



How the DOL's Changes to the Overtime Rules Will Impact Employers

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The Clock is Ticking

- The Department's Notice of Proposed Rulemaking (NPRM) was published in the Federal Register on July 6, 2015.
- The NPRM provides the regulated community with 60 days to provide comments.
 - Preferred method is via www.regulations.gov
- Comments are due September 4, 2015



What the Proposal Contains

- Increase in salary level for standard exemption
- Increase in salary level for highly-compensated employee exemption
- Dueling methodologies for indexing the salary levels
- Requests for comments on:
 - Duties tests
 - Use of nondiscretionary bonuses to satisfy salary level
 - Need for additional examples
- Statements on exempt status of:
 - Employees paid commissions
 - Certain computer professional employees



How We Got Here

1938: FLSA passed with exemption for, but no definition of, EAP employees

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

1949: Salary level updated

1958: Salary level updated

1963: Salary level updated



How We Got Here (cont'd)

1970: Salary level updated

1975: Salary level updated

2004: Salary level updated; revisions to duties tests

2014: Presidential Memorandum directing Secretary of Labor to “update the regulations defining which white collar workers are protected by the FLSA’s minimum wage and overtime standards.”



How We Got Here (cont'd)

2014: Departmental meetings with stakeholders seeking input on proposed revisions

2015: Stakeholder meetings with OMB

July 6, 2015: NPRM in Federal Register



Labor Stakeholder Concerns

- Maximum hours cap on EAP exempt employees
- Disproportionate amounts of time performing routine nonexempt tasks
- No true flexibility and status traditionally associated with such positions



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 4.6 million currently exempt workers between \$455 per week and \$921 per week



Highly-Compensated Employee Salary Increase

- Currently \$100,000
- Would be set to 90th earnings percentile
- Would be \$122,148 in 2015
- Estimated 36,000 exempt workers between \$100,000 and \$122,148



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, commissions to satisfy test
- Unclear how to handle where fail to earn bonus



A Trap for Financial Services?

“The Department is also concerned it would be inappropriate to count commissions toward the salary level requirement, as employees who earn commissions are usually sales employees who -- with the exception of outside sales employees -- are generally unable to satisfy the standard duties test . . . for the EAP exemptions. “



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.”



Setting Stage for Salary vs. Duties Battle

“The salary level’s function in differentiating exempt from nonexempt employees takes on greater importance when there is only one duties test that has no limitation on the amount of nonexempt work that an exempt employee may perform”

“This suggests that a salary significantly lower than the 40th percentile of full-time salaried workers would pose an unacceptable risk of inappropriate classification of overtime-protected employees without a change in the standard duties test.”



Questions on Duties Tests

- 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?



Questions on Duties Tests (cont'd)

- Should the Department look to the State of California's law (requiring that 50 percent 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 percent 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?



Questions on Duties Tests (cont'd)

- 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 Department Speaks on Computers

- “a help desk operator whose responses to routine computer inquiries (such as requests to reset a user's password or address a system lock-out) are largely scripted or dictated by a manual that sets forth well-established techniques or procedures would not . . . likely qualify for any . . . EAP exemption.”
- “an information technology specialist who, without supervision, routinely troubleshoots and repairs significant glitches in his company's point of sale software for the company's retail clients might be an example of an administrative employee pursuant to Sec. 541.200 . . .”



DOL's Financial Analysis

- Salary increase = litigation decrease
- Regulatory familiarization = 1 hour of mid-level HR per establishment
- Adjusting classifications = 1 hour of mid-level HR per employee
- Additional managerial hours per week = 5 minutes per affected workers



What Does this Mean for Employees?

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



Next Steps

- Participate in Comment Process
 - Individual Comments
 - Trade Associations
 - Seyfarth Shaw Comments
- Prepare for Salary Increase
 - Operational Decisions
- Plan for Duties Changes
 - How do we classify in CA?
 - What would we do if US = CA?



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:
 - <http://www.wagehourlitigation.com/dol-compliance-rule-making/obama-overtime-rules/>
- Seyfarth's Exempt Status Amendments Taskforce:
 - ExemptStatusQuestions@seyfarth.com



Upcoming Webinars and Roundtables

- Be on the look-out for invitations to participate in industry specific “On Demand” webinars:
 - *Retail*
 - *Hospitality*
 - *Financial and Insurance Services*
 - *Health Care*
- In the coming weeks, will be hosting informative roundtable discussions in several Seyfarth Shaw offices:
 - *Atlanta, GA: Date and time TBD*
 - *Boston, MA: Date and time TBD*
 - *Chicago, IL: Wednesday, July 15 (4:00 p.m. - 5:30 p.m.) with reception to follow*
 - *Los Angeles, CA: Date and time TBD*
 - *New York, NY: Date and time TBD*
 - *San Francisco, CA: Date and time TBD*
 - *Washington, D.C.: Date and time TBD*

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