Fair Labor Standards Act Overtime Regulations

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Background: The Fair Labor Standards Act (FLSA) establishes the minimum wage, overtime pay and recordkeeping requirements for employees in the private sector and in federal, state and local governments. The FLSA requires that employees be paid overtime at a rate of at least one and a half times their regular rate of pay for all hours worked over 40 hours in a workweek, unless they qualify for an exemption. Employees that qualify for an exemption are called “exempt” employees. Employees who do not meet requirements for an exemption and must, therefore, be paid overtime for all hours worked over 40 hours in a workweek, are referred to as “non-exempt.”

To be exempt, employees must be paid on a salary basis that does not fluctuate based on hours worked, be paid at a certain salary threshold that is established by regulation of the Department of Labor (DOL) and meet certain job duties tests. Under the current regulations, employees must be paid more than $455 per week ($23,660 per year) to satisfy the salary threshold for exemption. Commonly used exemptions include the “white-collar” exemptions (executive, administrative and professional) as well as the computer employee and outside sales employee exemptions. There is also a “highly compensated” exemption with its own salary threshold level that may apply to highly paid employees. The FLSA delegates to the Secretary of Labor the authority to define the terms of the exemptions. DOL has modified the regulations several times, most recently in 2004 when it increased the salary level and simplified the duties test.

Issue: On March 13, 2014, President Barack Obama directed the DOL, through Presidential Memorandum, to “modernize and streamline” the FLSA overtime regulations. On June 30, 2015, DOL published proposed changes to regulations defining the “white-collar” overtime exemptions. Proposed changes include:

Salary Threshold Level:
- Raising the salary threshold level to the equivalent of the 40th percentile of weekly earnings for full-time salaried workers as tracked by the Bureau of Labor Statistics (BLS). DOL estimates that the 40th percentile will increase the salary threshold to $970 per week or $50,440 annually in 2016, when the rule is expected to go into effect. In past rulemakings, DOL has set the salary level using a methodology that looked at lower-wage industries and set the level using either a 10th or 20th percentile level to determine appropriate salary threshold.
- Setting the highly compensated employee annual compensation level equal to the 90th percentile of earnings for full-time salaried workers ($122,148 annually). This is consistent with the methodology used in the previous 2004 overtime rulemaking.
- Adding a new provision to automatically update the salary levels every year. DOL asked for public comment on whether the automatic update should be pegged to the 40th and 90th percentiles or to changes in inflation. In the past, DOL has periodically reviewed and updated the salary level in the overtime rules instead of using an automatic update.
- Under the new salary level, a substantial number of employees in a variety of different industries who are currently classified as exempt would be made subject to the overtime requirements.

Duties Tests:
- DOL does not make changes to the duties test in the proposed rule. Instead, it asks for public input on whether, in light of the proposed salary increase, any changes to the duties test are warranted.
It is not clear whether DOL will make changes to the duties test in the final rule. SHRM believes that if DOL makes changes, the department should first spell out any proposals and engage in notice and comment rulemaking to allow stakeholders the ability to evaluate the impact.

**Outlook:** As a leader on this issue, SHRM chairs the Partnership to Protect Workplace Opportunity, the employer community coalition dedicated to responding to the overtime regulations. Both SHRM and the Partnership submitted comments to DOL on September 4, 2015. A final rule is not expected until late spring/summer 2016 with an effective date a minimum of 30 days after publication. If DOL does not make changes in the final rule in response to concerns outlined by SHRM and the employer community, legislative attempts to block or delay the rule are expected next year.

**SHRM Position:** SHRM appreciates the administration’s interest in updating the salary level. However, using a different methodology and a higher salary level set at the 40th percentile of weekly earnings (estimated at $50,440/year in 2016) presents challenges for employers whose salaries tend to be lower, such as small employers, non-profits, employers in certain industries, and employers in lower cost of living areas of the country such as the Southeast and Midwest.

Of equal concern, SHRM opposes automatic increases that have been considered and rejected in the past. Automatic increases ignore economic variations of industry and location. In addition, as more employees become non-exempt due to the dramatic increase in the proposed salary threshold level, the need for those employees to track their time to ensure they are not working overtime will limit their workplace flexibility. SHRM is also concerned that the DOL may make changes to the duties test in the final rule that would further exacerbate an already complicated set of regulations for employers, particularly small employers and employers in industries where managers often conduct exempt and non-exempt work concurrently.