# Firm Responds To USDOL's Exemption-Related "Request for Information"

Insights
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Fisher Phillips filed its own, extensive remarks (see link below) yesterday in response to the U.S. Department of Labor's Request for Information seeking additional public comment regarding the 2016 compensation revisions to the agency's regulations defining the federal Fair Labor Standards Act's so-called "white collar" exemptions.

The RFI contained eleven broad questions and numerous subparts, many of which touched upon matters we raised in our 2015 Comments concerning the revisions proposed at that time. The components of the 2016 Final Rule were somewhat different from the earlier proposals. The RFI sought feedback on the Final Rule's provisions, as well as on some of the possibilities that USDOL had hinted at in 2015.

**Our View: Consider a New Direction**

Most notably, we have detailed why the "salary-basis" requirement, let alone a minimum dollar threshold set at practically *any* level, is unavoidably problematic. We contend that both the "salary basis" and the salary threshold should be eliminated from the regulations altogether. We further argue that a duties-only test based upon the current standards is preferable to a dual-prong one in which the salary component can outweigh the nature of the work in determining whether an employee is exempt.

We propose in the alternative that the agency consider eliminating the separate "salary basis" and "salary-amount" requirements in favor of revising these exemptions' "primary duty" test to add two, additional pertinent factors that could be considered when an employee's exemption status is a close question:

◊ Whether the employee is paid on a "salary basis", and

◊ The amount of compensation the employee receives on a "salary basis" as compared to the wages regularly received each workweek or pay period by employees whom the employer treats as being nonexempt.

We also recommend that, if this is done, USDOL should still continue to evaluate the employee's *overall* compensation as compared to that of nonexempt employees.

The form and level of compensation could thereby be taken into account along with other important considerations with respect to an employee whose status is truly "borderline" or otherwise unclear. Those elements could then serve as the kind of "practical guide" that originators of the salary component said they had in mind in adopting it in 1940 (around two years after the first exemption regulations were published).

**Other Recommendations**

We have further recommended that, if USDOL proposes a new minimum salary threshold (presumably somewhere between $455 per week and $913 per week) and possibly an updating mechanism, it should avoid:

- A substantial increase in the weekly minimum salary threshold;
- Applying the erroneous rationales and flawed information used in the 2016 analysis;
- Tying the salary threshold to changes in inflation;
- Multiple salary thresholds;
- Limitations on "crediting" non-discretionary payments;
- Any "update" mechanism without restrictions (such as a per-revision cap and a safety-valve for exceptional circumstances); and
- A notice period of less than 12-months.

We have also opposed any percentage-based or similarly-predicated effort to quantify nonexempt work. In addition, based upon our experience with employers as they have struggled to come to grips with the 2016 Final Rule, we have suggested that any dollar-threshold increase implemented as an outgrowth of the RFI be phased-in over a three-year period.

**The Bottom Line**

These matters and others are discussed in more detail in our actual presentation. USDOL will now analyze and evaluate the feedback received as part of its next steps. It is difficult to predict when or how the agency will proceed.

We have urged USDOL to issue a remedial Interim Final Rule as soon as possible that has immediate effect and that is also subject to expedited notice-and-comment. Given that the legal status of the 2016 revisions is still a subject of dispute, combined with the significant negative impact that the current confused and uncertain state of affairs is having upon a large number employers and employees, we believe that this step would be authorized under the federal Administrative Procedure Act's "good cause" exception.

Fisher Phillips RFI Responses