

CLIENT ALERT

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Employment & Labor

U.S. Department of Labor Proposes Revisions to White Collar Exemptions from Minimum Wage and Overtime Requirements

The U.S. Department of Labor ("DOL") recently issued proposed major revisions to existing regulations under the Fair Labor Standards Act ("FLSA") governing "white collar" exemptions from the minimum wage and overtime provisions for executive administrative, professional, outside sales and computer employees, which, if adopted, would have a significant impact upon employers with respect to their treatment of white collar employees under the FLSA.

Under current rules, employers must affirmatively establish eligibility for a particular exemption. Job titles and salaries do not control this analysis. Applicability of an exemption depends upon the specific duties and responsibilities of the job. Further, the review of duties necessary to establish eligibility for an exemption differs depending upon the salary rate applied to these employees. For example, employees paid a higher salary will be exempt if they meet a "short" duties test, while lesser paid employees are subject to a more involved "long" duties test.

The major revisions proposed by the DOL seek to clarify the complicated and often confusing tests applied to determine whether an employee falls within the scope of an exemption under the Act. Significantly, the regulations would eliminate the "long" and "short" tests currently in use by

the DOL and increase the salary threshold for purposes of all of the FLSA white collar exemptions. These changes, which are intended to bring the rules into the modern day workplace, could result in the reclassification of hundreds of thousands of employees nationwide.

Compensation Requirements

Historically, salary level tests have been a vital component of the exemption criteria under the FLSA. Under current rules, employees paid below the minimal salary level are not exempt, regardless of their job responsibilities. Thus, employees must earn at least \$155 per week under the executive and administrative exemptions or \$170 per week for the professional exemption. The current rules also provide for application of a shorter test as to job duties once the employee earns at least \$250 per week. Notably, these minimum salary levels were last updated in 1975, rendering them of little use today in distinguishing between exempt and non-exempt employees.

Recognizing the need to modify the existing salary requirements, the DOL proposed regulations would raise the overall minimum salary level to qualify for the white collar exemptions to \$425 per week. Further, this level would apply uniformly; the "short" test and "long" test would be eliminated altogether.

Executive Employees

To qualify under the proposed regulations as an exempt "executive,"

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employees meeting the minimum salary requirements will be subjected to a single test of job duties. The new test would eliminate the prior long test sections limiting the percentage of nonexempt work and requiring a demonstration of discretionary powers. These test sections have historically been subjective and difficult to apply. On the other hand, the new rules would add to the existing short test a requirement that the executive have input in hiring and firing decisions. An employee owning at least 20% equity interest in the enterprise would also be recognized as an exempt employee.

Administrative Employees

Currently, the administrative exemption test is the most difficult to apply of all the duties tests. For example, the requirement that an employee exercise "discretion and independent judgment" has generated significant litigation. The DOL's proposed regulations would replace this requirement with a rule that the employee must hold a "position of responsibility." The existing requirement that the employee have a "primary duty" of performing office or non-manual work related to management or general business operations is clarified in the proposed rules and includes a list of examples of types of work areas which meet this requirement.

Professional Employees

Current rules recognize four separate categories of exempt professional employees: learned professionals, artistic professionals, teachers and computer professionals. The proposed regulations streamline the duties

test for these categories and substitute a single standard duties test for each, eliminating the percentage limitation on nonexempt work and the consistent exercise of discretion requirements. Significantly, the proposed rules relative to learned professionals incorporates the possibility that an employee with advanced knowledge by completing course work and working in the field might qualify for an exemption without a specific advanced degree in the field.

Outside Sales Employees

In keeping with the other exemptions, the DOL proposes to eliminate the 20% restriction on non-exempt work and adopt a "primary duty" concept for outside sales employees.

Highly Compensated Employees

The DOL has proposed a special rule for employees paid \$65,000 or more annually. Under this streamlined test, once the employee meets the salary requirement, an exemption would apply, provided that the employee is performing non-manual work with an identifiable executive, administrative or professional function as set forth in the standard duties tests applicable to these exemptions. The highly compensated employee would not have to meet all of the elements of these duties tests in order to qualify. Further, the annual salary calculation would include base salary, commissions, non-discretionary bonuses and other non-discretionary compensation in determining whether the \$65,000 annual threshold is met.

In sum, the proposed changes in the rules for determining exclusions from FLSA overtime

coverage will impact most covered employers that employ workers within the scope of these exemptions and will require these employers to audit their existing workforce under the revised standards. In addition, since many state laws have stricter exemption standards than those found in the FLSA, employers will need to monitor both federal and state regulations in making the all-important determination of whether an employee is subject to the overtime requirements of these laws.

Comments

The DOL has requested comments and/or concerns from interested parties on the suggested changes prior to final adoption of the regulations. Written comments must be submitted on or before June 30, 2003. The comments should be addressed to Tammy D. McCutchen, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW, Washington, D.C. 20210. Comments of 20 pages or less may be submitted via facsimile to (202) 693-1432 or by e-mail to whd-reg@fenix2.dol-esa.gov.

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