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More on the Proposed Overtime Regulations

10.05.23 | Linda J. Rosenthal, JD

As soon as early 2024, there could be a seismic shift in federally mandated worker compensation. See *New Overtime Rules May Affect Nonprofits* (October 2, 2023).

Under proposed Department of Labor regulations implementing the landmark Fair Labor Standard Act of 1938, U.S. employers across the board could be required to pay overtime for many more workers than under existing rules.

The changes include a significant upward adjustment to the salary cutoff amount for the so-called "white collar" exemption from the general rule that American workers must be paid time and a half for more than 40 hours of work per week. The proposed change moves the critical salary figure from $35,568 per year to $55,068. (Some states already have thresholds higher than this proposed new federal threshold, which prevails over the lower federal amount.)

The Labor Department is also proposing raising the minimum salary level for "highly compensated employees" from $107,432/year to nearly $144,000/year. This is a distinct category that establishes exempt status without regard to duties. Another proposed change is to add an automatic reconsideration every three years of these cutoffs.

DOL estimates that the new rule, if made final, could affect the status of as many as 3.65 million salaried workers around the nation. Of that total, the agency estimates that more than 380,000 work in the nonprofit sector. Indeed, "… nonprofits are more likely than for-profit businesses to feel the impact of the [proposed] overtime rule, with about 16.8% of nonprofit employees being reclassified as non-exempt" compared with 12.0% of for-profit employees.

The government announced the specifics of the changes in late August, and officially published the proposed regulation in the Federal Register on September 7, 2023, No. 2023-19032. That is the trigger that starts the clock ticking on the 60-day public comment period.

Action Needed

In our October 2nd post, we set the stage with a general explanation of the FLSA overtime mandate and the history of the regulations interpreting and applying it. The 1938 drafters of the Fair Labor Standards Act expressly authorized an exemption for certain "executive," "professional," or "administrative" workers from the new statutory minimum wage and overtime mandates.

Those lawmakers also expressly delegated to the Secretary of Labor the authority of "defining and delineating" the particulars for meeting three general tests of eligibility: namely, that any exempt workers be: (a) salaried; (b) be paid at or above a certain minimum annual salary; and (c) primary perform certain types of duties.

We'll pick up the discussion there, adding links to resources that more fully explain the history of the law, the changes implemented over time, and the proposed new rules. Both the government and nonprofit-sector leaders strongly encourage a vigorous public response to this invitation to comment.

And, as the National Council of Nonprofits points out, reviewing this significant proposed change in the law is a useful step for all nonprofit employers including those who don't have plans to submit public comments. See *DOL Proposed Overtime Reforms and the Impact on Nonprofits* (Updated September 8, 2023): "The National Council of Nonprofits encourages all nonprofits to conduct a mission-based analysis of these proposed regulations…."

NCN continues: "That means answering questions about how the proposed increase in the minimum salary levels would affect operations, resources, and staffing, as well as what impact the draft regulations would have on persons relying on the services and the mission of the nonprofit, all while factoring in what is equitable to the nonprofit workforce. Nonprofits should share their answers to those questions with the Department of Labor in the form of comments to the proposed regulations. Comments are due on November 7, 2023."

See, similarly, *Don't Panic (Yet): What Your Nonprofit Needs to Know About the (Latest) New FLSA Overtime Rule* (Updated: September 2, 2023) North Carolina Center for Nonprofits.

The Proposed Regulation

In its August 30th news release, the Department of Labor explains that the Biden-Harris administration is deeply committed to protecting workers, but wants any proposed actions to be done as thoughtfully and fairly as possible to all affected parties. The agency emphasizes that the rules-change announcement "follows months of extensive outreach to employers, workers, unions and other stakeholders, which included the department holding 27 listening sessions with more than 2,000 participants to inform the proposed rule."

It now welcomes as much additional public input as possible. To that end, DOL has drafted and published a staggeringly long proposed regulation – some 274 pages! – titled *Defining and*

Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees. This primary document along with a supplementary bundle of links and information is at Regulations.gov., Docket (WHD-2023-0001), posted by the Wage and Hour Division, September 7, 2023.

