DOL Issues Proposed Rules That Would Entitle More Employees to Receive Overtime Pay

The United States Department of Labor (DOL) has issued proposed rules under the Fair Labor Standards Act (FLSA) that would raise the minimum salary requirements for "white collar" employees to be exempt from the FLSA's overtime rules. The DOL's proposal, once finalized, will significantly expand the number of employees who are entitled to be paid overtime for working more than 40 hours per week, including, as the DOL acknowledges, a number of employees whose job duties would otherwise qualify them for the "white collar" exemptions.

Brief Summary. The FLSA’s "white collar" exemptions, which were last updated in 2004, generally contain a minimum salary requirement and several "duties tests" that must be met in order for an employee to be exempt from the FLSA's overtime rules. The current minimum salary requirement for "executive," "administrative," and "professional" employees (the "white collar" exemptions) is $455 per week ($23,660 per year). The DOL's proposed revisions would increase the minimum salary requirement to the 40th percentile of weekly earnings for full-time salaried workers (which, for 2016, is estimated to be $970 per week, or $50,440 per year). The DOL is also considering whether non-discretionary bonuses and incentive payments to employees can count towards this salary requirement.

The FLSA also has a special test for highly-compensated employees, who under current law must be paid at least $100,000 per year (and satisfy a limited "duties test"). The DOL’s proposal would increase the minimum salary requirement for this special test for highly-compensated employees to the 90th percentile of weekly earnings for full-time salaried workers (which, for 2016, is estimated to be $122,148 per year).

The DOL’s proposal would also provide for a mechanism to update the minimum salary requirements annually.

The DOL has solicited comments on its proposal, and after considering comments from interested parties, the DOL will decide whether to make any changes to its proposal, and will issue a final rule sometime after that. It is expected that the rule will be finalized and effective by the end of 2016 (before President Obama leaves office).

What Should Employers Do Now? Although the final rule may differ somewhat from the current proposal, employers should begin preparing now by reviewing employee classifications for exempt and non-exempt status. In general, employers should review employee classifications to make sure that exempt employees satisfy both the salary requirement and duties tests. In addition, employers should assess which employees are exempt under current law, but would not meet the minimum salary requirement for the exemption under the
proposed rule. Employers should consider how they will handle such employees when the final rule goes into effect (e.g., increasing employee salaries to meet the new minimum requirement for the exemption or changing employee status to treat such employees as non-exempt). Employers should also make sure that they are tracking all hours worked by non-exempt employees and paying such employees overtime for hours worked over 40 per week.

Other Upcoming, Related Developments. While the DOL’s proposal does not propose any changes to the duties tests for the "white collar" exemptions, the DOL has solicited comments on whether, in light of the proposed changes to the minimum salary requirements, changes to the duties tests are also warranted. Comments were specifically solicited as to the question of whether an employee should automatically be considered non-exempt if a certain percentage (e.g., 50%) of his or her duties constitute "non-exempt" duties.

The DOL also announced that, in the near future, it plans to request comments regarding the question of when the use of electronic devices outside of scheduled work hours by non-exempt employees will entitle them to overtime (for example, if a non-exempt employee spends ten minutes over the course of a weekend checking his iPhone for work emails, without actually responding to any emails or doing any work, does he need to be paid for those ten minutes?). The DOL will likely address this issue separately. This latter development is an important one. As part of any review prompted by the DOL’s proposal, employers should also consider their policies on allowing non-exempt employees to use their electronic devices for work purposes during non-working hours.

Reminder About State Law. As a reminder, the FLSA sets the minimum rules for overtime. States are free to enact greater protections, and many have done just that. Employers should be mindful of applicable state laws that impose additional requirements for an employee to satisfy an exemption from state overtime rules.

*                    *                    *

Our client alerts are for general informational purposes and should not be regarded as legal advice. If you would like additional information or have any questions, please contact:

David Gallai  
+1 (212) 408-1033  
dgallai@chadbourne.com

Marjorie M. Glover  
+1 (212) 408-1016  
mglover@chadbourne.com

Rachel M. Kurth  
+1 (212) 408-5185  
rkurth@chadbourne.com