The Wait Is Over… DOL’s Proposed Rule Sets Forth the New FLSA Overtime Regulations

Following President Obama’s announcement yesterday, and in keeping with his March 13, 2014 call to “modernize” and “streamline” overtime regulations under the Fair Labor Standards Act (FLSA), the Department of Labor’s (DOL) proposed overtime rule was released today. These highly anticipated changes more than double the minimum salary that an employee must earn to qualify for the so-called “white-collar exemptions” under the FLSA – from the current level of $455 per week ($23,660 per year) to the proposed level of $970 per week ($50,440 per year). The proposed rule comes after intense executive branch scrutiny of the FLSA’s regulations and their impact on the American workforce. President Obama’s 2014 Presidential Memorandum highlighted the need for these revisions, citing the “changing nature of the American workforce” and the failure of the regulations to keep pace “with our modern economy.” Echoing the President’s call, Secretary of Labor Thomas Perez previewed the proposed regulations in early May 2015 on the DOL’s blog, noting that the proposed updates to the FLSA’s overtime protections are aimed at “making sure that millions of workers are paid fairly for a long, hard day’s work.” Overall, the goal of this proposed rule is to re-classify approximately five to ten million workers as non-exempt, making them eligible for overtime protections under the FLSA.

The FLSA, enacted in 1938, established minimum wage and overtime requirements for employees in the private sector and in state, federal and local government. Employers must pay FLSA-covered employees overtime (1.5 times their regular rate) for all hours over 40 in a workweek. Certain employees are exempt from overtime under Section 13 of the FLSA under a set of so-called “white-collar” exemptions “as such terms are defined from time to time by regulations of the secretary.” To qualify as a “white-collar worker” under the current regulations, the employee must receive a salary of at least $455 per week (equal to $23,660 per year) on a salary basis as set forth in 29 C.F.R. § 541 and satisfy the job-duties tests under the Executive, Administrative, or Learned Professional exemptions. For each of the specified exemptions, the employee’s primary duties must encompass the functions described in the current regulations. A primary duty is defined as the principal, main, major or most important duty that the employee performs.

The proposed rule addresses only the so-called “salary basis test” described above. President Obama’s 2014 Presidential Memorandum had highlighted the outdated nature of the current $455 salary threshold, which was last raised by the DOL back in 2004 and unadjusted for inflation. The proposed rule increases this threshold to $970 per week (equal to $50,440 per year). By more than doubling the weekly salary threshold, the classes of employees who qualify for the overtime exemptions will be effectively narrowed, thereby requiring employers to pay overtime to larger segments of their workforces, including employees previously considered exempt. Indeed, the DOL stated that this proposed salary threshold equals the projected 40th percentile of weekly earnings for all
full-time, salaried employees. The DOL also proposed automatically updating the standard salary and compensation levels annually to ensure that the exemption tests maintain effectiveness over time and more accurately distinguish overtime-eligible white collar employees and those who may be exempt.

Importantly, however, the proposed rule does not propose changes to the standard “duties tests” applicable to the “white-collar” exemptions under the FLSA, as some had speculated would be the case. The DOL has stated it is considering whether revisions to the duties tests are warranted. In particular, it highlighted concern that “in some instances the current tests may allow exemption of employees who are performing such a disproportionate amount of nonexempt work that they are not [exempt] employees in any meaningful sense.” The DOL is seeking comments on whether the tests work as intended to screen out employees who are not bona fide exempt employees under the FLSA’s “white-collar” exemptions.

The next step in the rulemaking process is notice and comment, whereby interested parties can submit comments on the proposed rules. The Office of Management and Budget (OMB) has reviewed and approved the Notice of Proposed Rulemaking (NPRM), but the proposed rule has not yet been published in the Federal Register. Once the proposed rule is published, comments may be submitted electronically at http://www.regulations.gov, the Federal eRulemaking Portal, or via mail, within 60 days of the date of publication in the Federal Register.

With the parameters of the proposed rule finally made public, employers can begin to evaluate their workforce composition, assess the potential impact of these changes on their businesses, and determine what role, if any, they want to take individually or through relevant trade associations or other industry groups in the notice and comment process. As the rulemaking process progresses, it will be equally important for employers to assess the need for any organizational and pay practice changes needed in light of the proposed regulation. This undoubtedly will be a significant rule for many employers, and we will continue to monitor and update the Sidley Employment Law Blog with developments.

If you have any questions regarding this Sidley Update, please contact the Sidley lawyer with whom you usually work, or

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