



Evaluating USDOL's Proposals: Avoid Dangerous Assumptions

Insights

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Employers are of course continuing to evaluate the impact of the U.S. Labor Department's proposed increase in the minimum dollar amount for the federal Fair Labor Standards Act's Section 13(a)(1) exemptions' salary requirement.

However, judging from some of the already-filed comments and other recent statements we have seen, some might be doing so on the basis of flawed thinking.

Annualized Compensation Isn't The Test

Much ongoing discussion has referred to the proposed higher amount in *annualized* terms. The current proposal of \$921 annualizes to \$47,892, whereas USDOL's projected 2016 level of \$970 comes to \$50,440. Understandably, it might make sense for some business-planning purposes to focus upon 52-week equivalents.

But it is important to remember that, in most instances (see [this post](#) for a summary of the more-common exceptions), an employee for whom one of these exemptions is claimed *must be paid on a "salary basis"*. USDOL's regulations define this to mean that the employee "regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.602(a). The requirement must therefore be satisfied each *pay-period*.

This means that, at a \$970-a-week minimum, for instance, an employee who was not paid on a "salary basis" at a rate equivalent to at least that amount each pay period would fail to satisfy this exemption component, even if she earned \$60,000 in a year. On the other hand, an employee who was paid \$2,500 on a "salary basis" each semi-monthly pay period would meet this test, even if he earned only \$30,000 in a year because he worked on a seasonal basis for six months.

Exempt At Any Salary?

Employers must also bear in mind that the salary level and the "salary basis" are only *parts* of the analysis. Maintaining the status of exempt employees is not necessarily just a question of meeting whatever the new salary threshold turns out to be. Instead, management should also reconsider whether employees being treated as falling within these exemptions meet the duties requirements *today*, that is, whether an employee's status is questionable regardless of his or her current or future salary amount.

In fact, simply raising such an employee's salary on a mistaken assumption that the person is exempt could make matters worse if he or she is later determined to have been non-exempt. For example, the FLSA exposure based upon a salary of \$600 a week could be appreciably less than at a salary of \$1,000 a week.

The Bottom Line

Employers should avoid being distracted by generalities that are not based upon these exemptions' specific compensation requirements.

Also, this is a prime opportunity to evaluate the status of all employees management classifies as being exempt. If there is doubt about one or more of them, then it is time to consider:

- Whether it is possible to bolster that status appreciably, and if so how; or
- If that is not possible, how to go about re-classifying the employee, including by deciding what FLSA-compliant pay plan is best.