Tuesday, June 30, 2015

The minimum weekly salary for exempt employees will be raised from the current $455 to a likely $970 in 2016, if the Department of Labor’s (DOL’s) overtime pay revisions go into effect as proposed. In its long-awaited proposed revisions to overtime rules, the DOL estimates that 4.6 million U.S. workers who are currently exempt will be entitled to minimum wage and overtime compensation under the new salary level requirements.

Salary Level Would Automatically Adjust on an Annual Basis

Under its proposed rules, the DOL sets the salary threshold for the white collar exemptions at the 40th percentile of weekly earnings for full-time salaried workers nationwide. For 2013, using data from the Bureau of Labor Statistics, that figure was $921 per week, or $47,892 per year. The DOL anticipates that when its Final Rule goes into effect in 2016, the salary level will be $970 per week, or $50,440 per year.

In order to maintain the salary levels at a fixed percentile of earnings, the DOL proposes that the salary threshold automatically update annually. The automatic adjustment is intended to prevent the salary level from diminishing through inflation and to potentially make additional rulemaking adjusting the salary basis unnecessary. The DOL believes that this will provide more certainty to employers with a meaningful, bright-line test while improving government efficiency.

Highly Compensated Employee Exemption: $122,148 Salary

The current exemption for highly compensated employees requires an annual salary of $100,000. The DOL proposes to raise that salary threshold also based on an annualized value of a percentile of weekly earnings for full-time salaried workers. This proposal sets the salary level of highly-compensated employees at the 90th percentile, which was $122,148 per year for 2013. That number will likely be higher by the time the Final Rule is implemented. This salary requirement would also adjust automatically to the level equal to the 90th percentile of earnings for full-time salaried workers.

No Proposed Changes to Duties Requirements

Since 2004, the duties tests for the white collar exemptions have not included a limit on the amount of time that an employee can spend on nonexempt duties before the exemption is lost. Believing that a rise in the salary level will provide an initial bright-line test for the exemptions, the DOL refrained from proposing changes to the duties tests but will consider requests for changes during the comment period.

In its proposal, the DOL noted that employer stakeholders opposed any changes to the duties requirements as percentage limits on the amount of time spent on nonexempt duties are sometimes difficult to apply and hinder flexibility for work duties. Employee groups, on the other hand, expressed concern that certain businesses treat workers as exempt even though the employees perform mostly nonexempt duties, especially (they claim) in the retail industry. Without proposing its own duties requirements, the DOL seeks input from interested parties on whether changes to the duties tests are necessary in light of the salary level increases proposed.
**Nondiscretionary Bonuses May Be Included in Salary Level Requirement**

In the past, the DOL has not included nondiscretionary bonus payments when determining whether an employee’s salary meets the white collar exemption threshold; it looked only at actual salary or fee payments made to employees. In its proposed rules, the DOL seeks input on whether it should permit some amount of nondiscretionary bonuses and incentive payments to count toward a portion of the salary level requirement for the executive, administrative and professional exemptions. The DOL states that for these bonuses or incentive payments to count toward the weekly salary requirement, the bonuses and incentive payments would need to be paid monthly or more frequently, not as a yearly “catch-up” payment.

**Next Steps**

If you want to submit any comments on the DOL’s proposed changes to the overtime rules, you have 60 days in which to submit your input either electronically or by mail. Instructions are at the beginning of the Notice of Proposed Rulemaking.

After considering comments from interested parties, the DOL will decide whether to make any revisions to its proposed overtime rules and will issue its Final Rule sometime thereafter. Although the final version of the rules may change slightly, you should begin preparing for the changes now.

Examine your payroll records to determine which employees are currently treated as exempt under the various white collar exemptions. Determine which, if any, would or would not meet the new salary thresholds: $50,440 per year for executive, administrative and professional exemptions and $122,148 for highly compensated employees. Review the duties tests to make sure your exempt employees are performing exempt tasks.

After this review, consider how your organization is going to handle those employees who may not qualify as exempt under the new rules. Do you want to increase their salary to meet the new threshold? Change their status to nonexempt and pay them minimum wage and overtime? Do you need to change their duties to make sure they meet the duties tests? Have these internal conversations now so that you are not caught off guard when the Final Rule goes into effect in the coming months.

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