Tackling the Top Questions About Proposed FLSA Overtime Rules

By Shlomo D. Katz

With the U.S. Department of Labor’s overtime regulation update looming in the not-too-distant future, employers are likely to have some outstanding questions about the proposed changes. This column will help provide some of the answers.

Section 13(a)(1) of the Fair Labor Standards Act provides a minimum wage and overtime exemption for employees employed in a bona fide executive, administrative, professional capacity or as an outside salesperson. However, the FLSA does not say what it takes to qualify as an executive, administrative or professional employee. Instead, the Act directs the Secretary of Labor to issues regulations “defining and delimiting” those exemptions. The U.S. Department of Labor has issued such regulations and has revised them a number of times, most recently in 2004.

On March 13, 2014, President Obama issued a memorandum to the Secretary of Labor to “modernize and streamline” the existing exemption regulations. On July 6, 2015, DOL published proposed regulations to implement the president’s direction.

DOL has claimed that 5 million additional workers will become entitled to overtime pay under its proposed regulations, and the news media and the public at large did not miss that assertion. Thus, many public comments have been submitted, some for and some against the proposed changes. By the time the public comment period closed at 11:59 p.m. on Sept. 4, 2015, an eye-popping 289,942 public comments had been submitted — believed to be a record. (In comparison, the second-most-commented-on proposed rule pending as of this writing has received 2,440 comments.)

Now that the comment period is over, employers may have a host of questions about next steps. Here are answers to what I expect to be the most common questions.

1. When Will the New Regulations Take Effect?
   We can only guess, but it might be early in 2016. When an agency initiates a rulemaking activity, it must publish a proposed rule in the Federal Register and give the public an opportunity to comment on the proposal for a specified timeframe, usually 60 days. In this case, the proposed rule was published on July 6, 2015, and the public comment period closed 60 days later on Sept. 4, 2015. Agencies often extend the comment period, and many stakeholders and members of Congress urged DOL to do that here, but DOL refused.

   Now, DOL is in the process of reviewing the nearly 300,000 comments it has received. Some of the comments are very general — along the lines of “Go DOL!” or “Down with DOL!” But many of the comments are substantive and must be analyzed by DOL before a final rule can be issued. Indeed, DOL’s proposed regulations specifically solicited comments on certain questions — for example, whether to change the definition of “primary duty.” After reviewing all of the comments received, DOL must draft regulatory language to incorporate any comments it agrees with and it must draft explanations for why it disagrees with other comments.

   When that process is completed, a final rule will be published in the Federal Register, together with DOL’s responses to the comments. That final rule is likely to specify a phase-in period. A phase-in period of 90 to 180 days is a good guess, but, again, that’s only a guess.

2. What Changes to the Existing Regulations Has DOL Proposed?
   To be considered exempt executive, administrative and professional employees, workers must meet certain minimum tests related to their primary job duties and must be paid on a salary basis at not less than a specified minimum amount. The standard salary level required for exemption is currently $455 a week ($23,660...
for a full-year worker). That figure was last updated in 2004. By way of this rulemaking, DOL seeks to increase the minimum salary level for exemption as well as the minimum salary level for the “highly compensated employee” test. DOL also proposes automatically updating the salary level in the future. Lastly, DOL has solicited comments on whether revisions to the duties tests are necessary.

3. What Changes Has DOL Proposed To the “Salary Basis” Test?

Part of the exemption test is that the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed. This is called the “salary basis test.” If an employee does not satisfy the salary basis test, he or she will not be exempt no matter what his or her duties are. On the other hand, if an employee does satisfy the salary basis test, you must examine the employee’s primary duty to determine if he or she is exempt.

DOL has not proposed any changes to the mechanics of the salary basis test. However, DOL has proposed to change the minimum amount of salary a worker must earn in order to satisfy the salary basis test. Currently, that amount is $455 a week ($23,660 for a full-year worker).

DOL has not proposed a specific dollar figure for the new minimum. Instead, DOL is proposing to set the standard salary level equal to the 40th percentile of earnings for full-time salaried workers. That figure was $921 per week, or $47,892 annually for a full-year worker, in 2013. DOL relied upon 2013 data in developing the proposed rule, but it will update the data used in the final rule, which will change the dollar figures. If the final rule were to adopt the proposed salary level of the 40th percentile of weekly earnings, DOL says it would likely rely on data from the first quarter of 2016. The latest data available when the proposed rule was issued were for the first quarter of 2015, in which the 40th percentile of weekly earnings was $951, which translates into $49,452 for a full-year worker. Assuming 2 percent growth between the first quarter of 2015 and the first quarter of 2016, DOL projects that the 40th percentile weekly wage in the final rule would likely be $970, or $50,440 for a full-year worker. Keep in mind this is only an estimate and not the “official” figure. Therefore, you should not be programming any of these figures mentioned into your payroll processing system.

