**Department of Labor Publishes Proposed Rule on Overtime Regulations**

On June 30th, the U.S. Department of Labor (DOL), Wage and Hour Division, published proposed revisions to the overtime pay provisions under the Fair Labor Standards Act (FLSA). The Proposed Rule, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees” would update the regulations governing which executive, administrative, and professional employees (commonly referred to as the “white collar” exemption) are entitled to overtime pay under the FLSA. The DOL’s Proposed Rule could result in certain employees who are currently exempt under the FLSA being reclassified as non-exempt and therefore entitled to overtime pay at a rate of not less than one and one-half times the employee’s regular rate for hours worked over 40 in a work week. On issues of key importance, including a potential change to the duties test, the DOL adopted positions that FMI advocated for. Specifically, the proposed rule does not include any proposed revisions to the duties test which would be very problematic for FMI member and associates.

**Key Provisions of the Proposed Rule**

The Proposed Rule focuses primarily on updating the salary and compensation levels needed for white collar workers to be exempt. Specifically, the Department proposes to:

1. Set the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers ($921 per week, or $47,892 annually);
2. Increase the total annual compensation requirement needed to exempt highly compensated employees (HCEs) to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers ($122,148 annually); and
3. Establish a mechanism for automatically updating the salary and compensation levels going forward.

DOL has provided a 60 day comment period following official publication in the Federal Register. A brief summary of the Proposed Rule follows and additional information will be forthcoming. FMI will certainly seek your input in developing our comments and will be hosting a webinar soon to analyze the proposed revisions to the regulations and discuss how best to respond to these revisions.
Why is the DOL Updating the Overtime Regulations?
The Proposed Rule has been issued in response to a March 13, 2014, Presidential Memorandum titled, “Updating and Modernizing Overtime Regulations” which instructed the Secretary of Labor to update regulations regarding who qualifies for overtime protection and to “modernize and streamline the existing regulations for executive, administrative and professional employees under the FLSA”.

What are the Current Regulations?
The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek. However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative and professional employees (“white collar exemptions”).

Currently, to qualify for exemption, a white collar employee generally must:

1. Be salaried, meaning that they are paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test");
2. Be paid more than a specified salary threshold, which is $455 per week (the equivalent of $23,660 annually for a full-year employee) in existing regulations (the "salary level test"); and
3. Primarily perform executive, administrative, or professional duties, as provided in the Department’s regulations (the "duties test").

What is the Current Salary Test?
Under the current regulations, an executive, administrative, or professional employee must be paid at least $455 per week ($23,660 per year for a full-year worker) in order to come within the standard exemption. Highly compensated employees who earn at least $100,000 in total annual compensation are currently exempt if they customarily and regularly spend time on one or more exempt duties, and are not engaged in manual work.

What are the Proposed Changes to the Salary Test?
The Proposed Rule would raise the standard salary level from $455 per week and would instead base the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers ($921 per week, or $47,892 annually). Using 2013 data, the proposed salary amount would equal $921 per week (which is $47,892 annually for a full-year worker), the Department estimates that a 2016 level may be about $970 a week, or $50,440 a year. DOL is also proposing to raise the HCE annual compensation level equal to the 90th percentile of earnings for full-time salaried workers ($122,148 annually). DOL believes the final rule, when published, will rely on data from 2016 weekly earning. The Department seeks comment on the proposed salary threshold.
Will the Department Consider Bonuses as Part of the New Salary Level Test?
The Department is seeking comment on whether to allow nondiscretionary bonuses, such as
certain production or performance bonuses, to satisfy a portion of the standard salary test
requirement. Such bonuses include for example, nondiscretionary incentive bonuses tied to
productivity and profitability. FMI advocated for bonuses to be included in the salary test.

How is the Department Proposing to Automatically Update the Salary Level and HCE
Total Compensation Levels?
The Department is proposing to automatically update the standard salary and HCE total annual
compensation requirements. The Department has proposed two different methodologies for
updating the standard salary and HCE total annual compensation levels. One method would keep
those levels pegged to the 40th and 90th percentiles of earnings for full-time salaried workers,
respectively. The other method would adjust the standard salary and HCE compensation amounts
based on changes in inflation, as measured by the Consumer Price Index for all Urban
Consumers (CPI-U). The Department is seeking comment on both methods.

Is DOL Proposing Changes to the Primary Duties Test?
The Department is not making specific proposals to modify the standard duties test, which was a
significant concern for FMI members. There was speculation that the DOL could adopt a
qualitative test such as California’s 50 percent primary duty rule. When meeting with DOL, FMI
argued that a qualitative test would limit exempt employees’ ability to perform nonexempt and
would negatively impact the culture of the workplace, be difficult and costly to implement, and
lead to increased litigation.

While, the Department did not include specific changes to the duties test they are seeking
comments on whether the tests are working as intended to screen out employees who are not
bona fide EAP employees; in particular, the Department is concerned that in some instances the
current tests may allow exemption of employees who are performing such a disproportionate
amount of non-exempt work.

In anticipation of the Proposed Rule, FMI met with the Office of Management and Budget and
the Department to voice our concerns with potential changes to the overtime regulations. FMI
also participated in a Listening Session with Department of Labor Secretary Thomas Perez to
discuss the agency’s anticipated overtime initiative and its potential impact on the supermarket
industry and associates who are currently classified as exempt from overtime pay. We will
request a meeting with DOL and will be submitting formal comments to the Proposed Rule.

Please don’t hesitate to contact Stephanie Barnes with questions at sbarnes@fmi.org or 202-220-
0614.

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