

## EMPLOYMENT LAW

### Employers: Prepare to Reclassify Employees

Ranks of OT-eligible employees will swell by an estimated 5 million, under proposed DOL rules



By Kathleen M. Connelly

The U.S. Department of Labor’s (DOL’s) long-awaited proposals overhauling the “white collar” exemptions (which include the executive, administrative and learned professional exemptions) to the overtime requirements of the Fair Labor Standard Act (FLSA) have finally arrived.

Other existing exemptions under the FLSA are not affected by this round of proposed DOL regulations. According to DOL estimates, the new rules will result in approximately 5 million employees who were

*Connelly is a partner in the Employment Group at Lindabury McCormick Estabrook & Cooper in Westfield. She represents employers and individual members of management in both the private and public sectors.*

**Employers should undertake an audit of all positions to identify those that will likely be subject to reclassification when the final rules are implemented.**

previously exempted from overtime requirements being reclassified as nonexempt employees eligible for overtime. Employers must prepare for these dramatic changes that will have significant adverse economic consequences for many. This article addresses the key changes facing employers when the DOL regulations become final which is expected to occur later this year.

- *Salary threshold for white collar exemptions more than doubled to \$970.* Under present FLSA regulations, employees who meet regulatory minimum salary requirements and perform certain job duties may be classified as exempt employees and therefore

ineligible for overtime payments. Those employees who do not meet these requirements are classified as “nonexempt” employees and are eligible for payment at one and one-half times their regular rate for all hours worked in excess of 40 hours in a workweek.

The current salary threshold to qualify for the white collar exemptions is \$455 per week, or \$23,660 annually, a level that has remained unchanged since 2004. In his comments about the need to tighten up the scope of the current exemptions, President Obama wrote that “too many Americans are working long days for less pay than they deserve.” As part of its efforts to rectify this

situation, the DOL's proposed FLSA regulations significantly increase the salary threshold to the 40th percentile of weekly earnings for full-time salaried workers, which is estimated to be as high as \$970 per week, or \$50,440 annually, in 2016.

The DOL is seeking comments from employers about the possibility of including nondiscretionary bonuses to meet the threshold salary requirements. With the exception of calculating compensation for highly compensated employees (discussed in the following section), only the employee's actual salary is currently considered when calculating salary.

Employers who in the past relied upon the white collar exemptions to avoid overtime liability may now be faced with the Hobson's choice of increasing the salaries of previously-exempt employees who otherwise would no longer meet the salary threshold to preserve the exemption, or accept the reclassification and undertake efforts to minimize overtime hours for these newly nonexempt employees. Not surprisingly, the proposed changes are expected to disproportionately affect nonprofit and service-sector employers, as well as certain geographic regions of the country that typically pay wages below national averages.

• *Increases to the compensation level for highly compensated employees.* Another exemption available to employers is for highly compensated employees (HCE's) who earn in excess of \$100,000 annually. The DOL is proposing to raise the compensation threshold for the HCE exemption to the 90th percentile of weekly earnings for full-time salaried workers, or \$122,148 annually.

• *New automatic increases in the salary threshold.* To ensure that minimum salary levels do not become outdated and ineffective between rule-making initiatives, the DOL is proposing two alternative methods for automatically increasing the salary threshold and compensation levels for HCEs based on percentage of earnings for full-time salaried workers or based on changes to inflation. The DOL is seeking comments on which methodology would be the most appropriate for implementing the annual increases.

• *No changes—yet—to the duties requirements of the white collar exemptions.* The salary level test discussed above works

in tandem with a "primary duties" test that must be also be met to qualify for the white collar exemptions. The current regulations have separate duties tests for the executive, administrative and professional exemptions. Although the DOL is not proposing changes at this time, the department is seeking comments from stakeholders on several issues, including whether employees should be required to spend a minimum amount of time (e.g., 40 percent, or 50 percent as required under California's wage-and-hour laws) engaged in "primary duties" to qualify for the exemption; whether these tests "are working as intended to screen out employees who are not bona fide white collar exempt employees;" and whether additional examples of occupations that qualify for the exemptions should be added to provide employers guidance in administering the FLSA exemptions. Employers need to stay tuned for additional changes to the duties test implemented by the DOL in response to stakeholder comments.

• *Additional guidance on the exemptions available for computer-related occupations:* Employers and the courts have expressed frustration with the application of the white collar exemptions to individuals in the computer field. In an effort to provide further guidance in this complex area, the DOL's 2004 revisions provided specific examples of computer industry occupations (such as systems analysts and computer programmers) which, on a case-by-case basis, might qualify for the professional and/or administrative categories of the white collar exemptions. Although the DOL has announced that it will not expand the current exemptions for computer employees, the Department is examining the possibility of listing additional illustrative examples of computer-related positions that typically do or do not fall within the white collar exemptions. Acknowledging the "tremendous rapid pace of significant changes occurring in the information technology industry," the DOL is requesting stakeholders in these fields to provide comments about the additional occupational titles or categories that should be included as examples, along with the duties that are typical to each title and what would cause these positions to meet or not meet the professional or administrative white collar exemption criteria.

• *The DOL's comment deadline.* The DOL has invited interested parties to submit written comments on the proposed rule at [www.regulations.gov](http://www.regulations.gov) on or before Sept. 4. Only comments received during the comment period will be considered part of the rule-making record. Thereafter, the DOL will consider whether the comments warrant additional changes to be incorporated into a final rule. The Department has not indicated when it expects to issue a final rule.

• *What employers should do now.* The final rule ultimately adopted by the DOL will require many employers to reclassify a significant number of exempt employees to non-exempt status, which in turn will necessarily require increased tracking of hours worked by these employees. Employers must be prepared to undertake the administrative burden of training these new nonexempt employees on the employer's time-keeping procedures, complying with meal and break policies, and company restrictions on working outside normal work hours and other compensable time issues.

If necessary, employers should restrict nonexempt employees' access to the employer's computers to normal working hours, as the time spent by a nonexempt employee checking work-related emails and other documents during nonworking time could be deemed compensable. Employers should also develop strategies for minimizing overtime hours worked by these newly nonexempt employees or, in the alternative, raising the salaries of these employees to preserve their exempt status under the new minimum salary requirements. Moreover, reclassified employees often perceive a change in status to an hourly employee as a demotion, so employers must effectively communicate the reasons for the changes with employees to avoid a potential employee-relations disaster.

Finally, employers should undertake an audit of all positions to identify those that will likely be subject to reclassification when the final rules are implemented. Given the complexity of the exemption requirements, as well as the need to preserve the attorney-client privilege when making these difficult determinations, it is strongly recommended that employers conduct their classification audit under the guidance employment law counsel with experience in wage-and-hour classification issues. ■