

Comment Period on New Overtime Proposal to End Early September, Say DOL Officials

BY MICHAEL J. LOTITO AND ILYSE SCHUMAN ON JULY 1, 2015

In a conference call held on Wednesday morning, Labor Secretary Thomas Perez and Wage and Hour Administrator David Weil fielded questions about the recently released proposal to revise the Fair Labor Standards Act overtime regulations for white collar employees. During the call, the DOL officials discussed the new proposed salary threshold, potential changes to the duties test, and the notice-and-comment period deadline.

As [previously discussed \(http://www.littler.com/publication-press/publication/dol-releases-proposed-revisions-white-collar-overtime-exemptions\)](http://www.littler.com/publication-press/publication/dol-releases-proposed-revisions-white-collar-overtime-exemptions), the overtime rule overhaul will increase the salary threshold that triggers exemption from overtime requirements under the FLSA. The proposed change would peg this minimum salary requirement to the 40th percentile of average weekly earnings for full-time employees. The DOL estimates that by 2016, this calculation will mean those workers earning at least \$970 per week (\$50,440 per year) will be overtime exempt.

Indexing is another key component of the proposed rule. During Wednesday's call, Administrator Weil said the purpose of adding indexing is to ensure the marker of the salary threshold continues to adjust to changes in the larger economy. Weil explained that indexing will be accomplished by either linking the threshold to the consumer price index, or continuing to tie the minimum floor to the 40th percentile of worker wage distribution. Weil emphasized that the DOL is seeking public comment on both options.

Secretary Perez said the 40th percentile of salaried workers was chosen as a marker because, after "reviewing evidence," this percentage served as a "good proxy of the line that separates overtime exempt employees from overtime eligible employees."

Both Perez and Weil discussed the seemingly roundabout approach to amending the duties test. Currently, managers still qualify for the professional and administrative exemption even if they perform some of the same job duties as their direct reports. It is widely expected that the DOL will alter these tests used to determine

which job tasks are considered exempt. For example, California law uses a quantitative test requiring a manager to spend more than 50% of his or her time performing supervisory duties in order to qualify for the exemption.

The proposed rule does not establish a new standard for determining whether work is to be considered overtime eligible or overtime exempt. Instead, Perez explained, the notice of proposed rulemaking asks a series of questions about the adequacy of the current duties test. The answers and overall comments the DOL receives will help inform the agency "what changes, if any, should be made to the duties test."

Administrator Weil echoed these comments, emphasizing that the questions set forth in the NPRM is to help the DOL "understand the adequacy of the duties test as it currently stands," and "provides us with a way to assess whether we need to further amend the duties clause" to afford the protections "envisioned by the statute."

Perez said he believed the proposal will be published in the *Federal Register* on or around July 6, which would put the end of the 60-day comment period on Friday, September 4.

Because the stakes are so high, it is recommended that the employer community provide input to help shape the final rule, particularly with respect to how changes to the duties test would impact the workplace.

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