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DÉJÀ VU: DOL (AGAIN) PROPOSES TO INCREASE INCOME LEVEL FOR SALARIED EXEMPT EMPLOYEES

For the second time in roughly the past three years, the U.S. Department of Labor (DOL) issued a Notice of Proposed Rulemaking that would change the legal requirements for an employee to qualify as exempt from the overtime requirements of the Fair Labor Standards Act (FLSA). The exempt status requirements have not been revised since 2004. However, as employers know all too well, the DOL previously proposed a significant increase in the minimum salary requirements, which was scheduled to take effect in 2016 but was declared invalid by a U.S. District Court. While yesterday's announcement was merely a proposal, the potential changes to the law are significant enough to warrant employers' close attention and involvement in the rulemaking process.

Proposed Revisions

Most importantly, the DOL proposes to change the minimum compensation requirements for exempt employees as follows:

- The minimum weekly salary for exempt employees, currently $455 per week or $23,660 per year (http://www.dol.gov/whd/overtime/fs17a_overview.pdf), would increase to the 20th percentile of weekly earnings for full-time salaried workers in the United States in the lowest-wage census region, which is **$679 per week or $35,308 per year**.
- The minimum annual salary required for the Highly Compensated Employee exemption, currently $100,000 per year (http://www.dol.gov/whd/overtime/fs17h_highly_comp.pdf), would increase to the 90th percentile of weekly earnings for full-time salaried workers in the United States, which is **$147,414**.
- Employers would be permitted to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level for all exempt employees, provided these payments are made on an annual or more frequent basis, and could use a catch-up payment if necessary (the DOL is inviting comment on whether the proposed 10 percent cap is appropriate).
- While declining to adopt a specific or automatic methodology, the DOL

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proposes to revisit the minimum salary levels every four years.

The DOL also announced that it is *not* considering revising the job duties requirements for exempt employees as part of this update.

What This Means for Employers

If the DOL's proposed revisions become final, absent a special exempt status, no employee will be exempt from the overtime requirements of the FLSA if the employee is paid a salary less than the new minimum salary of $35,308 per year, which is about a 49 percent increase over the current minimum. For any and all salaried employees currently earning less than the new minimum, employers would be required to choose between either (i) having those employees subject to record-keeping requirements as hourly employees and paying overtime for hours worked over 40 in a week, or (ii) increasing base salaries to meet or exceed the new minimum. Thus, in the event the proposed changes are implemented, the impact on employers could (once again) potentially be significant. However, the new proposal to allow certain nondiscretionary bonuses and incentive payments to satisfy part of the minimum salary threshold would potentially soften the blow slightly.

Again, it is important to understand that yesterday's announcement was merely a proposal, and is not final. The public will have 60 days to comment on the proposed regulation once it is published in in the Federal Register. The DOL anticipates that this rule could become effective in January 2020.

What Employers Can, and Should, Do Now

While this is merely a regulatory proposal, it is likely that some version of this proposed rule will ultimately become final. Prudent employers should begin both thinking about the budget impact the rule could have and consult with counsel to develop strategies to evaluate and potentially reclassify exempt workers, as many employers did in 2015 and 2016.

The DOL is again soliciting comments on the proposed revisions, as well as a number of other considerations as discussed above. Employers are encouraged to comment and let the DOL know how this significant revision would impact their businesses and employees. Visit the DOL website for instructions on how to comment now, as well as the DOL's full Notice.