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The Duties Test Trap Set by the Department of Labor: How Employer Comments (Due September 4) Should Address It

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It has been widely reported that the Department of Labor (DOL) on June 30, 2015 proposed raising the salary level of executive, administrative and professional (EAP) employees as a requirement of exempt status under the Fair Labor Standards Act from \$455 per week (\$23,660 annually) to \$970 per week (\$50,440 annually). (See NPRM – Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, RIN 1235-AA11, (hereinafter "Proposal")). The DOL has also proposed making annual increases to this amount. What was missing, but widely expected by the legal community, was a proposal to change the duties test of the EAP exemptions as well. The DOL specifically made no such proposal but it did note its dissatisfaction with the existing duties test, suggesting that California's 50 percent exempt/nonexempt primary duties requirement might be warranted. The DOL discussed the reasons for its dissatisfaction with the current test and asked for comments on five areas relating to whether the existing duties test should be changed.¹ As a result "...[t]he Department is seeking to determine whether, in light of our salary level proposal, changes to the duties tests are *also* warranted." Proposal p. 95 (Italics added) Could the DOL be planning to make a rule change to the duties test at the same time it changes the salary level? By proposing a very high salary level of \$50,440 per year with annual increases and soliciting comments, has the DOL set a trap to justify a change in the duties test?

A salary level increase of \$50,440 is more than double the existing amount to qualify as an exempt EAP employee. If implemented, this increase will be a major change, and this high salary level would drastically affect the compensation models of numerous industries. Undoubtedly, a large number of employers and interested parties will send comments to the DOL arguing for a lower salary level. Notwithstanding, some increase in the salary level is expected because the current salary level of \$23,660 per year, which was implemented in 2004, is below the current poverty level for a family of four. Whatever salary level is chosen, it likely will create a clearer demarcation between exempt and nonexempt for employers, even though a higher salary level would cause significant disruption for employers large and small.

On the other hand, a change in the duties test to require that an exempt EAP employee perform no more than 50 percent nonexempt work (or some other percentage) would be an even more drastic disruption to business. For example, part of the current duties test for an exempt lower level manager is that his/her "primary duty is management...of a customarily recognized department or subdivision..." of the enterprise. 29 C.F.R. 541.100(a)(2) "Primary duty" means the principle, main, major or most important duty that the employee performs." 29 C.F.R. 541.700(a). The current regulation states that employees who spend less than 50 percent of their time performing exempt work (in this example, management) may still be exempt.² "Employees who do not spend more than 50 percent of their time performing exempt duties may none-the-less meet the primary duty requirement if other factors support such a conclusion." 29 C.F.R. 541.700(b). As a result, many employers rely on this definition to allow their managers and other exempt employees to perform more than 50 percent nonexempt duties because the employees will remain exempt. A change to the California rule would mean these employees would no longer be exempt.

As stated, the DOL has expressed dissatisfaction in its Proposal with the current definition of "primary" duty: the "Department is concerned that in some instances the current test may allow exemption of employees

who are performing such a disproportionate amount of nonexempt work that they are not EAP employees in any meaningful sense." Proposal p. 10. The adoption of a primary duty definition requiring exempt employees to spend at least 50 percent of their time performing exempt work would create a standard difficult to apply in practice. How does an employer prove its exempt employees always perform 50 percent or more of their time on exempt work? Such proof would be necessary to defend a suit for back wages under the FLSA brought by employees who claim they were misclassified. The 50 percent test would, for example, probably make it more difficult for employers to obtain summary judgment in a duties test determination because the employer will have the burden of showing a greater degree of exempt duties performed than under the current rule. In light of that enhanced burden, employees may be more prone to file suit, and when they do file suit, they will have a better chance of going to trial and ultimately to a favorable verdict.

So what is the DOL's plan? A possible explanation requires a discussion of how the DOL arrived at the \$50,440 salary level. Prior to 2004, when the current regulations were promulgated, two tests existed for the exemption from overtime of white collar employees: the long test and the short test. The long test had a lower salary level but a more stringent duties test to determine exempt status. To be exempt, an employer could devote no more than 20 percent of hours worked in the workweek to nonexempt work. The short test, on the other hand, had a higher salary level but a less stringent duties test, which was more akin to the current duties test. The short duties test did not include a limitation on nonexempt work because employees paid the higher short test salary presumably were likely to meet the duties requirements with respect to nonexempt work. Proposal p. 51. So the long test had a lower salary level and more stringent duties; whereas the short test had a higher salary level requirement and less stringent duties. The 2004 changes to the white collar exemptions did away with these two tests. Afterwards, the current, much simpler test of the exemption was implemented.

