

Department of Labor Proposes New Regulations Regarding “White Collar” Exemptions Under the Fair Labor Standards Act

Written by Jonathan A. Keselenko

July 1, 2015

On June 30, 2015, the United States Department of Labor (“DOL”) released a proposed rule which, if implemented, will alter the minimum salary threshold for the so-called “white collar” exemptions to the minimum wage and overtime requirements of the Fair Labor Standards Act (“FLSA”). The proposed regulation more than doubles the minimum salary threshold for white collar workers and provides for automatic year-over-year increases.

Under current DOL regulation, employees qualify for one of the executive, administrative, or professional exemptions if: (1) they meet the minimum salary threshold; (2) they are paid on a salary basis; and (3) their job functions satisfy the duties test. This proposed rule only alters the minimum salary threshold required for exempt status. Under the proposed rule, to be exempt under the executive, administrative, and professional exemptions, an individual must be paid at least \$921 per week (\$47,892 per year), more than double the current level of \$455 per week (\$23,660 per year). This minimum weekly rate will be revised in each subsequent year, and it will be indexed to the prevailing 40th percentile of weekly earnings for full-time salaried workers. New rates will be published 60 days in advance of their effective date by the Secretary of Labor.

In addition, under the proposed regulation, to qualify for the highly compensated employee exemption, an employee must earn total annual compensation of at least \$122,148 (also to be adjusted annually), a significant increase over the current threshold salary of \$100,000, so long as the employee also regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee. The total annual salary compensation must include weekly salary compensation amounts that meet the minimum salary threshold requirement. The proposed rule maintains the safe harbor for employees classified as highly compensated, but who do not end up meeting the total annual compensation requirement. An employer is permitted, during the last pay period or within one month after the end of the 52-week period, to make one final payment sufficient to achieve the required total annual compensation level. For example, an employee who earns \$100,000 as base salary, is projected to earn \$25,000 in commissions, but ultimately only earns \$10,000 in commissions by the end of the year will still qualify as an exempt highly compensated employee if his or her employer, within one month after the end of the 52-week period, makes one additional payment to the employee of at least \$12,148. Any such final payment may only count toward the prior year’s total annual compensation.

Like the current DOL regulations, the proposed regulations permit employees paid on a fee basis to qualify as exempt under certain circumstances. Salaries paid out on a fee basis will qualify if, given the fee paid and the length of time spent on the job, the employee has been paid the equivalent of at least the minimum salary requirement prorated to a 40 hour workweek. For example, an artist who is paid \$500 for a picture that took 20 hours to complete would qualify as exempt, as his or her weekly salary for a 40 hour week at this rate would be \$1,000.

As anticipated, the proposed regulation aims to make it more difficult for employers to classify employees as exempt from the overtime requirements of the FLSA. President Obama had directed the Department of Labor to reevaluate the minimum salary threshold, and in doing so the White House emphasized that it viewed some workers who are exempt under the current rules as deserving of overtime pay. If the proposed regulation becomes final, employees who currently make less than the new salary threshold will need to be given a raise to remain exempt or paid overtime for each hour worked over 40 hours in a workweek.

What is surprising about the proposed regulation is that it does not propose to alter the current duties test for the professional, administrative and executive exemptions. However, the DOL has invited detailed comments from the public regarding whether or not it

should nonetheless alter the duties test and the potential impact of such a change. Employers have 60 days to provide comments to the DOL on the proposed rule. In addition, the release of the proposed regulation provides employers with an opportunity to review their exemption classifications, both for current compliance and with an eye towards the impact of the DOL's proposed changes.

RELATED PRACTICES

- [Labor & Employment](#)
 - [Wage & Hour](#)
-

This communication is intended for general information purposes and as a service to clients and friends of Foley Hoag LLP. This communication should not be construed as legal advice or a legal opinion on any specific facts or circumstances, and does not create an attorney-client relationship.

United States Treasury Regulations require us to disclose the following: Any tax advice included in this document was not intended or written to be used, and it cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

Attorney advertising. Prior results do not guarantee a similar outcome. © 2017 Foley Hoag LLP. All rights reserved.