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W A G E A N D H O U R

Preparing for DOL's Final Rule on FLSA's 'White-Collar' Exemptions

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Special to the Legal

The employment law community remains abuzz with predictions as to exactly when the U.S. Department of Labor (DOL) will issue its Final Rule setting the new minimum salary level for employees to qualify for “white-collar” exemptions to the Fair Labor Standards Act’s (FLSA) overtime requirements. The salary level proposed in the Notice of Proposed Rulemaking (NPRM) published in the Federal Register in July 2015 would more than double the current salary level for “white-collar” employees to be exempt from the FLSA’s overtime requirements. Such an increase in the salary level would have wide-reaching implications for employers and employees alike. DOL Secretary Thomas E. Perez has predicted that, “on an annual basis, workers will get roughly \$1.2 to \$1.3 billion in additional wages as a result of this rule.”

While the Office of Management and Budget released a timetable Nov. 19 indicating that the Final Rule would issue by July 2016, Perez has been quoted in recent media reports stating that the DOL is planning to publish the Final Rule this spring. This is in contrast to widely disseminated media reports of comments made by Solicitor of Labor M. Patricia Smith at the American Bar Association’s Labor and Employment Law Conference in early



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November that the Final Rule would be released in “late 2016.” Although it is impossible to fully predict when the Final Rule will be published, employers should be proactively assessing the DOL’s NPRM and its impact on their workforce and work flow well in

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advance of the publication of the Final Rule.

BACKGROUND

In order to qualify as exempt from the FLSA’s overtime requirements, employees who are employed under

certain white-collar exemptions must, in addition to satisfying the duties requirements and being paid on a salary basis, be paid a certain amount of salary per week. The current salary level is \$455 per week (\$23,660), which was set when the FLSA regulations were revised in 2004.

In July 2015, the DOL published its NPRM and provided the regulated community with 60 days to provide comments. The NPRM’s central focus was on updating the salary amount in order to qualify for white-collar exemptions—such as the administrative, professional and executive exemptions—based on 2013 data regarding weekly earnings for full-time salaried workers. Specifically, the DOL proposed to set the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers, which in 2013 was \$921 per week (\$47,892 annually), and which is projected in 2016 to be \$970 per week (\$50,440 annually). The NPRM also seeks to 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, which in 2013 was \$2,349 per week (\$122,148 annually). The current FLSA regulations require highly compensated employees to be paid \$100,000 in order to qualify for that exemption. The NPRM further

sought to establish a mechanism for automatically updating the salary and compensation levels going forward without the need to issue new regulations either by maintaining the salary levels at the 40th and 90th percentiles or keying future increases to the Consumer Price Index for All Urban Consumers.

Although the NPRM did not include any specific proposed changes to the duties tests, it asked several questions of the regulated community, which leaves open the possibility that the Final Rule could include changes to these tests.

During the 60-day notice and comment period, the DOL received over 270,000 comments.

WHAT EMPLOYERS CAN DO TO PREPARE NOW

Although it is impossible to predict with certainty whether the DOL's Final Rule will mirror the NPRM, employers should be preparing now for an increase in the salary level to the level listed in the NPRM, that is \$970 per week (\$50,440). This means that employers should be evaluating all employees who currently are classified as exempt under the executive, administrative or professional exemptions who are earning between \$455 and \$970 per week to assess exempt status.

The DOL estimates that within 10 years following the proposed increase in the salary basis, plus the proposed "automatic" annual increases, somewhere between 5.1 million and 5.6 million additional workers would be overtime-eligible, absent intervening action by employers. However, Perez has acknowledged that "employers have a range of options in terms of how to comply."

Rather than having a single salutary effect on all workers, the likely impact of an increase in the salary level along the lines that the DOL has proposed will be far more complex. While exempt employees earning slightly less than the proposed salary level may see

a salary increase in order for them to remain exempt from the FLSA's overtime obligations, a salary increase will be far less likely for employees earning significantly below the amount of the proposed new salary threshold.

For those currently exempt employees who are reclassified as non-exempt, employers will need to make additional decisions, including how to set the rate of pay and how much (if any) overtime to budget for newly nonexempt employees. As an example, an employee currently earning a salary of \$800 per week (\$41,600 per year) and classified as exempt could be reclassified as nonexempt at an hourly rate of \$20 on the assumption that the employee works only 40 hours per week. However, it is more likely that the employee's rate will be set below that level in order to budget for overtime. If the employer assumes that the employee will work an average of nine hours of overtime, the employee's hourly rate would be set at around \$15 (\$15 times 40 hours equals \$600 plus overtime rate of \$22.5 times 9 equals \$202.50). This, of course, means that when the employee does not work overtime, she or he is actually earning less (and in order to earn more the employee would need to work more than nine hours of overtime). Employers also could decide to hire additional employees in order to avoid the need to pay overtime to those that have been newly reclassified or assign some of the tasks previously performed by reclassified employees to those who remain exempt.

Exempt employees typically have greater certainty as to the amount of wages that will be earned because they are paid on a salary basis and cannot have their pay reduced due to variations in the quality or quantity of work performed (or hours worked in any given week). Likewise, employers can more precisely budget labor costs for exempt employees. Reclassification to nonexempt status creates greater uncertainty.

Reclassification of large swaths of employees certainly will require increased employer vigilance to mitigate against the risk of "off-the-clock" claims by newly reclassified employees.

Of course, the question of exempt status is not solely a monetary one. Employees who are classified as exempt may well regard their role in the organization in a certain way. Being reclassified and requiring employees to "punch a clock" may impact that perception. More significantly, exempt employees may have less flexibility in their day-to-day work to handle personal affairs given a change to nonexempt status. Reclassification of employees also may well have a significant impact on talent and leadership development, as those who are classified as nonexempt may be afforded fewer opportunities for training.

COORDINATED EFFORT

Implementation of the DOL's Final Rule will require coordinated effort throughout organizations, requiring the collaboration of legal, finance, operations and employee relations professionals. This will be extremely difficult to accomplish in the short window the DOL most likely will provide following issuance of its Final Rule for employers to comply. While the Final Rule issued by the DOL will impact certain geographic regions and industries more than others, all employers will feel the impact of the DOL's Final Rule and should begin planning now for the changes that are coming. •