How Far USDOL's "Overtime Rule" Has Come, and How Far It Has Left to Go

Insights
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The comment period for USDOL's most recent proposal regarding the Fair Labor Standards Act's white-collar exemptions (Overtime Rule 2.0) has closed. You probably have heard that the proposed salary level test is "too high" and "too low", and it all feels a bit like déjà vu. In actuality there have been some notable improvements up to this point, though hopefully more to come before finalization.

The Rule Has Continued To Evolve

We've written at length about the prior version (Overtime Rule 1.0), the related injunction, subsequent stakeholder feedback, and the history of how we got here. Though we cannot say USDOL went back to the drawing board to propose a *new* rule this year, it is clear from the agency's accompanying comments and some of the provisions that it considered the various views and endeavored to resolve the most controversial aspects of Overtime Rule 1.0 in drafting at least an *improved* rule.

To the credit of both administrations, the 2015 proposed rule was the last variation that truly contemplated a change to the duties tests, multiple thresholds, or annual updates. The 2016 Final Rule under the Obama administration, wisely, did not include any of these in the end, nor are they in the Trump administration's current proposal. (A return to these debates would surely put the entire matter back at square one.)

The current proposal also is an improvement over 2016 in that USDOL now:

- Proposes a return to the 2004 methodology, which is said to support a $679 per week salary level test more in line with the test's stated purpose.
- Proposes extending the period for the 10% "credit" from a "quarter" to a more practical 52 weeks.
- States the agency's intention that updates occur no more frequently than every 4 years, at least marginally more practical.
- States the agency's intention that each future update would be subject to the rulemaking process and the agency would be left some discretion to delay increases based on economic factors.

In other words, while it is not a whole new proposed rule, it is a vastly improved one, particularly because it does not put future analyses on "auto-pilot". Nonetheless, some of the finer points still

require USDOL's further consideration.

Where the Proposal Misses the Mark

Putting aside that Fisher Phillips has for decades taken the position that the compensation requirement is improper, the following are some of the other points that the firm's Comments reiterate in hopes that USDOL will publish a final version of Overtime Rule 2.0 that is valid, practical to apply, and aligned with the deregulation initiative.

- The agency must ensure that it uses the proper data and selects the lowest salary level that fulfills the purpose while avoiding the complications caused by multiple levels (based on any factor). Indeed, an employer seeking "certainty" or "efficiency" in its analysis always is free to draw higher lines for a specific context (the nature of the work, industry, locale, compensation level of coworkers, additional benefits, etc.). If USDOL wants to draw an across-the-board line to promote its *own* efficiency, the proper solution would be to draw a line *above* which it will presume an employee's exempt status is proper as an *enforcement position*.
- USDOL still is contemplating a schedule regarding the salary level, according to the statements accompanying the proposed rule. Notably, USDOL should at most plan to determine on a more regular basis whether the salary level test is "significantly outdated". Care should be taken to avoid not only the salary level test *eclipsing* the duties test, but effectively *directing* the market by prompting reactive/preemption compensation decisions.
- In light of the confusion caused by the 10% "credit", the agency should confirm for all that the compensation requirement must simply be met in cash, or its equivalent. Employers have long used incentive pay, paid leave, and other payments to meet the predetermined amount agreed upon by the parties. The only limitation for purposes of the white-collar exemptions is that "board, lodging or other facilities may not count towards the minimum salary amounts required for exemption". 29 C.F.R. § 541.606, § 531.1 *et. seq*. Moreover, USDOL should scrap the 10% "credit", or better articulate whether/how it relates to each test within the compensation requirement.
- At a minimum, employers should have sufficient time to adjust their budgets, if necessary, well before the beginning of their fiscal year. We have recommended a 12-months-notice period going forward and a phase-in approach for the initial (still significant) update.
- We also asked that USDOL clarify other issues related to the salary *basis* concept, including explicitly stating where contrary inferences are not appropriate.

While there is a tendency for a government to continue regulating an area once it has inserted itself, it is a flawed rationale to continue to do so here simply because it has (although not always) been done in the past. Strikingly, even our alternative recommendations go quite a ways towards deregulation with respect to a white-collar-exempt-employee's wages. Of course, *completely* eliminating the compensation requirement would not only ensure that USDOL has acted within its authority under 29 U.S.C. § 213(a) as well as make the *application* of exemptions easier, it might just be the greatest means for educating all that being paid a "salary" is not "the" test.

Why Those Calling For A Higher Salary Level Test Are, Candidly, Wrong

Of course, some stakeholders continue to advocate for a higher salary level test, that incentive pay should be excluded from the test, and even for a fully automated update process. The difference is that our recommendations are based on USDOL's actual task and other practical matters within its scope of authority.

USDOL is authorized to, in fact has been directed to, define the white-collar exemptions: executive, administrative, professional, and outside sales. In doing so, Congress did not include a compensation requirement. Unlike, for example, the 3(m) tip credit or the 7(i) exemption from overtime, the *statutory* text at 29 U.S.C. § 213(a) makes no reference to any percentage or multiple of the minimum wage when it comes to the white-collar exemptions. It was decades before USDOL introduced the white-collar exemptions' (other than for outside sales) compensation requirement. Since then the "salary level" and the "salary basis" concept have been conflated, their original purposes sometimes mischaracterized, and they have, in many instances, overshadowed the duties tests significantly.

At bottom, these exemptions are reserved for executive, administrative, and professional employees such that the compensation requirement is only an additional requirement that, ironically, should become more redundant the more accurately the salary level test is set. A low figure *cannot* make someone *exempt*. A high figure though (or really *any* figure) can make at least someone unqualified, and thus, *non-exempt*. Congress has not tasked USDOL with narrowing the set of exempt employees or providing a minimum compensation. At the end of the day, USDOL's job is to actually define the terms, which generally requires a description of the work that qualifies. Indeed, even the highly-compensated employee variation of these exemptions requires that the employee meet certain duties in recognition of the fact that compensation cannot be determinative.

At each round, so to speak, advocates of a higher salary level have presented a variety of opinions that boil down to an idealistic, perceived concept of "fairness" to employees. Laudable as that might sound, "fairness" is not the question posed to USDOL here. Setting the salary level stems from a different principle (*i.e.*, identifying those employees highly *un*likely to meet the duties tests). Even setting the figure at half of what is somehow deemed "fair" is clearly beyond the agency's authority if it would result in a significant number of otherwise-exempt employees losing that status.

The Bottom Line

Whatever the USDOL does next, it must uphold its responsibility to define the terms executive, administrative, and professional (as well as outside sales) in meaningful ways, which prohibits it from improperly emphasizing the compensation requirement.

In the meantime, the good news is that the agency has presented the rule three times now under two different administrations and never actually set forth a change to the duties tests. Accordingly, employers can be reasonably certain that the next publication will not include changes to the duties tests. This means an employer can determine the largest set of exempt-classified employees now – again, the salary level test only can serve to narrow it – and start *planning* now for the *potential*

again, the salary level test only can serve to narrow it – and start *planning* now for the *potential* changes to the salary level test. Many have gone through this before, but we would caution those employers to review the company's updated compensation data *and* consider how the jobs might have changed since the last review.

Stay tuned as we follow the progress of the proposed rule, which we expect to proceed relatively quickly.

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