What CHROs Need to Know about DOL’s Proposed Overtime Rule

Proposed Rule Significantly Increases Salary Level for White Collar Exemptions and Signals Potential Changes to Duties Tests; HR Policy to File Comments

On June 30, 2015, the Department of Labor (DOL) posted a proposed rule to update the regulations governing which executive, administrative, and professional employees (white collar workers) are entitled to the Fair Labor Standards Act’s (FLSA) minimum wage and overtime pay protections. The proposal significantly increases the salary level required for “white collar” exemptions and lays the groundwork for potentially changing the duties tests in the final rule that could require employers to carefully monitor the amount of time their managers spend performing nonexempt duties. According to the White House press release, “for decades, industry lobbyists have bottled up efforts to keep these rules up to date, leaving millions of Americans working long hours, and taking them away from their families without the overtime pay that they have earned.” HR Policy will file comments on the proposed rule prior to the September 4, 2015 deadline. The following is an overview of the proposed rule.

Increases Salary Threshold For Overtime Exemption To $970 Per Week

The proposed rule would increase the minimum salary for the FLSA “white collar” exemptions from the current $455 per week ($23,660 per year) to a “level equal to the 40th percentile of earnings for full-time salaried workers,” which DOL projects to be $970 per week ($50,440 per year) in 2016. According to DOL, this could require employers to potentially review the classification of up to 21.4 million salaried employees, and reclassify as nonexempt 4.7 million salaried employees at a cost of $593 million in 2016. However, DOL estimates that only 1.2 million employees might see some increase in their take-home pay. DOL also notes that employers could respond to the increased salary level by eliminating overtime hours, reducing the regular rate of pay so total weekly earnings do not change after overtime is paid, increasing some employees’ salaries to the proposed salary level, or paying overtime for the overtime hours worked.

Annual Increases In The Salary Threshold

The proposed rule suggests two potential ways to annually increase the salary threshold and seeks comments on both alternatives. The alternative proposed by the rule would peg the salary threshold to the 40th percentile of weekly earnings for all full-time salaried workers so that as wages rise the salary threshold would rise. The other alternative would be to annually increase the salary threshold by increases in the Consumer Price Index. DOL states that “[r]egular annual increases in the salary and compensation levels, instead of large changes that result from sporadic rulemaking, will provide more certainty and stability for employers.”
Does NOT Propose Any Changes To The Duties Tests, But Asks For Suggestions

Although no changes to the duties test are proposed, DOL is “considering revisions to the duties test,” and is seeking comment on whether the current tests are working as “intended.” DOL expresses concern that in some instances the current tests are exempting employees who are performing a disproportionate amount of nonexempt work. Specifically, DOL is seeking comments on:

- 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?
- Does the single standard duties test for each exemption category appropriately distinguish between exempt and nonexempt employees? Should DOL reconsider its 2004 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? Should there be a limitation on the amount of nonexempt work?

By asking for comments on these issues DOL opens the door to making such changes in a final rule without proposing any specific regulatory text for the public to react and comment upon. Before DOL makes any changes to the duties tests for the FLSA white collar overtime exemptions, it should go through a separate notice and comment rulemaking process that begins with actual proposed regulatory text for the public to specifically comment on. The duties tests are critically important to employers and DOL should not jump from what is effectively a request for information on these issues to final regulatory language.

DOL May Also Add Examples Of Jobs That May, Or May Not, Meet The White Collar Exemptions

In 2004, DOL added a number of examples of exempt jobs to the administrative and professional duties tests, including insurance claims adjusters, certain financial service employees, team leaders, human resource managers, physician assistants, dental hygienists, accountants, paralegals, and certain computer employees. The proposed rule asks for comments on what specific additional examples of nonexempt and exempt occupations would be most helpful to include in a final rule.

May Include Nondiscretionary Bonuses in Salary Level Test: DOL also is considering whether to allow nondiscretionary bonuses and incentive payments to count toward a portion of the salary level threshold for the executive, administrative, and professional exemptions. Such payments may include, for example, nondiscretionary incentive bonuses tied to productivity and profitability. Currently, such bonuses are only included in calculating total annual compensation under the simplified duties test for employees who earn more than $100,000 per year (i.e., the highly compensated employee test). During the listening sessions leading up the proposed rule, some employers urged broader inclusion, pointing out that in some industries, particularly the retail and restaurant industries, significant portions of salaried employees’ earnings may be in the form of such bonuses.