

Management Alert



Obama Administration Proposes New Overtime Rules

By Alexander J. Passantino

Today, the U.S. Department of Labor's Wage & Hour Division announced its [long-awaited proposal](#) to amend 29 CFR Part 541, the "white collar" exemption for executive, administrative, and professional employees. Somewhat surprisingly, the Division only made specific proposals with respect to the salary levels required for the exemption and the highly-compensated exemption. In 2016, which is when the salary increase would be expected, the standard salary is projected to be \$970 per week or \$50,440 per year, indexed to the 40th percentile of weekly earnings for full-time salaried workers; the highly-compensated employee standard would be set at \$122,148, indexed to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers. Given the size of the increase, even California and New York employers will need to be more alert to federal wage and hour compliance.

As has always been the case, the proposed salary levels would not apply to individuals employed as outside sales employees. Similarly, lawyers, doctors, and teachers are excluded from the proposed salary requirements.

The effort to amend these regulations began over a year ago, when President Obama directed Secretary of Labor Perez to consider whether revisions to the regulations were appropriate. The proposed rule has been under review at the White House's Office of Information and Regulatory Affairs since May 5, 2015, and President Obama is expected to discuss the proposal at an event scheduled for this Thursday, July 2, in Wisconsin. We expect publication in the Federal Register shortly. Employers (and the entire regulated community) will have 60 days to provide their comments on the proposal.

Since last year, there has been rampant speculation about what the proposed rule would—and would not—contain. At long last, we now know. An increase to the standard salary test, indexed to the 40th percentile of weekly earnings for full-time salaried workers, and an increase to the highly-compensated employee salary, indexed to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers. In other words, the rule proposes to perpetually increase the salary levels required on an annual basis.

What the rule does not contain is any specific proposal with respect to duties. Instead, WHD asks for comments on the following questions:

- 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?
- 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?
- 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?

WHD also asks whether there are specific occupations for which it should provide additional examples in the regulatory language. In addition, WHD asks whether (and how) nondiscretionary bonuses might be used to satisfy the standard salary level.

WHD's decision to use questions to address the duties test is somewhat unique for an Notice of Proposed Rulemaking. Presumably, WHD will use responses to the questions to formulate its positions in a final rule, which deprives the regulated community of any ability to meaningfully comment on a proposal—it's a moving target.

Despite the fairly limited scope of the rulemaking, it is important to note that the salary levels are proposals. In 2003, when the Department last proposed revisions to the white-collar exemptions, the Department received 75,280 comments during the 90-day comment period. We can expect similar participation this time around. All of the comments will need to be reviewed by the Department, and issues raised by the comments will need to be considered and addressed. As a result, the final regulations may be different from the proposal in any number of respects. Moreover, given the scope of the proposal and the anticipated volume of comments, it is highly unlikely that the Department will be able to get a final rule completed in less than a year. In all probability, compliance with any ultimate revisions to the regulations will not be necessary until summer or fall of 2016.

What the Proposed Regulatory Revisions Mean for Employers

The current minimum salary level of \$455 per week translates to \$23,660 per year. This level was established in 2004, and represented a significant increase from the \$155 per week (\$8,060 per year) minimum that had been the standard for the preceding 30 years.

Just over 10 years removed from the last salary increase, the proposed rule expects to set a new threshold of \$970 per week (\$50,440 per year) in 2016. Initial estimates indicate that a salary increase to \$50,400 per year would impact 5-10 million workers, many of whom are concentrated in the retail and hospitality industries. Some other estimates believe the number of impacted employees is more likely to be in the range of 15 million. Although the impact of this salary increase will almost certainly have a larger impact in Southern states and rural areas than it would in the Northeast and metropolitan areas, because the new salary minimum exceeds the California requirement of \$37,440, even California employers will need to pay close attention to the federal exemption requirements.

Notably, this sizeable increase in the salary level makes it difficult to maintain part-time exempt positions. Under the current salary requirement, a part-time, pro-rated salary is sufficient to establish the exemption (provided that the pro-rated amount exceeds \$455 per week). The new amount makes such an arrangement far more difficult, effectively eliminating some flexible workplace arrangements. If an employee's pro-rated salary is not in excess of the new salary amount, that employee now needs to meticulously record his working hours, even if he never approaches 40 hours, because the FLSA's "hours worked" recordkeeping obligations apply to all non-exempt employees.

In addition, WHD proposes to increase the highly-compensated employee standard. By its calculations, that figure is \$122,148 for 2015. Neither the proposal nor WHD's talking points indicate how much the salary would be in 2016 based on the proposed indexing.

Of course, the proposed salary is not necessarily the salary that will be required in the final regulation. In 2004, for example, the proposed salary was \$30 per week lower than the salary in the final rule; the standard for highly compensated employees increased from \$65,000 in the proposed rule to \$100,000 in the final.

Notably, for the first time ever, the salary tests will include an automatic, annual increase, with the standard salary indexed to the 40th percentile of weekly earnings for full-time salaried workers, and the highly-compensated employee salary indexed to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers.

Conclusion

Clearly, the salary revisions that have been proposed will make a significant impact on an employer's operations. Employers should now consider the impacts this proposal might have on their operations—and their bottom line. Although the salary levels will be the focus, employers should not forget about the questions posed by WHD—input is critical on these points as well. The public comment period is 60 days, and a robust regulatory record will allow the Department to best analyze the impacts its proposal will have on the economy. Thus, employers should seriously consider providing comments in response to the proposal. Seyfarth attorneys are already working with clients to do so and will be submitting comments on behalf of the firm.

Beyond the importance of providing comments, it will be necessary to begin preparing company executives and operations employees for these proposed changes. In just over a year, the proposed changes almost certainly will become final, in what we expect will largely be the same form as the proposal. The final changes are unlikely to provide a significant period of time to come into compliance—in 2004, employers only had 120 days to do so; we expect a shorter lead time next year.

With the expected lack of lead time, employers will need to start planning well in advance. For example, it will be necessary to budget for salary increases and/or increased overtime costs for at least part of 2016. In order to make informed decisions with respect to budgeting, employers will need to complete a preliminary assessment of the positions that may be impacted by the changes, and determine whether the duties performed by the positions would qualify for the exemption. Only then can the employer consider whether a salary increase is even an option.

In the next few days, we will be publishing Alerts, specifically for the Retail, Hospitality, Financial Services, and Health Care industries, among others. These industry-specific Alerts will address not just the legal issues arising from the DOL's proposal to amend the "white collar" exemptions but, importantly, business concerns unique to employers in each of these industries. Please be on the lookout for the Alert that relates to your company's business.

Please contact any of the members of Seyfarth Shaw's Task Force on the 541 Regulatory Amendments listed below:

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