

Cooley

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On June 30, 2015, the United States Department of Labor ("DOL") proposed a rule to revise the "white collar" overtime exemptions under federal law. The federal Fair Labor Standards Act ("FLSA") generally requires that employees receive overtime pay of one and one-half times their regular rate of pay for all hours worked over 40 hours per week. However, there are a number of exemptions. Under existing FLSA regulations, employees who earn at least \$455 per week (\$23,660 per year) and who satisfy the so-called "duties test" by performing certain executive, administrative, or professional type duties, are exempt from overtime pay. A relaxed duties test applies to "highly compensated" employees who earn at least \$100,000 per year.

The DOL's proposed rule would restrict these overtime exemptions by more than doubling their salary floors. The minimum salary to qualify for the executive, administrative, and professional overtime exemptions would be increased to \$970 per week (\$50,440 per year). The minimum salary to qualify for the "highly compensated" employee exemption would be increased to \$122,148 per year. The DOL proposes automatically updating these thresholds by tying them to either inflation or the 40th percentile of weekly earnings for full-time salaried workers (90th for highly compensated employees). According to the DOL, these changes could extend overtime pay to roughly 5 million previously exempt workers and result in as much as \$1.27 billion in required additional annual income for the affected employees.

The DOL's proposal to increase these salary thresholds does not include any changes to the duties test. But the proposed rule does call for comments on "whether the tests are working as intended," signaling that the DOL may alter the duties test in the final rule. The DOL also calls for comments on whether nondiscretionary bonuses (i.e., bonuses conditioned at the outset of the payment period on meeting certain criteria, such as production goals or work quality) should be included in determining whether an employee meets the minimum salary thresholds for the executive, administrative, and professional overtime exemptions.

The DOL has opened a 60 day comment period, after which it will publish a final rule. Employers should keep watch for the final rule, which is likely to go into effect sometime in 2016. Employers will need to be prepared to modify human resource policies and payroll practices once the final rule is in place. Exempt employees who no longer meet the minimum salary thresholds will have to be converted to non-exempt status, or their salaries raised to satisfy the new thresholds and remain exempt from overtime. Employers will have to pay overtime (and provide meal and rest breaks in the state of California) to employees converted to non-exempt status. In addition, state and federal laws require employers to maintain accurate records of non-exempt employees' hours worked, meal periods, split shift intervals, and other wage and hour related particulars.

Our attorneys have deep counseling and litigation experience on these issues. To discuss these issues further or pose questions about this *Alert*, please contact one of the attorneys listed above.

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