FLSA Exemptions And "Overtime Rights"

Insights
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We continue to follow developments relating to President Obama's directive that the U.S. Labor Department "modernize and streamline" its regulations governing the federal Fair Labor Standards Act's Section 13(a)(1) executive, administrative, professional, and "outside salesman" exemptions. For employers, the signs remain ominous.

The Salary Level

Pressure mounts to increase the current minimum salary for exempt status by over 200%. For example, the Center for American Progress is contending that the threshold should jump from its present level of $455 per week (annualizing to $23,660), to "at least" an annualized sum of $50,000 (or about $960 per week). CAP's rationales typify the proponents' thinking: Today's salary amount (which was purportedly too low to begin with) has been eroded by inflation; the nation can "afford" to pay overtime to a larger proportion of employees; and the number of "middle-class workers" (whatever that means) having "guaranteed overtime rights" is supposedly shrinking to an unacceptable extent.

As do many ongoing discussions of the matter, these propositions misconstrue the reason for the salary test: This criterion is just one of the tools used (along with the exemptions' duties-requirements, which must also be satisfied if an exemption is to apply) to carry out USDOL's statutory responsibility to delineate who is and is not exempt. *That's it.*

By contrast, USDOL has recognized for at least 65 years that:

- It is not empowered to regulate the wages of employees under these exemptions;
- Setting the salary level for a purpose other than defining the exemptions is inappropriate; and
- The salary threshold should serve as a "as a guide to the classification of...employees and not as a barrier to their exemption."

But establishing a barrier to the exemption of "middle-class workers" is exactly what advocates of doubling the amount appear to want.

Neither has USDOL resorted to inflation or to vague notions of buying-power to establish the salary threshold. It has instead looked at the facts concerning, and/or the impact upon, 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, among other factors. These kinds of considerations are at least as important today as in the past.

A Minimum "Exempt Work" Percentage?

Also troubling for employers are intimations that USDOL might impose a requirement that an exempt employee must spend a specified proportion of his or her time (such as more than 50%) performing exempt work. An alternative approach to the same effect would be a 50% limitation upon the amount of non-exempt work that an employee could perform if he or she is to remain exempt.

One indication that this might be in play appeared in the HR Policy Association's recent letter to U.S. Labor Secretary Thomas Perez growing out of a late-May meeting. The correspondence said in part that "a rigid duties test based upon a minimum percentage of time spent performing exempt duties would be exceedingly onerous and potentially unworkable." The letter does not say whether this was in response to a possibility expressly raised at the meeting.

Moreover, CAP's otherwise-salary-focused paper observed that "no percentage breakdown is given" as to how much time an employee must spend in exempt work. It is no stretch to surmise that this hints at a discussion point among those whose aim is to curtail the exemptions' application.

And an exemption-related bill introduced in the U.S. Senate earlier in the year, S. 2486, also addresses this concept. If it was enacted, the bill would require that, to be exempt, an employee "shall not spend more than 50 percent of such employee's work hours in a workweek on duties that are not exempt . . .." Presumably, the provision's supporters have been in touch with USDOL about it.

For more than six decades, USDOL has said that whether an employee spends more than half of the time in exempt work is "a useful guide" but "not the sole test." If USDOL's longstanding view is to be abandoned now, Congress or the courts might be interested in evaluating why.

The Bottom Line

Many commentators are clearly motivated by a desire to reduce the number of workers eligible for these exemptions in the interests of achieving a policy goal of expanding "overtime rights". This is an entirely different undertaking from the *definitional* process that is actually called for by the FLSA's Section 13(a)(1). Congress decided to exempt these kinds of employees; whether to modify the exemptions now for the purpose of implementing public policy is for Congress to determine.

Which tack USDOL will take remains to be seen. In any event, employers should be ready for a quick response once the proposed revisions are actually released (in November, according to USDOL's agenda). [*Editor's Note*: The U.S. Labor Department now says that the target for publishing a Notice of Proposed Rulemaking is February 2015.]