOL proposes that the required salary level for the administrative, executive and professional exemptions be increased to match the 40th percentile of weekly earnings for full-time employees. Practically, this means that the DOL has proposed increasing the current minimum salary of \$455 per week (or \$23,660 per year) to about \$970 per week (or \$50,440 per year) by the time the Final Rule is issued in 2016.

In addition, the DOL proposes increasing the required salary for the highly compensated employee exemption to equal the 90th percentile of weekly earnings which, in effect, increases the exemption's salary threshold from \$100,000 annually to about \$122,148 annually.

The DOL has further proposed that the minimum salary thresholds be automatically adjusted upwards on an annual basis "to make sure that they maintain their effectiveness" by using either a percentile of weekly earnings or inflation. The Obama Administration estimates that more than 4.5 million workers will become eligible for overtime under the DOL's proposed revisions, and that number will grow every year as the minimum salary threshold increases annually.

Comments Requested

The DOL did NOT make any specific proposals, at least for now, to change the duties test for the "white collar" overtime exemptions. The DOL did, however, request public comment on whether changes should be made to the duties test and what those changes should be. Remarks by President Obama and the Secretary of Labor indicate that they are particularly concerned that the current exemption tests allow for the exemption of employees (especially retail managers) who are performing too much nonexempt work. Accordingly, the DOL is specifically seeking comments related to time spent on nonexempt duties and how that should impact the duties test:

- 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?
- 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?

The DOL's request for comments about the duties test signals that significant changes could be forthcoming when the Final Rule is published. Notably, to the extent the DOL changes the duties test when the Final Rule is published, its failure to effectively announce such changes now could lead to litigation challenging the DOL's formal rulemaking compliance. At a minimum, the lack of clear guidance from the DOL will prevent employers from making final decisions about potential reclassifications prior to the issuance of the Final Rule.

On July 6, 2015, the proposed rules issued by the DOL were published in the Federal Register. The DOL established a 60-day period for the public to submit written comments to the proposed rule – these comments can be submitted electronically through the Federal Rulemaking Portal or by mail. The comments are currently due on September 4, 2015. It is anticipated that the new regulations will become law in mid-to-late 2016.

So, what next? Comment, Comment, Comment. The DOL has only issued proposed revisions to the “white collar” overtime exemptions. These changes are not yet law. It is important that industries most impacted by the proposed changes, such as retailers, submit their comments to the DOL. The DOL may consider such comments and make further revisions to the regulations prior to publishing the Final Rule. This is particularly true with respect to the requested comments related to the duties test, because the DOL has not yet proposed any specific revisions.

Ultimately, however, it is expected that there will be some significant increase to the salary level for the “white collar” overtime exemptions; thus, employers have a preview of the regulatory changes anticipated in 2016.

Retail Impact

Accordingly, retail businesses should consider the impact of the expected increased salary level on currently exempt employees earning less than \$50,440 annually. It is likely that many retailers will need to reclassify as nonexempt some employees for whom complying with the new salary test is not feasible. Retailers should start reviewing their organizational structure to identify employees who can remain exempt and those that might need to be made hourly.

In addition, retail businesses need to have an understanding of the increased financial burden from the proposed regulations. The proposed regulations may significantly impact the retail industry, especially if the Final Rule forces retailers to reclassify exempt store-level managers to hourly nonexempt employees. It would be wise for retailers to start analyzing the impact of the proposed overtime exemption changes on their bottom line now, so contingency plans can be considered and prepared in advance of the publication of the Final Rule.

Jacob Modla is a partner focusing on retail issues in the Charlotte, N.C., office of Littler Mendelson, the world's largest labor and employment firm representing management.

Tracy Scott Pyles is a partner focusing on wage and hour issues in Littler Mendelson's Columbus office.

This article is reprinted with permission from the July 13, 2015 issue of the Chain Store Age. Further duplication without permission is prohibited. All rights reserved.