One Year Later: The DOL's "New" Overtime Rules Are Finally On The Way - Get Ready!

05.02.2016

Almost one year ago, we reported that *"the speculation was over"* regarding the U.S. Department of Labor's (DOL) long-awaited "Notice of Proposed Rulemaking" (NPRM) which addressed overtime exemptions and minimum salary thresholds under the Fair Labor Standards Act (FLSA). Indeed, it was on June 30, 2015 that the DOL published the NPRM after missing several signaled release dates. In the ten months that have passed since the NPRM was published, many employers have been waiting anxiously for the other shoe to drop as they plan and prepare for the new regulations actually to go into effect. The question for many remains, simply: "When?" Well, after thousands of comments, many prognosticators believe that the final rules will be published by mid-May with an effective date 60-days thereafter, likely in July or August 2016. In the coming weeks, we may finally know how closely the final rules mirror or diverge from the proposed ones.

Background on the Proposed Overtime Rules

The NPRM was in response to President Obama's March 13, 2014 memorandum directing the agency to update the existing FLSA overtime regulations with the expressed intention of "simplifying" the rules while updating worker protections in light of the changing nature of the US economy. "Overtime is a pretty simple idea," the President said at a White House signing ceremony. "If you have to work more, you should get paid more." The President pointed directly to the white collar exemptions to the FLSA overtime requirements as needing revision, noting that the current rules treat as "highly paid" those employees earning as little as $23,660 per year.

Given the stated goal, the DOL's proposed overtime rules did not disappoint. In the NPRM, the DOL expressly stated its intention to significantly increase the salary basis threshold for white collar exemptions, which will in turn potentially raise the pay of millions of workers (the White House estimates nearly 5 million, in fact).

Employers had numerous questions about the 295-page NPRM and its potential impact on their workforce. To help digest and process all of this information, we have provided key information in Question & Answer format.

Q1: Which employees are impacted immediately under the proposed rule?

A1: The proposed rule will directly impact any salaried employees currently classified by the employer as “exempt” salaried employees under the executive, administrative, professional, outside sales or computer employee exemptions, who are currently paid a salary that is more than $455/week ($23,660/year) but less than $970/week ($50,440/year)[1]. Under the proposed rule, employees making less than the anticipated new salary level of $970/week ($50,440/year) would no longer be exempt, regardless of whether they meet the exemption duties tests, and would be entitled to overtime for all hours worked over 40 in each work week.

Under the proposed rule, those classified as “highly compensated employees” (HCE), must earn at least $122,148 (rather than the current $100,000) in total annual compensation.

The proposed rule also impacts the movie industry – as the DOL proposes to increase the current base rate for those employees by approximately 102 percent – from $695 to $1,404 per week.

Q2: Will there be any updates to the “duties” tests for the white-collar exemptions?

A2: While the NPRM does not include a direct proposed rule change, the DOL has considered whether changes to the “duties” tests for the individual exemptions are warranted. The DOL sought public comment on this and other issues and received nearly 250,000 responses. However, it remains uncertain whether, or to what degree, the “duties” tests will be revised in the final rule.

Q3: Will there be any more changes?

A3: Yes – the DOL has proposed creating a mechanism for automatically raising the salary basis threshold going forward. Right now, the salary basis threshold is raised through the traditional rulemaking process. However, the DOL notes the long time between increases and has proposed automatic updates so that the salary basis threshold stays at or near the 40th percentile of weekly earnings for full-time salaried workers (90th percentile for highly compensated employees).

Apparently, the DOL still is considering two alternative methodologies for annually updating the salary and compensation thresholds. One is based on a fixed percentile of earnings for full-time salaried workers; the other on changes in the Consumer Price Index for All Urban Consumers (CPI-U).

Q4: Will this proposed rule impact exempt hourly computer professional employees?

A4: No. Hourly computer professional employees who earn at least $27.63 per hour and perform certain duties are exempt under section 13(a)(17) of the FLSA and will not be affected by this proposed rule. However, salaried computer professionals will be affected as described in Q1 above.

Q5: In what ways does the NPRM "simplify" the exemption rules?

A5: Well, the DOL basically says that it will be simpler for employers and employees to know who is and who is not exempt because there will be more automatically non-exempt workers. Therefore, the employer will not have to waste time figuring out if those employees meet the "duties" test because salaries will exclude them from the exemptions.

Q6: Since the salary requirement is going up, will I be able to count discretionary bonuses, medical, disability, or life insurance, fringe benefits, retirement benefit contributions, etc. in reaching the $970/week threshold?

A6: Nope. The DOL specifically stated that it has not considered changing its exclusions to count these employer benefits toward the salary level requirement.

Q7: Is there anything employers can do right now?

A7: Continue to plan and prepare for the final rules to take effect (see Q8 below). Employers need to identify business solutions that will position them to absorb the likely significant salary increases necessary to continue classifying certain employees as exempt from overtime. These changes have the potential to impact small to mid-sized employers significantly, especially those who rely heavily on mid-level managers who currently are classified as exempt. Employers may also desire to seek the advice of outside professionals familiar with common issues implicated by the FLSA and the NPRM.

Q8: When will this rule go into effect?

A8: Likely sometime later this year. As a routine part of the process, the DOL sent the proposed overtime rule to the Office of Management and Budget (OMB) for review during the week of March 14, 2016. Generally, OMB takes around 30-60 days to review proposed rules. However, given the significance of this rule and the attention that it has received nationally, this review may very well take longer. Following OMB review, and issuance of a final rule, there is often an additional 60 days before the DOL puts the rule into effect, which would forecast an effective date sometime in July 2016.

However, once a final rule goes into effect, under the Congressional Review Act, Congress has 60 days from the issuance of the final rule to pass a joint resolution of disapproval to try and block the rule. If that occurs, President Obama can always veto a congressional joint resolution of disapproval (an authority President Obama has exercised before). In the event of a presidential veto, Congress would then have a final additional 30 days to override the veto.

So, in the end, for anyone who is mapping out this process on their calendars, they can put a star (in pencil, of course) beside Labor Day weekend. Would it not be poignant for the DOL to give approximately 5 million workers a pay raise on Labor Day?

> [1] *The final increase to the salary threshold has not been calculated definitively. Technically, the NPRM sets the standard salary level required for exemption at the 40th percentile of weekly earnings for full-time salaried workers. Depending on when the final rule goes into effect, as well as the data set that is used by the government to calculate the "40th percentile of weekly earnings," most commentators forecast a range of $921 - $970 for weekly pay and $47,892 - $50,440 for annual salary. For planning purposes, employers should consider using the $970 / $50,440 figures.*

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