



USDOL To Publish "White Collar" Exemption Information Request (Updated 07 26 17)

Insights

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By: The Editor

UPDATED 07 26 17: The U.S. Department of Labor's Request for Information has now been officially published in the *Federal Register*.

A U.S. Department of Labor Request for Information will be published tomorrow morning to seek additional public comment regarding the 2016 compensation revisions in the regulations defining the federal Fair Labor Standards Act's so-called "white collar" exemptions. The agency has now released a preview of the document that will appear in the *Federal Register*.

USDOL is undertaking this initiative while at the same time moving forward with a partial defense in the litigation that prompted a nationwide federal-court preliminary injunction last November.

The RFI contains eleven broad questions, most of which further pose a variety of related sub-inquiries. Among the topics to be explored are:

- ◇ How USDOL should go about "updating" (a euphemism for "increasing") the threshold salary amount(s) to be used to define exempt status, including whether there should be multiple levels varying by employer-size, state, census regions or divisions, or other statistical or geographical areas;
- ◇ Whether and how these same considerations should be applied with respect to the Highly-Compensated Employee total-annual-compensation minimum;
- ◇ Whether and in what ways these compensation matters affect the duties-related exemption requirements, whether and how the duties-tests should therefore be expanded or otherwise revised, and whether and according to what criteria there should be a duties-only exemption category;
- ◇ Whether there should be a salary threshold for the executive and administrative exemptions that is lower than the one for professional employees (as was the case under the "long test" for exempt status that was discontinued in 2004);

- ◇ Whether and on what basis the compensation thresholds should be "automatically updated";
- ◇ Whether the 10% limit upon using non-discretionary bonuses, incentive payments, and/or commissions to satisfy part of the salary threshold is the "appropriate" cap, and whether the amount of the salary threshold should be "relevant" to the crediting of these sums;
- ◇ Whether, in what ways, and with what effect employers took steps to modify employee compensation, schedules, or worktime in anticipation of the 2016 changes and/or after the federal court's preliminary injunction.

The RFI does not say explicitly that a lower-than-\$913-per-workweek threshold will ultimately be proposed and adopted. However, there is reason for optimism that this will be done, including that issuing the RFI would otherwise seem to serve little purpose.

USDOL will receive comments for a period of 60 days, or through *Monday, September 25, 2017*. Employers should give serious consideration to submitting substantive responses.