Evaluating The Impact Of USDOL's Salary Proposal

Insights
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The U.S. Labor Department has of course proposed a substantial increase in the minimum salary amount required to meet the basic compensation criterion for an executive, administrative, professional, or a derivative exemption under the federal Fair Labor Standards Act's Section 13(a)(1).

There appears to be some misunderstanding or uncertainty about particular aspects of how an employer should undertake to evaluate whether and to what extent this possible increase would affect employee compensation.

Whom Does It *Not* Affect?
Remember first that this salary level is irrelevant to some segments of the nation's workforce.

One such group consists of non-exempt employees who are paid on a salary-plus-overtime basis. In other words, the potential salary change would not represent some generalized requirement to pay salaried, *non*-exempt employees at the minimum salary rate.

Others as to whom there would be no impact are employees who meet the tests for one of the Section 13(a)(1) exemptions to which the salary requirement does not apply. These include:

Salespeople falling within the "outside salesman" exemption;

- Employees qualifying for the "teaching professional" exemption;
- Employees authorized to practice law who are actually practicing law;
- Employees authorized to practice medicine or any of its branches who are actually engaged in the relevant practice;
- Employees holding the degree required to practice medicine who are working in a medical internship or residency; and
- Employees whose work meets the computer-employee exemption requirements who are paid on an hourly basis at a rate of at least $27.63.
- Neither would the increased salary threshold affect the status of employees who are exempt from the FLSA's minimum-wage or overtime requirements on some basis *other than* one of the Section 13(a)(1) exemptions. There are too many of these to list here, but an example is the Section 7(i) overtime exception for retail employees paid under a commission pay plan.

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What Should Be The Analytical "Benchmark"?
Some employers are conducting their evaluations on the assumption that $921 per week (annualizing to $47,892) is the proper comparator. It is true that, strictly speaking, this is USDOL's current first-step proposal.

However, indications are that, due to USDOL's proposed automatic-"update" approach, $970 per week (annualizing to $50,440) – or maybe even more – would soon come to be the minimum. In fact, it is entirely possible (if not probable) that, by the time the proposal actually takes effect, this figure or a higher one will control.

Employers who are viewing this from the standpoint of longer-range planning and budgeting would be wise to project for now that the minimum salary would move up steadily and would head toward an annualized level in the mid-$50,000s in the not-too-distant future.

In a related vein, USDOL has asked for comments on whether "nondiscretionary bonuses and incentive payments" should be credited to at least some extent in meeting the salary test. The agency says that it would be inclined to limit any credit to no more than 10% of the salary threshold and to require settlement no-less-frequently than monthly. At present, USDOL would not include commissions in this approach, but it has also invited comments on the point. Whether, in what form, and to what extent any credit mechanism might be included in final regulations are probably too speculative to warrant including this in any forecasting.

The Bottom Line
If the proposed salary threshold would cause some employees to become non-exempt, then there are alternative ways to pay in compliance with the FLSA's minimum-wage and overtime requirements at levels that are financially palatable. In addition to the ones we have mentioned previously, other methods could be built around commission-based plans; day-rate, job-rate, or shift-rate payments; and a variety of other approaches.

However, we urge employers not to become so focused upon the effects of the current proposals that they make no effort to influence what the ultimate outcome of the process might be. Please consider submitting comments, which are currently due by *September 4, 2015*.

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