



Salary-Threshold Autopilot Still Possible

Insights

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A BloombergBNA report suggests that the U.S. Department of Labor is seriously considering retaining the Obama Administration's procedure (or something like it) for automatic "updates" to the compensation thresholds specified in the federal Fair Labor Standards Act's Section 13(a)(1) exemption regulations. Apparently, U.S. Labor Secretary Acosta recently revealed this in closed-door remarks to the U.S. Chamber of Commerce.

Every indication so far is that USDOL has used "update" as a euphemism for "increase".

USDOL's Request for Information published in July asked, "Should the standard salary level and the highly compensated employee total annual compensation level be automatically updated on a periodic basis to ensure that they remain effective, in combination with their respective duties tests, at identifying exempt employees?" Many respondents argued that the correct answer is, "No".

However, according to this latest revelation, Secretary Acosta has now tied the concept to a supposed need to "keep pace with inflation" where these thresholds are concerned.

Still A Bad Idea

This proposition has no more merit now than when it was first proposed and later adopted by the Obama Administration. As Fisher Phillips contended in 2015 and again in September in responding to USDOL's information request:

◇ Whether any "update" is appropriate, and, if so, what the "update" should be, are matters more-appropriately evaluated in separate, substantive USDOL proceedings undertaken for the express purpose of making inherently-subjective and necessarily-imprecise judgments about the specific, relevant circumstances existing at that time.

◇ There is significant reason to question whether whatever factors and/or reference-points are enshrined in an automatic-"update" regulation will remain pertinent and all-encompassing into the unforeseeable future. This is no doubt one reason for USDOL's having long recognized that, due to subjective considerations and intrinsic uncertainties, "the line of demarcation between the salaries of white collar employees who are [non-exempt] and those who are exempt . . . cannot be reduced to a standard formula." 80 Fed. Reg. 38527 (July 26, 2015).

- ◇ Since at least 1949, USDOL *itself* has strongly disfavored using inflation as a basis for changes in the salary threshold. The agency has predicated adjustments upon that factor only in exigent circumstances. Regular, orderly reevaluations that take into account the myriad elements that must be considered will eliminate (or at the least drastically minimize) the prospects that USDOL will face any such exigencies in the future.
- ◇ That USDOL has through administrative neglect allowed many years or even decades to go by without reconsidering the salary threshold is no adequate justification for abdicating its responsibilities to some unavoidably-insufficient autopilot mechanism.
- ◇ USDOL continues to have made no commitment to undertake a thorough analysis of these compensation levels *at all* in the future, let alone to do so regularly. It could be that, for many years or even decades to come, the prevailing thresholds will represent nothing more than the cumulative impact of applying "a standard formula" to whatever figures USDOL proposes as a result of its Request for Information.
- ◇ Any approach based upon or similar to the Obama Administration's "update" mechanism will likely have the effect of artificially skewing the compensation thresholds upward.
- ◇ Automatic "updates" will circumvent the important notice-and-comment requirements of and interests embodied by the federal Administrative Procedure Act.

The Bottom Line

In order to adopt a mechanism different from the one chosen by the prior administration, USDOL must first propose a regulation to that effect. If and when this occurs, employers will have an opportunity to review the provision and to submit their views to the agency. But experience suggests that, once an automatic "update" provision reaches the notice-and-comment stage, USDOL might be so invested in it that the agency will be reluctant to back-away from the proposal.

Furthermore, USDOL might instead decide simply to leave the 2016 "update" regulation in place in hopes that the agency's appeal of September's ruling against the Obama Administration's changes will be successful.

Employers who oppose automatic "updates" in all eventualities might therefore consider writing to Secretary Acosta *now* to make their opinions known.