In its Proposal, the DOL was critical of the 2004 changes to the white collar exemptions. It concluded that the \$455 weekly salary level requirement was too low when considering the limitations of the long duties test that had historically been paired with such a low salary level. Proposal p. 49. "This [Proposal] is the first time that the Department has needed to correct for such a mismatch between the existing salary level [\$455] and the applicable [current] duties test." *Id.* (Brackets added). In the DOL's view, the long duties test, eliminated in 2004 but which had a limit on the amount of nonexempt work that could be performed, provided a safeguard against the exemption of white collar workers who should be overtime protected.

The DOL justified the increased salary level of \$50,440 as being the 40th percentile of all full-time salary workers. Setting the standard salary level at the 40th percentile would effectively correct for the 2004 Rule's single standard duties test that "was equivalent to the former short duties test without a correspondingly higher salary level." Proposal pp. 54-55. "Therefore, without a more rigorous duties test, the salary level set in the 2004 Final Rule is inadequate to serve the salary's intended purpose of the 'drawing of a line separating exempt from nonexempt employees.'" Proposal p. 55. "The salary component of the EAP test for exemption has always worked hand in hand with the duties test in order to simplify the application of the exemption." Proposal p. 57. At a lower salary level, more overtime eligible employees will exceed the salary threshold, and a more rigorous duties test would be required to ensure that they are not classified as falling within an EAP exemption and therefore denied overtime pay. Proposal p. 57.

To remedy the DOL's purported error from 2004 of pairing the lower long test salary with a less stringent short test duties, the DOL has proposed setting the salary level in a range of the historical short test salary ratio so that it will work appropriately with the current standard duties test. Proposal p. 58.³ *"This suggests that a salary significantly lower than the 40th percentile of full-time salaried workers would pose an unacceptable risk of inappropriate classification of overtime protected employees without a change in the standard duties test."* Proposal p. 58 (Italics added). The DOL states that the proposed salary level of \$50,440 is at the lower range of the short test salary level – lower than the historical average. Proposal p. 142. "Because the standard duties test [the current duties test] is based on the short duties test – which was intended to work with a higher salary

level – and the proposed salary level [\$50,440] is below the historic average with a short test salary, *a salary level significantly below the 40th percentile would necessitate a more robust duties test to ensure proper application of the exemption.*" Proposal p. 95. Thus, the DOL wants to decide whether, in view of its proposed salary level of \$50,440, changes to the duties test *are* also warranted. Proposal p. 95.

It seems clear if the DOL lowers its proposed salary level after taking into account the comments it receives, it will attempt to modify the current duties test. Such modification would likely involve adding the 50 percent California Rule or something similar. To avoid this trap, in making comments about the proposed high salary level, employers should also vigorously address the issues and impacts surrounding a change in the duties test. The deadline to make comments to the proposed rule is September 4, 2015.⁴ In addition, employers, in planning for the proposed change in the salary level, should plan for the possibility that the duties test will be changed as well.

¹ Specifically, the DOL seeks comments on the following: A. What, if any, changes should be made to the duties tests? B. Should employees be required to spend a minimum amount of time performing work that is their primary duty in order to qualify for exemption? If so, what should that minimum amount be? C. Should the Department look into the State of California's law (requiring that 50 percent of an employee's time be spent exclusively on work that is the employee's primary duty) as a model? Is some other threshold that is less than 50 percent of an employee's time worked a better indicator of the realities of the workplace today? D. Does the single standard duties test for each exemption category appropriately distinguish between exempt and nonexempt employees? Should the Department reconsider our decision to eliminate the long/short duties tests structure? E. Is the concurrent duties regulation for executive employees (allowing the performance of both exempt and nonexempt duties concurrently) working appropriately or does it need to be modified to avoid sweeping nonexempt employees into the exemption? Alternatively, should there be a limitation on the amount of nonexempt work? To what extent are exempt lower-level executive employees performing nonexempt work? Proposal p. 96.

² Exempt work is defined in the regulations. See 29 CFR 541.702. For a manager, exempt work is one (a) whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; (b) who customarily and regularly directs the work of two or more other employees; and (c) who has authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight. See 29 CFR 541.100. Management includes activities such as interviewing, selecting and training employees, setting rates of pay and hours of work, directing the work of employees, maintaining production or sales records for use in supervision or control, and the like. 29 CFR 541.102. All other work is nonexempt work. 29 CFR 541.702.

³ Historically, the short test salary level was set at approximately 130 to 180 percent of the long duties test salary level. Proposal p. 58.

⁴ Comments may be submitted to Mary Ziegler, Director of Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U. S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Please see the Proposal at page 2 on how to make electronic comments. Also, please note (a) that RIN 1235-AA11 and U.S. Department of Labor, Wage and Hour Division must be placed on all comments; and (b) all comments must be received by 11:59 p.m. on September 4, 2015. For more information please refer to the Proposal at page 2.