



Firm Critiques USDOL's Exemption Initiative

Insights

9.10.15

Last Thursday, Fisher Phillips filed its own extensive comments (see link below) on the U.S. Labor Department's proposals and requests relating to the federal Fair Labor Standards Act's Section 13(a)(1) exemptions.

The firm's presentation expresses opposition to USDOL's undertaking in largely every respect.

The comments also note that USDOL has in most cases offered no *specific* regulatory language for public review, including as to any revisions in the duties-related exemption requirements. We have again expressed our belief that USDOL would violate the federal Administrative Procedure Act by adopting any actual regulatory changes having to do with subjects on which the agency published no explicit provisions.

Time For A "Do-Over"

With respect to USDOL's intended \$921-per-week minimum salary level (which the agency says might be \$970 by the time a final regulation is issued), the firm has taken the position that USDOL's rationales in this regard are erroneous and are based upon flawed information, and that the proposal should be withdrawn. We have called for an entirely-new evaluation predicated upon different data and considerations.

The firm also contends that no "annual update" of the salary minimum is warranted, and that no such mechanism should be adopted.

Fisher Phillips also argues against:

- Any minimum *exempt*-work percentage requirement;
- Imposing a strict percentage limitation upon *non*-exempt work;
- Doing away with or changing the longstanding concept that an employee's concurrently performing exempt and non-exempt work can be consistent with exempt status under the proper circumstances; and
- Adding more "examples" to the regulations without first offering specific versions for public review and comment (about which we have written previously).

Other Suggestations

We have further recommended that, if any salary-"update" procedure is ultimately adopted:

- The "update" should not be done annually, but that instead any re-evaluation should occur no more frequently than every three years;
- The period of advance notice of any change should be 180 days, rather than only 60;
- Any increases should be subject to a per-revision cap or maximum; and
- The "update" mechanism should be subject to temporary modification, or even suspension, should exigencies call for this.

Our comments also support counting nondiscretionary bonuses and incentive payments (including commissions) towards the minimum salary amount. However, we have argued against any percentage limitation upon the extent of this credit; USDOL is "considering" a maximum of 10 percent. In addition, we have opposed USDOL's limiting the credit to payments made on a monthly or more-frequent basis but have also recommended that, if there is to be some maximum timeframe, it should be longer than a month.

The Bottom Line

The firm has of course discussed these and other matters in much more detail in our actual presentation.

USDOL will now analyze and evaluate the comments received and must take them into account in its next steps. The most-likely outcome will be its issuing a Final Rule, that is, the actual changes in the exemption regulations themselves.

It remains difficult to predict when any Final Rule will be published or when any revisions will take effect. Given the apparent sense of urgency that led USDOL to refuse to extend the comment deadline, it seems probable that the agency will release any revisions as soon as officials believe they reasonably can. We are still inclined to think that this will not occur before late this year.

[Fisher Phillips FLSA Exemption Comments 09 03 15.pdf \(292.97 kb\)](#)