

BACK STORY

NEW DEPARTMENT OF LABOR OVERTIME REGULATIONS ON THE HORIZON

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In July 2015, the Department of Labor (DOL) issued a Notice of Proposed Rulemaking (80 FR 38515) that will drastically change the DOL's interpretation of the Fair Labor Standards Act (FLSA) with respect to overtime exemptions. The rule has the potential to affect an untold number of employers and an estimated 5 million white-collar workers within the first year of its implementation.

The proposed rule focuses primarily on updating the salary and compensation levels needed for white-collar workers to be exempt. Specifically, the DOL proposes to:

- Set the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers. As proposed, this would raise the salary threshold from \$455 a week (\$23,660 a year) to about \$970 a week (\$50,440 a year) in 2016.
- Increase the total annual compensation requirement needed to exempt highly compensated employees to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers (\$122,148 annually). Under the current rule, highly compensated employees are those making at least \$100,000 annually.
- Establish a mechanism for automatically updating the salary and compensation levels going forward to ensure that they will continue to provide a useful and effective test for exemption. (Currently, the FLSA salary threshold does not account for inflation.)

After announcing the proposed rule, the DOL was flooded with approximately 270,000 comments during the 60-day comment period. By comparison, the agency received 75,280 comments in response to its last proposed rule update in 2004. Perhaps as a result of this deluge, the final rule has apparently been delayed. It was originally anticipated that the final rule would be issued in late 2015 or early 2016. However, it was recently reported that the final rule is not expected before late 2016.

There has been an explosion in wage/hour litigation over the last decade, with federal court filings increasing virtually every year and reaching an all-time high in 2014, according to statistics released by the Administrative Office of the U.S. Courts. Wage and hour litigation now represents the primary litigation risk for employers. Accordingly, attorneys who represent employers should advise them to take quick and meaningful action in response to the regulations if and when they become final, and should consider these steps:

- Identify all currently exempt employees who earn less than \$50,400 per year. For each exempt employee earning less than \$50,400 per year, consider whether it would be feasible or cost effective to: (i) raise their salary above the minimum threshold (assuming they continue to meet the duties test); (ii) reclassify them as non-exempt, so that they are overtime-eligible; (iii) as part of any reclassification, adjust their salary to reflect the potential for overtime pay; or (iv) as part of any reclassification, reduce or manage their hours to minimize overtime pay.
- Identify all currently exempt employees earning between \$100,000 and \$122,148 per year. For each employee earning under \$122,148 per year, carefully analyze their duties to ensure that they meet one of the more stringent white-collar exemptions, and consider whether it would be cost effective to raise their total compensation to qualify for the highly compensated test.
- Carefully review and update job descriptions to accurately reflect job duties and responsibilities. Create proper procedures to ensure that new hires are appropriately classified and that hiring managers or human resources personnel are properly trained on classifications.
- Ensure that employee handbooks and any disciplinary and payroll administration policies comply with the FLSA. **NL**



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