DOL Takes Another Crack at Modifying the Overtime Rules

By Scott Mirsky

Summary: *The DOL has proposed new rules that would substantially increase the minimum salary that employees must be paid to qualify for the white collar and highly compensated exemptions to the FMLA overtime requirements. The increase to the white collar salary threshold would be markedly lower than that which the Obama Administration attempted to implement and, as with the Obama-era regulations, the duties tests associated with the exemptions will not be impacted.*

On March 7, 2019, the U.S. Department of Labor ("DOL") released its new proposed rules concerning the "white-collar exemption" and the "highly compensated employee" to the minimum wage and overtime requirements of the Fair Labor Standards Act ("FLSA"). If this rule is approved, employees earning less than $35,308 per year ($679 per week) will no longer qualify for the "white-collar exemption" under the FLSA, and therefore will be eligible for overtime, irrespective of their job duties. Currently, to meet the salary level test of the "white-collar exemption" the employee only needs to be paid $23,660/per year ($455 per week). For highly compensated employees, the required salary threshold would increase from $100,000 to $147,414 annually.

This proposed rule is in direct response to a Court ruling in 2016, which enjoined the DOL from enforcing the final overtime rules that the Obama Administration had attempted to implement. Because of the change in administration that occurred just after the injunction was issued, the Trump Administration chose not to oppose the injunction and instead to pursue its own new overtime rules. The Obama-era rules would have increased the salary level test to $47,476 per year.

The proposed rule will continue making its way the through the rulemaking process (including allowing the public to submit comments to the DOL) and, if approved, the proposed rule would most likely not take effect until 2020.

However, employers should begin to review the impact of the proposed rule on their workforce. As an initial action, employers should determine how many of their employees are currently exempt under the "white collar exemption" and are paid less than $35,308/year and perform the same analysis as to the highly compensated exemption. These are the employees who may be impacted by the proposed rule. If the rules are adopted as proposed, employers will still have several options to avoid the payment of overtime pay to these employees, which would include raising salary levels to the new threshold or shifting workloads, modifying work schedules, or spreading work hours so that the effected employees do not work more than 40 hours in a work week. In their review of employee exemptions, employers should also be confirming that, in addition to receiving the requisite guaranteed salary, employees who are being treated as exempt had the necessary duties to qualify them for the exemption. Although the duties test is not implicated by the proposed rules, to be exempt, employees must have both the required guaranteed minimum salary AND qualifying duties. In other words, raising the salary of an employee who makes less than $35,308/year to target the proposed rules will not be effective if the employee does not have the duties to qualify as exempt.

If you would like to discuss the implication of the proposed rule on your business, please consult an experienced employment law attorney.