DOL also has proposed that the minimum salary necessary for exemption be updated automatically on an annual basis. It remains to be seen whether this proposal will be implemented and what formula DOL will select for calculating that update.

4. What Changes to the “Highly Compensated Employee” Test Has DOL Proposed?

The 2004 rule changes created a new “highly compensated employee” test for exemption. Under that HCE test, employees who are paid total annual compensation of at least $100,000 (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA’s overtime requirements if they customarily and regularly perform at least one of the exempt duties or responsibilities of an executive, administrative or professional employee identified in the standard tests for exemption.

Now, DOL is proposing to increase the total annual compensation requirement for the HCE test to the annualized weekly earnings of the 90th percentile of all full-time salaried workers (roughly $122,148, but the exact amount will be announced in the final rule).

5. What Changes to the Definition of “Primary Duty” Has DOL Proposed?

To be considered exempt executive, administrative and professional employees, workers must meet certain minimum tests related to their primary job duties. DOL has not proposed any specific changes to the definition of primary duty, but it has signaled that it is considering such changes.

It would not be surprising if DOL’s final rule defines “primary duty” as the duty an employee performs 50 percent of the time. But we’ll have to wait and see.

6. What Changes to the Executive Exemption Test Has DOL Proposed?

Ironically, none. We say “ironically” because one of President Obama’s cited reasons for “modernizing” the exemption regulations is his belief that many exempt managers are actually performing nonexempt duties, especially in retail and fast food outlets.

However, rather than change the definition of “executive,” DOL hopes to change those workers’ statuses by increasing the minimum salary for exemption, with or without changing the definition of “primary duty.”
7. What Changes to the Administrative Exemption Test Has DOL Proposed?
None. However, an increased minimum salary for exemption, with or without changing the definition of “primary duty,” could affect the status of some administrative employees.

8. What Changes to the Professional Exemption Test Has DOL Proposed?
None. However, an increased minimum salary for exemption, with or without changing the definition of “primary duty,” could affect the status of some professional employees.

Note that some professional employees, including lawyers, teachers and physicians, will continue to be exempt without meeting the salary basis test. In other words, it will not matter to them whether the minimum salary level is increased.

9. What Changes to the Computer Employee Exemption Test Has DOL Proposed?
None. However, DOL said it may add examples to the regulations to illustrate the application of the Computer Employee exemption.

10. What Changes to the Outside Sales Exemption Test Has DOL Proposed?
None.

11. How Will the New Rules Affect my Obligation to Track Employees’ Hours?
Employers are required to track the regular and overtime hours worked by nonexempt employees. Once the final rule is issued, you will have to determine which employees are newly nonexempt and adjust your payroll processes accordingly.

12. Are There Exceptions in the Rules For Small Businesses or Nonprofits?
No. Virtually all employers are covered by the FLSA, including private employers, states, local governments, schools and nonprofits. The proposed exemption rules likewise would apply equally to all of those categories of employers. In fact, one of the main criticisms that has been leveled against the proposed rule changes is they fail to take into account that a bona fide manager at a small nonprofit, or even a small for-profit company, might not earn $50,000. Such a person will become nonexempt under the new rules even though he or she is genuinely performing exempt managerial duties.

13. What Must I Do Now to Comply With the Proposed Regulations?
Nothing, because the new rules have not yet taken effect. In fact, we don’t even know what the final rule will say or what the new salary threshold will be, so it would not be responsible to start implementing changes now.

14. What Can I Do Now to Prepare to Comply With the New Regulations When They Become Final?
The most important thing you can do is stay alert so that you know when the final rule is published and what it requires. You might consider signing up for training regarding the final rule.

Some employers have taken steps such as identifying employees earning less than $921 per week who are likely to be newly nonexempt when the final rule is published. However, the actual threshold will almost certainly be a different figure than $921, so be cautious.

15. Do I Have the Right to Comment On the Proposed Regulations?
Unless DOL changes its mind and extends it, the comment period closed on Sept. 4, 2015.

16. If I Disagree With the Published Final Regulations, Can I Stop Them From Taking Effect?
A law called the Administrative Procedure Act permits interested persons to sue to stop new federal regulations from taking effect. For example, when DOL published changes to the FLSA’s “companionship exemption,” a trade association for home care providers sued DOL. That lawsuit was successful at the trial level, but an appeals court recently reversed the decision and ruled for DOL.

17. What Will Be Consequences of not Complying With the Final Regulations?
An employer that violates the FLSA can be liable for double back wages looking back up to three years, plus the employee’s legal fees.

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