



How the DOL's Changes to Overtime Rules Will Impact the Healthcare Industry

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What the DOL Proposal Contains

DOL issued its Notice of Proposed Rulemaking on July 6, 2015:

- Increase in salary level for standard exemption - \$50,400 in 2016 with automatic increases
- Requests for comments on:
 - Duties tests
 - Whether a time-based test like California is the better approach
 - How to deal with “concurrent duties”
 - Use of nondiscretionary bonuses to satisfy salary level

Comments are currently due September 4, 2015



The near term....

- Seyfarth has published an Alert as well as a **blog related to your industry** regarding possible initial preparations
- Seyfarth is gathering a **comprehensive briefing** for the DOL to reiterate the business concerns with changes to the test and aspects of the new salary proposal
- Seyfarth is holding **roundtables** in all its offices to help the business community connect with each other on these issues and prepare responses to the DOL



Healthcare employers beware

- Millions of healthcare employers and workers potentially will be affected by the proposed changes.
- Many managers in healthcare receive less than \$50,000 in pay, particularly in certain geographies and clinical practices.
- Significant duties test change could impact healthcare operations, where managers are expected to help out to improve patient experience.



How We Got Here

1938: FLSA passed with exemption for, but no definition of, executive, administrative, and professional (EAP) employees

1940: Regulations implementing exemption include salary basis, salary level, duties tests

1949- 2004: Salary level updated 5 times (duties test also updated in 2004)

2014: Per Presidential directive, Secretary of Labor begins 18 months of stakeholder meetings and analysis on updating the FLSA overtime exemptions



29 C.F.R. Part 541

- White Collar Exemptions
 - Executive
 - Administrative
 - Learned Professional
 - Creative Professional
 - Computer
 - Outside Sales
- Salary Level
- Salary Basis
- Duties



Salary Test Implications for Healthcare Facilities

- Failing the salary test is sometimes what gets providers into misclassification cases



Salary Level Increase

- Proposal to increase salary level to 40th percentile of all full-time salaried employees
- Would be \$921 per week in 2015
- Expected to be \$970 per week in 2016
- DOL estimates that there are currently 4.6 million employees classified as exempt “white collar” employees who are paid \$455 to \$921 per week



Automatic Update of Salary Levels

Department proposes two options:

- Using fixed percentile of wage earnings
- Tying to CPI-U



Nondiscretionary Bonuses

- Considering monthly (or more frequent), nondiscretionary bonuses counting towards salary level
- Suggested cap of 10% of salary
- Would not allow discretionary bonuses or commissions to satisfy test
- Unclear how to handle where an employee fails to earn the bonus



Highly Compensated Test

- Salary level for highly compensated test to be set at 90th percentile for all salaried employees
 - Currently the 90th percentile is \$122,148 annually
 - Could increase by the time the Final Rule is published in 2016



What Does this Mean for Employees?

- 4.7 million workers affected by salary or highly-compensated employee test
- 3.5 million of those workers work fewer than 40 hours/week
- 181,000 work occasional overtime
- 931,000 become overtime eligible
- 71,000 get salary increases



Impact of a Salary Level Increase

- Increasing the minimum salary may have a more pronounced impact on assisted living facilities and long term care facilities, where salaries tend to be lower
- Low salaried pharmacists, nurse practitioners, and RNs may also lose their exempt status under the proposed changes



The Duties Tests

“. . . the Department is seeking to determine whether, in light of our salary level proposal, changes to the duties tests are also warranted.”



Three Questions on Duties Tests Particularly Important to The Healthcare Industry

- 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?
 - More reports/paperwork instituted to “demonstrate” exempt work
- Should there be a limitation on the amount of nonexempt work?
- Should DOL look to CA law (requiring 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 a better indicator of workplace realities?
- Is the concurrent duties regulation (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?
 - Managers overseeing and observing – assigning tasks versus doing



What Does this Mean for the Healthcare Industry?

- Exemption to the following classifications are potentially at risk
 - help desk
 - coordinators
 - therapists
 - dieticians/nutritionists
- Also at risk:
 - IT specialists working with electronic medical records



What Does this Mean for the Healthcare Industry?

- Managerial staff
 - If you operate in CA, how is it managed there and can that model be financially successful elsewhere, for example?
- Back room personnel
 - Salaried administrative personnel, such as HR, IT and finance department employees, may be affected by the proposed regulations.
- A new time-based duties test would create more litigation and could tie up managers in bureaucratic paperwork versus driving patient experience and quality of care



Special Problems for Healthcare Industry

- What if an exempt manager is paid \$45,000 a year and works 50-60 hours every week?
- What if a member of the management team lives on site at a long-term or senior living facility and earns less than the proposed salary threshold?
- How do you address facilities and housekeeping managers who devote a substantial amount of their time to manual labor (“leading by example”)?
- How do the proposed regulations affect an “always on call” manager?
- How uniquely are healthcare employers affected given operations that run around the clock, 365 days per year?



Next Steps: Operational (Pay Practices)

- **Prepare for Salary Increase**

- Establish baseline by identifying all managers under \$50,440 (with and without bonuses and commissions)
 - Gap analysis
 - Comp structure change
- Assess timekeeping and pay policies and practices to ensure they can accommodate new nonexempt employees
- Coordinate with the Recruiting Team on possible turnover issues

- **Plan for Financial Impact**

- Prepare FY16 budget for increases
- Assess ability to create IT or comp review processes to keep pace with annual increases
- Speak with Ops Team on closures/openings and joint ventures in the next 12 months to ensure these finances are taken in to account
- Consider an audit of other nonexempt pay practices to ensure compliance



Next Steps: Operational (Duties Test)

- **Prepare to Institutionalize Duties Change**
 - Start thinking about effect of potential duties test changes on operations
 - How will operations be effected with California-style duties test? Is it possible to eliminate or limit non-exempt duties performed by managers?
 - Audit your manager training, evaluations, and other collateral documents to ensure they capture the reality of healthcare management



Next Steps - Advocacy

- Participate in Comment Process
 - Individual Comments
 - Trade Association Comments
 - Seyfarth Shaw Comments
- We have held and will continue to hold In the coming weeks informative roundtable discussions in several Seyfarth Shaw offices.
- Use sounding boards to provide attorney-client privileged guidance.



Resources

- Notice of Proposed Rulemaking:
 - <http://www.gpo.gov/fdsys/pkg/FR-2015-07-06/pdf/2015-15464.pdf>
- DOL Fact Sheet on Proposed Rule:
 - <http://www.gpo.gov/fdsys/pkg/FR-2015-07-06/pdf/2015-15464.pdf>
- Seyfarth's Wage & Hour Litigation Blog Post and July 7 Webinar on the overall changes:
 - <http://www.seyfarth.com/publications/RD070215-LE>
 - [Webinar Recording](#)
 - [PowerPoint](#)
- Seyfarth's Healthcare FLSA Taskforce:
HealthCareQuestions@Seyfarth.com

THANK YOU

- THANK YOU for participating. Please get involved!



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