



Pushback Against USDOL's Exemption Proposals

Insights

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The period for public comment on the U.S. Labor Department's proposed revisions in the regulations defining the federal Fair Labor Standards Act's Section 13(a)(1) exemptions ended on September 4. Nevertheless, efforts are being made to forestall the release of the proposed changes, or at least to influence the final form of the revised regulations.

Employer Group Writes To Congress

Earlier this week, a coalition of employer associations and advocacy groups known as the Partnership to Protect Workplace Opportunity asked members of the Senate and the House of Representatives to contact USDOL, the Office of Management and Budget, "and others within the Administration" to "urge them to reconsider" the proposed changes. PPWO pointed out that the current proposals would both curtail important workplace flexibilities and limit employees' career-advancement opportunities.

The letter also criticized what the coalition sees as being USDOL's inadequate and ill-founded analysis of the "devastating" economic and financial impact of what the agency seeks to do. PPWO referred to related concerns raised even by the Small Business Administration, the head of which is a member of President Obama's cabinet. We are aware that other employer groups have directed similar objections to the OMB.

Congressional Outreach

According to Bloomberg BNA, members of Congress have been talking with USDOL in an effort to convince the agency to set the exemptions' salary minimum at a level below the proposed \$921 a week (projected by USDOL to be \$970 a week by the time the regulations are issued). In this regard, House Workforce Protections Subcommittee Chairman Tim Walberg (R-Mich) reportedly referred to lawmakers' request that USDOL establish instead a salary minimum annualizing to \$36,000 (presumably, a rate of a little more than \$692 a week).

Representative Walberg's remarks indicated that, if USDOL's response to these discussions is not acceptable to Congress, an effort might be made to block the final regulations under the Congressional Review Act, 5 U.S.C. §§ 801-808. This law provides for declaring a "major rule" to be without force and effect if a disapproval resolution is enacted. If the President vetoes the resolution (which in this instance would seem likely), then the measure would be effective only if Congress overrode the veto by a two-thirds vote in both the House and the Senate.

The Bottom Line

One can certainly hope that these laudable initiatives will have the intended results.

However, we are not optimistic that the proposed changes will be reconsidered and revised in any material way as a result of these efforts, or that their issuance will be postponed beyond the time that USDOL concludes the regulations are ready for publication. And we currently see no reason whatsoever to believe that the new minimum salary will be anything nearly so low as an annualized \$36,000.

We continue to recommend that employers move ahead with their analysis and planning so that they will be ready to move whenever this becomes necessary. Moreover, they would be wise to do this against the backdrop of USDOL's proposals that were officially published in July. Employers should not count on the success of any of these pushback efforts and should not anticipate that the eventual salary minimum will be 25% or more lower than USDOL has proposed.