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DOL Issues New Proposed Overtime Regulations

On June 30, 2015, the U.S. Department of Labor released long-awaited proposed regulations designed to modify the criteria for determining whether employees fall within the scope of the exemptions to the Fair Labor Standards Act's overtime pay requirements for "white collar" executive, administrative, and professional employees. The proposed rule change was prompted by an Executive Order issued by President Obama in March 2014 directing the DOL to "modernize and streamline" the regulations that define the scope of the exemptions, a move viewed as in line with the President's message that "it's time to give America a raise."

Last updated in 2004, the current regulations limit the white collar exemptions to employees whose "primary duty" consists of exempt executive, administrative or professional work and are paid a salary of at least \$455 a week, or \$23,660 a year. To satisfy the "primary duty" test, an exempt executive must primarily perform management duties and direct the work of at least two other employees; an exempt administrative employee must primarily perform office or non-manual work directly related to management or general business operations and exercise a certain degree of discretion and independent judgment; and an exempt professional must be primarily engaged in work requiring advanced knowledge "in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." "Highly compensated employees" earning at least \$100,000 annually may be

considered exempt if they "customarily and regularly" perform at least one of the exempt duties of an administrative, executive or professional employee.

As expected, the DOL has proposed a sharp increase in the minimum salary requirement that would more than double the current compensation threshold to \$921 per week, or \$47,892 annually. This figure represents the 40th percentile of earnings for salaried workers. Similarly, under the proposed regulations, the salary minimum for "highly compensated employees" would increase to \$122,148 annually, corresponding to the 90th percentile of salaried workers' earnings. For the first time the proposed regulations provide for indexing so as to trigger periodic automatic increases that would keep the minimum salary levels at the 40th or 90th percentile, respectively, of weekly earnings for full-time salaried workers. It is therefore projected that if the proposed regulations are finalized and go into effect in 2016, the adjusted salary thresholds will rise to \$970 per week, or \$50,440 per year, to qualify for the executive, administrative and professional exemptions, and \$122,148 to qualify for the exemption applicable to "highly compensated employees." This indexing provision was included in order to prevent the regulations from becoming outdated and therefore, in the view of some, out of step with the underlying purpose of the exemptions.

Contrary to speculation, the proposed regulations do not, for the time being at least, contemplate any specific changes

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to the “primary duty” test. It was widely expected, and feared in the business community, that the DOL would propose adoption of the California model requiring that white collar employees spend at least 50% of their working time performing exempt tasks. Rather than offer any specific proposals, the DOL is “seeking comments on whether the tests are working as intended to screen out employees who are not bona fide” executives, administrators or professionals. This of course leaves open the possibility that the “primary duty” test will be modified when the regulations are finalized, perhaps even to mirror, or more closely resemble, the 50% test used in California.

Employers, and any other interested persons or groups, have 60 days to submit comments on the proposed regulations. It is expected that the regulations will be finalized in the next year or so. If the last rule change in 2004 is any indication, compliance with the new regulations will be required within about 120 days following publication, meaning employers should begin to prepare now. Among other preparatory steps, employers would be well-advised to begin identifying employees currently classified as exempt who are earning less than the projected minimum salary level of \$50,440 and evaluating the effect the new salary limits will have on the company’s organizational structure and other costs associated with potentially preserving exempt status. Because a wage increase

on the order of magnitude necessary to satisfy the expected new salary floor under the proposed regulations may be significant in some or all circumstances, employers should closely examine related budgetary and staffing adjustments to account for the reclassification of certain heretofore exempt jobs as non-exempt. Additionally, employers should review their personnel policies to ensure that distinctions made between exempt and non-exempt employees remain accurate and meaningful, and also consider preparing to train employees soon-to-be newly classified as non-exempt on company policies relating to time cards, meal/break requirements, restrictions on working over normal hours, procedures for overtime authorizations, and other compensable time issues.

Employers in Connecticut are also covered by Connecticut’s wage and hour law where the salary threshold for the white collar exemptions is \$475 per week, or \$24,700 annually. It is very possible that Connecticut will take steps to mirror the change in the federal law, and we will provide an update if and when we learn of any such changes. However, because employers are legally required to comply with the standards that are most advantageous to the employee, whether that is the federal or state wage and hour law, once the change in the FLSA occurs, employers will be obligated to apply the new federal salary levels for purposes of determining exempt status.

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.