

### **Overtime Expansion Unveiled: Proposed USDOL Rule Would More Than Double the Salary Threshold for Overtime Exemptions**

Yesterday, the U.S. Department of Labor's ("DOL") Wage and Hour Division announced a proposed rule that would significantly increase the salary threshold to classify employees as exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act ("FLSA"). To qualify for most exemptions, the proposed rule would increase the required salary level from \$23,660 to \$50,440 per year.

The FLSA guarantees minimum wage and overtime pay at a rate of one and one-half times the employee's regular rate for all hours worked over 40 in a workweek. Individuals employed in a "bona fide executive, administrative, or professional capacity," as outside salespeople, and certain computer employees are exempt from this requirement. 29 U.S.C. § 213(a)(1), (17). This means that those individuals may be required to work more than 40 hours per week without receiving additional overtime pay.

Currently, employees must meet three requirements to be exempt: (1) the employee must be paid on a salary basis (meaning he or she receives a set amount of compensation for each week in which he or she performs any work); (2) that salary level must be at least \$455 per week (or \$23,660 per year);<sup>1</sup> and (3) the employee must meet duties tests that vary among the different exemptions. For example, an exempt executive must receive at least \$455 per week on a salary basis, his or her primary duty must involve managing the enterprise, he or she must regularly supervise at least two full-time employees, and he or she must have hiring and firing authority (or his or her suggestions regarding hiring and firing must be given particular weight).

Under the proposed rule, the required salary level would be increased to match the 40<sup>th</sup> percentile of earnings for full-time salaried workers in the U.S. – an amount the Department of Labor expects to be \$970 per week, or \$50,440 annually, by the time the rule becomes final. This means that any employee with a salary of less than \$50,440 per year **must** receive overtime pay for all hours worked in excess of 40 in a single week.

The proposed rule also changes the salary level for the highly-compensated worker exemption. Under 29 C.F.R. § 541.601, employees who earn at least \$100,000 annually on a salary basis are exempt as long as they perform office or non-manual work and they regularly perform at least one of the exempt duties of an exempt administrative, executive, or professional employee. The proposed rule would increase this salary level to an amount equal to the 90<sup>th</sup> percentile of earnings for full-time salaried workers in the U.S. (currently \$122,148 per year).

Notably, the proposed rule would adjust these levels annually to match the then-current 40<sup>th</sup> and 90<sup>th</sup> percentile salaries in the U.S. This means the levels would likely increase every year, requiring employers to re-evaluate employees' classification as exempt on an annual basis.

The DOL's proposed rule does not change any of the duties tests associated with the exemptions listed above, but the rule does invite comments on whether adjustments to the duties tests would be appropriate. Among other things, it specifically asks whether the DOL should adopt the California duties rule for overtime exemption, which requires that 50 percent of an employee's time be spent exclusively on the exempt work that is the employee's primary duty.

<sup>1</sup> States often have higher salary level requirements than those required by federal law. For example, to qualify for exemption from overtime under New York law, employees must be paid at least \$656.25 per week, or \$34,125 per year.

As noted throughout this alert, the rule is not final; the 60-day comment period will not begin until the proposed rule is published in the Federal Register, and the DOL will take time to review and address the many comments it is likely to receive. When the DOL last proposed revisions to these exemptions in 2003, it received 75,280 comments.

### **Take-Aways for Employers**

Though the salary levels and duties tests may change in the final rule, employers should start thinking about wage and hour compliance now. At this stage, it would be appropriate to determine how many of your exempt employees make less than \$50,440 per year and may be affected by this change. In making budgeting decisions for 2016, you should keep in mind that these employees will likely be entitled to overtime at some point that year. Finally, as a best practice, you may wish to treat this change as an opportunity to review the exemption status of your workforce and ensure that all job descriptions properly reflect the employees' exempt duties and the reality of their day-to-day work.

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