July 6, 2015

USDOL Proposes Significant Increase in Federal Salary Test for FLSA White Collar Exemptions

By Lloyd W. Aubry, Jr.

On Monday, July 6, the United States Department of Labor (USDOL) published its long awaited proposed rule "updating" regulations "defining and delimiting" the exemptions from overtime for white collar employees (i.e., the executive, administrative and professional exemptions). As you will recall, on March 13, 2014, President Obama signed a Presidential Memorandum directing the Department of Labor to update the regulations defining which white collar workers are eligible to receive overtime pay for hours worked over 40 in the workweek under the Fair Labor Standards Act (FLSA). The Presidential Memorandum was part of the President's initiative to address income inequality and included efforts to raise the hourly minimum wage as well. The proposed regulations have taken much longer to draft than expected. The Department conducted a number of stakeholders meetings around the country seeking information, and the proposed regulations have taken much longer to draft than expected. In any case, the Department believes that if these regulations are finalized, an additional five million workers will be entitled to overtime under the FLSA.

By way of background, in order qualify for one of the white collar exemptions, the FLSA currently requires that an employee be paid at least $455 per week ($23,660 per year) as well as meet a number of other tests. This threshold was created in 2004, the last time these regulations were updated. The Department is now proposing that the weekly salary be raised, pursuant to a formula to about $970 per week or $50,000 per year in 2016 when the regulations would be effective. The $970 figure is the expected salary level at the 40th percentile of weekly earnings for full-time salaried workers in 2016. The proposal actually sets the standard at the 40th percentile of weekly earnings and thus the actual salary level will be automatically updated each year to keep it at this 40th percentile level.

The FLSA also contains a streamlined exemption for highly compensated employees making at least $100,000. The Department proposes that this also be raised to the 90th percentile of earnings for full-time salaried workers or approximately $122,000 in 2016.

Over the last year, there has been a great deal of discussion about whether the USDOL would propose changing the so-called duties test for the white collar exemptions. Many commentators had speculated that the Department would move closer to the California standard ("primarily engaged") where an employee is required to spend more than 50% of his/her time in exempt duties rather than the FLSA's current "primary duty" standard which allows an employee to spend less than 50% of his/her time on exempt duties and still be classified as an exempt employee. The Department has decided not to propose anything specific at this time but rather to seek comment on whether there should be changes to the federal duties test under the FLSA. The request for comment on the duties test is also part of this proposed rulemaking package.

For California employers, should these regulations be finalized, this would be one of the very few instances where the FLSA would provide a tougher standard than the California rules on white collar exemptions. In California, the salary basis is currently $720 per week or $37,440 per year.

Comments on the proposed regulation and the duties test are due by September 4, 2015.

Contact:

Lloyd W. Aubry, Jr.
Of Counsel
(415) 268-6558
laubry@mofo.com

About Morrison & Foerster: