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W A G E A N D H O U R

Sweeping Changes to FLSA 'White-Collar' Exemptions Are Imminent

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Special to the Legal

The U.S. Department of Labor (DOL) is poised to release its proposed revisions to the Fair Labor Standards Act's (FLSA) so-called "white-collar" exemptions in the days ahead. Employers are waiting with baited breath for what is widely anticipated to have major financial implications for nearly all employers covered by the FLSA. The DOL's regulations are expected to substantially expand the number of workers eligible for overtime pay under the FLSA, by increasing the minimum salary requirements for workers to be classified as exempt and therefore not eligible for overtime. The proposed regulations also likely will make more onerous the duties requirements to qualify as exempt under the FLSA's white-collar exemptions. While the salary numbers that have been floating around in the media vary, the lowest minimum salary requirement being suggested is \$42,000 per year, an almost 78 percent increase from the current salary threshold of \$23,660 per year.

BACKGROUND

In March 2014, President Obama issued a memorandum to



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DOL Secretary Thomas Perez directing him to "propose revisions to modernize and streamline the existing overtime regulations" of the FLSA. The memorandum specifically referenced the FLSA's "white-collar" exemptions, stating that the regulations related to those exemptions "have not kept up with our modern economy" and that due to this, "millions of Americans lack the protections of overtime and even the right to minimum wage." The memorandum charged Perez to revise the regulations to "update existing protections consistent with the intent of the act; address the changing nature of the workplace; and simplify the regulations to make them easier for both workers and businesses to

understand and apply."

The administration's action is meant to address an exemption from overtime pay provided by the FLSA for "white-collar" workers—or what the act defines in Section 13(a)(1) as "employees employed as bona fide executive, administrative, professional and outside sales employees." These exemptions require specific tests, including under most circumstances that employees be compensated on a salary basis "of not less than \$455 per week." According to the Economic Policy Institute, in 2013, 11 percent of salaried workers fell under this threshold. In addition to meeting the required salary basis to qualify as exempt from the FLSA's overtime requirements, the DOL regulations require employees to perform certain types of duties that are consistent with the exempt character of the position.

The FLSA regulations will have less impact in states such as New York and California, which already have increased the salary basis for workers (\$600 per week in New York, increasing to \$675 per week in 2016, and \$720 per week in California, increasing to \$800 per week in 2016).

This is the first time that the

white-collar regulations will be revised in more than a decade.

WHAT'S LIKELY TO COME NEXT?

A deadline for the proposed FLSA revisions came and went in November 2014, and according to the Office of Management and Budget's Office of Information and Regulatory Affairs, the DOL expects to publish the proposed regulations by the end of February. Following publication of the proposed regulations in the Federal Register, individuals and businesses will have the opportunity to provide comments to the DOL.

While no specifics have been released, governmental and legal observers have wagered educated guesses as to what the white-collar exemption proposed regulations will look like. Consensus has formed around the following:

- The salary test of \$455 per week will increase significantly. The Huffington Post has reported that the Obama administration is leaning toward setting the minimum salary requirement at \$42,000 (which equates to slightly more than \$800 per week). Recently, 26 senators (25 Democrats and one Independent) wrote to the president advocating for a minimum salary requirement of \$56,680 per year (or \$1,090 per week).

- According to the Economic Policy Institute, an increase to \$42,000 per year would cover 35 percent of salaried workers (up from 11 percent with the regulations currently in effect).

- Employers should anticipate revisions to the duties requirements as well, which likely will make it more onerous to satisfy the tests

to qualify as exempt. Specifically, Perez has been quoted as describing the current "primary duty" test as a "loophole." His comments suggest that the DOL may require employees to spend a certain percentage of time on exempt duties in order to qualify as exempt under any of the white-collar exemptions.

- These proposed changes, if adopted, could make millions of employees eligible for overtime (especially in states that have not adopted a higher salary threshold like California).

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HOW AND WHY EMPLOYERS SHOULD PREPARE

Employers should be mindful of the significant changes that look to be on the horizon, especially employers in sectors that will be most significantly impacted by an increase in the salary basis, such as the retail, service and production sectors. Of course, there will be an opportunity for all employers and individuals to provide comments to the DOL, and employers certainly should consider doing so through a trade industry organization or individually.

Employers should take specific and definite actions once

the regulations are issued in final form, including:

- An assessment of all positions currently classified as exempt that no longer meet the salary basis requirement, or that are impacted by any changes in the duties requirements of any of the exemptions.

- A revision of all job descriptions impacted by the revised regulations.

Employers should conduct their review to the maximum extent feasible under the ambit of attorney-client privilege to prevent disclosure of the process in any potential future litigation.

With wage-and-hour litigation already keeping many an in-house counsel up at night, the changes to the white-collar exemptions could only provide more fuel to the already bright wage-and-hour fire burning. Employers need to be cognizant of the changes that look to be coming down the pike, and assess the financial and legal impact that the final issued DOL regulations widely are expected to have. •