

## U.S. Department of Labor Issues Request for Information on White Collar Exemption Regulations

On July 26, 2017, the U.S. Department of Labor (USDOL) published a [Request for Information](#) (RFI) in the Federal Register regarding the regulations defining the Fair Labor Standards Act (FLSA) exemptions for executive, administrative, professional, outside sales, and computer employees. Public comments can be submitted by any of the methods set forth in the RFI by September 25, 2017.

Before summarizing some of the subjects on which the USDOL is soliciting input from the public, here is a quick review of the history of the USDOL's efforts to revise its FLSA white collar exemption regulations. As you certainly recall (who can forget?), the USDOL issued [final regulations](#) last year increasing the salary threshold from \$455.00 per week to \$913.00 per week in order to qualify for the executive, administrative, professional, and computer employee exemptions. Those regulations were supposed to become effective December 1, 2016. However, shortly before the effective date, the U.S. District Court for the Eastern District of Texas issued a [nationwide injunction](#) prohibiting the USDOL from implementing its revised regulations based on its holding that Congress intended the white collar exemptions to be defined with regard to duties — not with regard to a minimum salary level. The USDOL appealed to the Fifth Circuit Court of Appeals. In its recent reply brief, the USDOL stated that it no longer wishes to argue in support of the \$913.00 salary level, but instead only intends to argue that it has the authority to establish a salary level test for the white collar exemptions. The USDOL informed the Fifth Circuit that it intends to undertake further rulemaking to determine what the appropriate salary level should be if the Court holds that it has the authority to establish a minimum salary level.

The USDOL's publication of this RFI is a preliminary step toward its issuance of a notice of proposed rulemaking. There are many questions posed by the USDOL in its RFI. Some noteworthy questions are:

- \* Would updating the 2004 salary level (\$455.00 per week) for inflation be an appropriate basis for setting the standard salary level and, if so, what measure of inflation should be used?
- \* Should the regulations contain multiple standard salary levels and, if so, how should these levels be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method?
- \* Should the regulations contain different salary levels for the executive, administrative, and professional exemptions?
- \* To what extent did employers, in anticipation of the implementation of the \$913.00 per week salary level, increase salaries of exempt employees to retain their exempt status?
- \* To what extent did employers intend to convert exempt employees to non-exempt status in anticipation of the implementation of the \$913.00 per week salary level, but change their implicit hourly rates so that the total amount paid would remain the same even with overtime?
- \* Would a duties-only test for the white collar exemptions be preferable?
- \* Should the salary levels be automatically updated on a periodic basis and, if so, what mechanism and what time period should be used for the automatic updates?

It is a positive development for employers that the USDOL no longer intends to defend the increase in the minimum salary level to \$913.00 per week in order to qualify for the executive, administrative, professional, and computer employee exemptions. However, the USDOL will likely propose some changes to its white collar exemption regulations upon receipt of input from the public with respect to its RFI and after the Fifth Circuit issues its decision. Those proposed changes could include an increase in the minimum salary level, but such a proposed increase will almost certainly not be as drastic as the one that nearly went into effect last year.

If you have any questions about this Information Memo, please contact [Subhash Viswanathan](#), any of the [attorneys](#) in our [Labor and Employment Law Practice](#), or the attorney in the firm with whom you are regularly in contact.



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