



FLSA Exemptions And "Fighting Poverty"

Insights

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We have written previously about President Obama's directive to change the requirements for who falls within the federal Fair Labor Standards Act's Section 13(a)(1) "white collar" exemptions for executive, administrative, and professional employees (as well as for outside-sales employees and other, derivative categories included at 29 C.F.R. Part 541). The virtually-certain outcome will be U.S. Labor Department regulatory proposals that are intended to reduce the number of employees who can meet the tests for exempt status.

The American Action Forum think-tank recently published the results of its research evaluating the effects of a possible increase in the regulations' current minimum salary figure of \$455 per week (perhaps by 100% or even more). AAF's report addresses whether this would be "an effective way to fight poverty." AAF concludes among other things that, although USDOL "will specifically try to help . . . workers by raising the salary level test":

- Under 1% of "salaried workers" live in poverty, and few will be affected by "expansions" of the FLSA overtime requirements;
- Between about 70% and 90% percent of those who would be affected have family incomes that are at least twice the poverty level;
- The change would "help" no more than about 7% of "salaried workers" (maybe as little as one-half of 1%) and is unlikely to "improv[e] the livelihood of low-income families..."

This is an interesting statistical exercise, but it deals with matters that are entirely irrelevant to where the salary amount should be set.

What Is The Salary Level's Purpose?

USDOL's role under Section 13(a)(1) is confined to "defin[ing] and delimit[ing]" the white-collar exemptions. Since 1940, the salary level has served as one means by which USDOL has carried out its responsibility to differentiate between who does and does not fall within these exemptions.

The rationale was that whether an employer genuinely viewed a person's work as being of exemption-worthy importance could be judged in part by the amount the employer paid for that work. The threshold figure selected has historically set a floor (acknowledged by USDOL to be inexact) serving as a "practical guide" in "borderline cases" for "screening out the obviously

nonexempt employees." *Report and Recommendations on Proposed Revision of Regulations, Part 541* (U.S. Labor Department, March 1958) at 2-3.

In selecting the threshold, USDOL has studied available data relating to the amounts paid to salaried employees at the time the evaluation was being done. Factors it considered have included such things as differing wage levels and compensation structures in different industries; real prevailing salary levels among employees across the nation; varying economic conditions in different geographic regions; the dissimilar circumstances of large cities versus small towns and rural areas; the concerns of small businesses; and potential inflationary impact. USDOL has then established a level toward the lower end of this range in order to accommodate the wide variations across the U.S.

It's Not A Minimum Wage for Exempt People

But USDOL has *never* established the rate based upon the necessarily *policymaking* formulation of how much exempt employees "ought to be" paid, whether due to poverty concerns or otherwise.

In fact, USDOL has expressly acknowledged that it may *not* do so and has disclaimed any such consideration as being a proper exercise of its charge under Section 13(a)(1). Over 65 years ago, the official then responsible for re-evaluating the threshold said:

The [U.S. Wage and Hour] Administrator *is not authorized* to set wages or salaries for executive, administrative, and professional employees. Consequently, *improving the conditions of such employees is not the objective of the regulations*. The salary tests . . . are essentially guides in distinguishing bona fide executive, administrative, and professional employees from those who were not intended by Congress to come within these categories. Any increase in the salary levels . . . must, therefore, have as its primary objective the drawing of a line separating exempt from nonexempt employees *rather than the improvement of the status of such employees*.

Report and Recommendations on Proposed Revision of Regulations, Part 541 (U.S. Labor Department, June 1949) at 11 (emphasis added).

The Bottom Line

USDOL's sole authority under Section 13(a)(1) is to issue regulations that properly distinguish exempt employees from non-exempt ones consistently with the intent of Congress.

It has no power to set a salary level based upon notions of "helping" exempt employees financially, improving their working conditions, or "fighting poverty". These are not legitimate considerations, and the debate should not be conducted as if they are.