



President Seeks To Curtail FLSA "White Collar" Exemptions

Insights

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President Obama has instructed the U.S. Labor Department to revise the federal Fair Labor Standards Act's so-called "white collar" exemptions in a ["Presidential Memorandum"](#) released on March 13. This effort is intended (as the *New York Times* [put it](#) apparently in light of a White House briefing) to "force American businesses to pay more overtime to millions of workers . . ."

Since the FLSA's 1938 enactment, its Section 13(a)(1) has exempted executive, administrative, professional, and outside-sales employees from its minimum-wage and overtime requirements. The FLSA specifically tasks the U.S. Labor Secretary (not the President) with "defin[ing] and delimit[ing]" these exemptions. The current regulations were last revised in 2004.

Broadly speaking (and with some exceptions), the relevant requirements are that these exempt employees must (1) be paid on a "salary basis" at a rate of not less than \$455 per week, and (2) perform duties falling within particular descriptions and parameters. There are as yet no detailed proposals for what changes might be made in these regulations (at least none that have been released publicly), but it appears that both an increase in the minimum salary amount and a tightening of the duties criteria are on the way.

Much Confusion And Loose Talk

The media have perpetuated a good bit of misleading or distorted information (and some outright nonsense) about both the exemptions themselves and this most-recent development.

Some reports speak as if specific revisions are imminent "a pen and a phone" propositions. On the contrary, any modifications are subject to time-consuming Administrative Procedure Act notice-and-comment procedures and other reviews. From proposal to effective date, steps leading to the 2004 revisions spanned approximately 17 months. This does not count developmental time leading to proposals published for comment in March 2003. USDOL attempts to shortcut or substantially truncate the necessary processes are likely to increase any modifications' vulnerability to court challenges.

Other commentators suggest that inflation has allegedly "eroded" the \$455 threshold so much that a minimum-salary increase to something in the range of \$900 to \$1,000 is warranted. The truth is that (i) the inflation-adjusted figure would be a little more than \$560, and (ii) USDOL has for decades

rejected rote inflation-adjustment as being a desirable basis for setting the amount, because that approach gives no weight to other important considerations.

As in the past, the amount set must take into account actual facts concerning, and/or the impact upon, differing wage levels and compensation structures in different industries and localities; real prevailing salary levels among salaried employees across the nation; varying economic conditions in different geographic regions; the dissimilar circumstances of large cities on one hand and of small towns and rural areas on the other; the concerns of small businesses; potential inflationary implications, and a host of other factors. It is also worth recalling USDOL's long recognition that it has no authority to establish a "minimum wage" for exempt employees or to set a salary threshold based upon notions of what will best "protect" their working conditions.

The *New York Times* article quoted one supposedly knowledgeable individual as saying, "Under current rules, it literally means that you can spend 95 percent of the time sweeping floors and stocking shelves, and if you're responsible for supervising people 5 percent of the time, you can then be considered executive and be exempt." Statements like these are either intentional propaganda or a reflection of virtually no understanding of how these exemptions are really applied. Even so, such misinformed sentiments are likely to foster proposals to add more duties-related requirements, to make the existing ones harder to meet, or both.

Reports further say that exempt status will be done away with for "computer technicians" (whatever that is intended to mean). USDOL's options are very limited in this regard as a practical matter, because FLSA Section 13(a)(17) exempts certain computer employees in terms that are largely identical to the present "Computer Employees" provision in USDOL regulations. The Administration has no authority whatsoever to modify or invalidate this statutory version; only Congress could do so.

The Bottom Line

What the specific changes might be, and over what timeframe they will occur, are questions the answers to which must await further developments. However, clearly the predetermined outcome is to ensure that more employees fall into the non-exempt category. Consequently, how principled, deliberate, and neutral USDOL's defining-and-delimiting efforts will be remains to be seen.

Whether the revisions will actually "force" employers to pay more to employees who do not meet the new requirements is subject to considerable doubt. For instance, other FLSA exemptions might be available in some cases. Furthermore, there are entirely lawful ways to establish new pay plans that, when properly administered, probably result in little or no increase in the employees' pay.

Most pressing at the moment is that employers stay informed and vigilant. When proposals are published, it will be *highly important* to evaluate them promptly and thoroughly and then to submit concerns and any criticisms to USDOL. More than 75,000 comments were tendered in connection with the 2004 modifications, some of which led to significant changes and substantial improvements.

