

DOL Releases Proposed Amendments to FLSA Overtime Regulations: Now is the Time to Reassess Compliance and Update Your Policies

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BKK Employment Law Newsletter
July 2015

The Department of Labor (DOL) has just released its proposed amendments to the white collar exemption under the Fair Labor Standards Act (FLSA). The amendments, if passed, will significantly increase the minimum salary test (from \$23,660 to \$50,440) for workers entitled to receive overtime pay for hours worked over 40 in a work week. The amendments will have far-reaching impacts on many industries that will need to reclassify many currently exempt employees and corresponding wage and hour policies.

What does the FLSA provide for and what is the white collar exemption?

The FLSA is a federal statute that establishes minimum wage, overtime pay, recordkeeping and child labor standards. The statute requires that most employees be paid, at least, the federal minimum wage and overtime pay at one and one-half the regular rate of pay for all hours worked over 40.

The statute also provides an exemption from both minimum wage and overtime pay for employees who are employed as executive, administrative, professional, outside sales, computer or highly compensated employees. Collectively, these are known as the “white collar exemptions.” To qualify for these exemptions an employee must meet the salary basis test, which requires they be paid at least \$455 per week (\$23,660 per year). Additionally, the employee’s job must meet the “primary duties” test:

- Executive - must be managing the enterprise or a customarily recognized department or subdivision of the enterprise;
- Administrative - must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers and
- Professional - must be the performance of work requiring advanced knowledge or the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Why are the regulations being amended?

The DOL is specifically acting in response to a 2014 directive from President Obama that instructed the DOL to “modernize and streamline the existing overtime regulations.” In particular, Obama indicated that the current FLSA exemptions for

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overtime requirements had not kept up with inflation and modern economic realities. The regulations have only been updated two times in the past 40 years with the most recent update occurring under the Bush Administration in 2004.

What changes are anticipated?

The DOL's proposed amendments, made public yesterday, include:

1. Establishing a mechanism for automatically updating the salary levels going forward;
2. Increasing the standard salary level at the 40th percentile of earnings for full-time salaried workers which currently is equivalent to \$47,892 and projected to be \$50,440 in 2016;
3. Increasing salary level for highly compensated employees to the equivalent of the 90th percentile of weekly earnings.

Noticeably missing from the proposed amendments are any proposed changes to the primary duties test. Many expected that the DOL would propose a change to the primary duties test and implement a quantitative primary duty test similar to California's state law that would require an employee spend more than 50% of his/her time on tasks deemed exempt. However, DOL indicates in the Notice of Proposed Rulemaking that it believes the proposed salary level increase and automatic updates may address most of the concerns so that a change in the primary duties test will not be necessary. However, DOL is seeking public comment on this issue and may change the proposed amendment to include this.

What should an employer do?

Employers should start reassessing their FLSA compliance now. While this is true for all industries, it is particularly pertinent for employers in the restaurant or healthcare industries, both of which the DOL recently identified as top FLSA violators.

At a minimum, employers should:

- Determine whether you have current written job descriptions and if not, prepare detailed descriptions of each job category;
- Determine whether the written job descriptions accurately reflect job duties and essential functions;
- Identify any position currently classified as exempt that might be at risk under the proposed changes due to the employee's annual salary being less than \$50,440;
- Begin reviewing pay systems and budget to determine how changing these employees to hourly will impact the company and
- Review company handbook to ensure it contains FLSA safe harbor language.

Many employers assume that because they pay an employee more than \$23,660 and have an employment agreement in place identifying the employee as exempt, the employer will avoid FLSA liability for misclassifications. This is not the case; while the DOL will consider the agreement, it is only one factor among many that come into play.

What's the status of the proposed amended regulations?

The proposed amendments were made public as of June 30, 2015. There will be a public comment period of 60 days after the amendments are published in the Federal Register.

When will the amended regulations go in effect?

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The proposed changes will likely not be effective until Fall 2015. Following the public comment period, the DOL will draft a final regulation in response to the public comments. OIRA will then conduct a final review to approve the text of the regulation and publish it in the Federal Register. The period for a review of the draft is limited to 90 days with a possible single 30-day extension. There is no minimum time for review, with the typical turnaround being 60 days. The period may also be delayed further if affected parties file suits to challenge the revisions.

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