Officials explain that much of the length is due to the inclusion of explanations of the law enacted in 1938 and all historical developments since then, culminating in the current proposed revision to the salary-threshold figure to over $55,000 per year. An important point the government makes is that the proposed upward revision is not an adjustment for inflation or other similar modification. Instead, it is a carefully selected amount that "better reflects" where the EAP exemption cutoff should be, given the rationale for the existence of such an exemption.

Happily, the first quarter or so of the document includes bite-sized overviews and summaries of relevant history and why the DOL determined that a change is needed. Kudos to the government drafters: it's well-written, easy to understand, and surprisingly interesting.

Fair warning: What follows, comprising the bulk of the document, is "deep-in-the-weeds" material that will be most relevant for people tasked with developing and writing public comments objecting to the proposed change. It comprises the data and analyses for how and why the decision was made to propose a substantial adjustment right now, and how the final figure was selected.

Included at Docket WHD-2023-0001 are several additional links to each and every one of the studies and analyses that supported the earlier regulations changes since the 1940's.

There is also the tab which links to all of the public comments received by the government to date. So far, there are over 260 submissions. That's a surprisingly small number. In 2016, when an earlier regulatory change was on the table, the DOL received 300,000 public comments.

Are There Additional Summaries?

Yes, there are.

The National Council of Nonprofits published its primary thoughts and guide to the proposed regulation at *DOL Proposed Overtime Reforms and the Impact on Nonprofits* (Updated September 8, 2023). This is supplemented by a section of NCN's biweekly newsletter, *Nonprofit Champion* (October 2, 2023). The September 8th document is 7 pages including valuable sections titled: What's Being Proposed?; Background; Is There a Nonprofit Exemption?; Analysis and Nonprofit Perspective; and The Need for Nonprofit Input.

In the final section, NCN does not take a specific position pro or con on the regulatory change, particularly since "the effect of the proposed overtime regulations, if implemented, would vary widely among nonprofit organizations." It continues: "The only assured point here is that the impact on the sector will be defined by academics, bureaucrats, and others based on assumptions and data from other sectors – unless individual nonprofits take the time to review the regulations and offer comments to the Department of Labor prior to the due date of November 7, 2023."

For that reason, the National Council of Nonprofits "encourages all nonprofits reviewing the proposed regulations to conduct a mission-based analysis of the proposed regulations. That means

answering questions about how the proposed increase in the minimum salary levels would affect operations, resources, and staffing, as well as what impact the draft regulations would have on persons relying on the services and the mission of the nonprofit, all while factoring in what is equitable to the nonprofit workforce."

NCN then offers an intriguing and important list of "questions that can help shape an organization's analysis" for either eventuality; that is, if the draft regulations are implemented as written or if the Department of Labor is "open to further revisions."

We'll pick up that discussion in the next post.

Another valuable summary is an 8-page PDF online booklet by the North Carolina Center for Nonprofits (a member of NCN): *Don't Panic (Yet): What Your Nonprofit Needs to Know About the (Latest) New FLSA Overtime Rule* (Updated: September 2, 2023), *ncnonprofits.org*. It includes nutshell explanations of the history of the FLSA and the most recent regulatory changes from about 2004 through 2019.

One of the most significant parts of this publication is a thoughtful discussion of why nonprofit employers must prepare now for the eventuality of higher thresholds going into effect "at some point in 2024." Nonprofit organizations "will likely need to make adjustments to the pay and work plans for affected employees. These range from: raising salaries above the new threshold (estimated to end up somewhere between $55,000 and $60,000)"; reclassifying employees as non-exempt and assuming the expense of overtime pay, or adopting one of "more than a dozen other options laid out in this analysis."

Conclusion

The final section of the booklet from the North Carolina Center for Nonprofits is: "What should my nonprofit do now?" followed by 8 points. The first one is "Don't panic! The proposed rule is still open for public comment, and DOL can make adjustments to the final rule based on those comments. Realistically, the new salary threshold won't take effect until well into 2024, so your nonprofit has some time to make any necessary adjustments to your operations."

The eighth point is: "Panic! (But only do this if you are reading this article for the first time after the final rule has been published and taken effect!)"

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