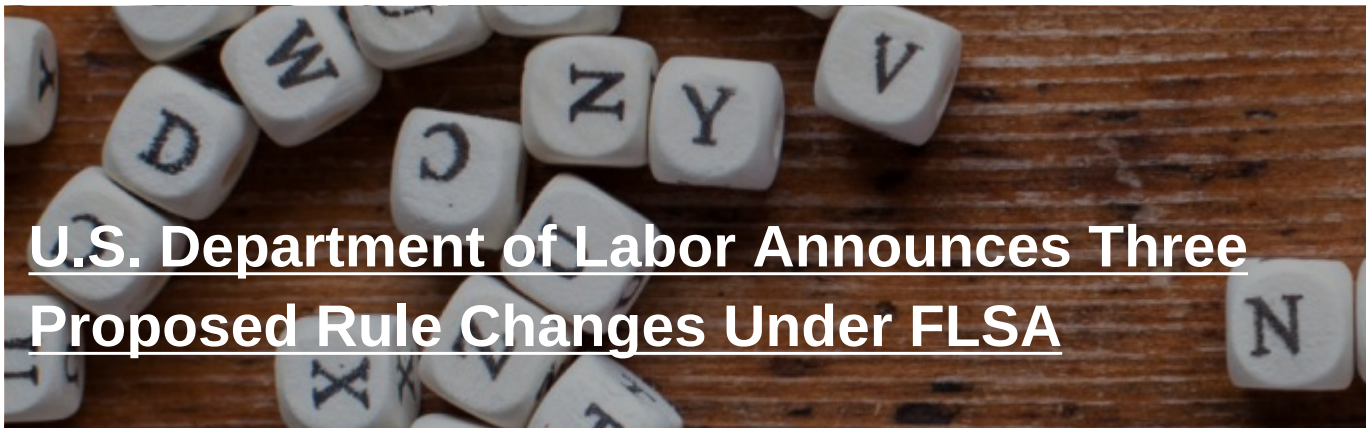


U.S. Department of Labor Announces Three Proposed Rule Changes Under FLSA

By John Vering and Curry Sexton

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Following more than two years of regulatory inaction, the U.S. Department of Labor ("DOL") has now issued three proposed rule changes under the Fair Labor Standards Act ("FLSA") within the past month. First, on March 22, the DOL published a proposed rule that would increase the minimum salary level for overtime exemptions. Then, on March 28, the DOL published a proposed rule that would expand forms of compensation that can be excluded from overtime calculations. Finally, on April 1, the DOL issued a proposed rule that would redefine when two entities are considered to be joint employers. These proposed changes are highlighted in more detail below.

1. Overtime Exemption Proposal

After its long-awaited arrival, the DOL announced its proposed revisions to the "overtime rule" on March 7, 2019 and published the proposal on March 22. The proposal defines the overtime exemptions for Executive, Administrative, Professional, and certain other employees under the FLSA (the federal wage and hour laws). The proposed rule would make more than one million additional American workers eligible for overtime pay.

This proposal is the most recent attempt to change the currently existing overtime wage rules. Note that just three years ago, the DOL, under the Obama Administration, released a set of finalized rules that would have drastically altered federal compensation rules had they gone into effect. Under those rules, the minimum salary threshold for an employee to be considered exempt from overtime would have increased to $913 per week, or an annualized value of $47,476. Further, the 2016 proposals were set to automatically "update" every three years, an event that likely would have triggered additional increases. These changes were set to become effective on December 1, 2016 with the first update on January 1, 2020, but a federal judge in Texas blocked the implementation just days prior to their going into effect.

Key Changes in the Recent Proposed Rules

- The changes increase the minimum salary requirement for an employee to qualify for the overtime exemption to $679 per week, an annualized amount equivalent to $35,308. Under the currently enforced law enacted in 2004, the threshold is set at $455 per week, or $23,600 annually.
- The changes raise the total annual compensation amount an employee must receive in order to qualify as a "highly compensated" employee from $100,000 to $147,414.
- The changes would allow up to 10 percent of the threshold minimum salary requirement to include non-discretionary bonuses and commissions which are paid at least annually.

- The changes require that the threshold amount would be subject to periodic review, and any update would require notice-and-comment rulemaking. There would be no automatic updates to the threshold amount.

If seeking further clarification or review, the DOL has published additional information, which includes Frequently Asked Questions, on its website. The FAQs can be found here. 2.

2. Required Inclusions in Overtime Compensation Calculation Proposal

Shortly after its release of the proposed overtime exemption changes, on March 28, 2019, the DOL announced and published a proposal that would update and clarify the definition of the "regular rate" of pay, which in turn determines how overtime pay is calculated. If the proposal becomes law, it would change the circumstances under which certain employee benefits—tuition and travel reimbursements, unused paid leave, and meal breaks, for example—can be excluded from an employee's regular pay rate and overtime calculations.

The DOL's current definition of the regular rate has not been updated in over 50 years and often creates confusion for employers on what benefits are or are not included in calculating the regular rate of pay. As it currently stands, the FLSA requires employers to pay nonexempt employees an overtime rate of one-and-a-half times the regular rate of pay for all hours worked in a given week beyond 40 hours. The "regular rate" requires inclusion of all "remuneration for employment," except for a list of seven specific items.

The proposed changes would expand this seven-item list and allow employers to exclude additional employee benefits from the regular rate calculations, so long as the benefits are not directly tied to an employee's hours worked or services rendered. Items that would be excluded from regular rate calculations under the proposal include: the cost of providing wellness programs or gym access; payments for foregoing unused paid or sick leave; reimbursed expenses, (even if not solely for the employer's benefit); reimbursed travel expenses; discretionary bonuses; benefit plans; and tuition programs.

The DOL has published additional information on this subject, including FAQs, which can be found here.3.

3. Joint Employment Liability Proposals

Most recently, on April 1, 2019, the DOL announced a proposed rule change to amend existing regulations regarding joint employment under the FLSA that would be welcome news for employers. The proposal would signify the first meaningful changes to joint employer regulations since 1958. Currently, employers found to be joint employers under the FLSA are jointly and severally liable for all wages due to employees. If adopted, these changes would provide a clearer, bright line for employers in determining when an employer may be deemed a joint employer.

The DOL has proposed a four-factor test for determining joint employment under the FLSA. Under the test, the DOL will consider whether a potential joint employer actually exercises the power to: 1) hire or fire the employee; 2) supervise and control the employee's work schedule and employment conditions; 3) determine the employee's pay rate and payment method; and 4) maintain the employee's employment records.

Ultimately, this proposal would more accurately reflect the modern business setting to better accommodate the increased use of staffing arrangements and contingent relationships and would, among other changes, clarify the rules of joint employment between franchisors and franchisees. The

proposal would enable businesses to operate with more certainty as to potential wage and hour responsibilities.

Additional information on the joint employer proposed rule, including FAQs, can be accessed here.

It is still unclear at this time whether any of these proposed changes will replace existing regulations, but it is anticipated that the rules will become final in early 2020 after comments are received and reviewed by the DOL. Comments on the proposals are open for a 60-day time frame beginning on the date of publication. For the overtime exemption proposal, the comments period began March 22, 2019 and ends May 21, 2019. The comments period for the overtime regular rate calculation proposal started with publication on March 28, 2019 and runs through May 28, 2019. Because the joint liability proposal has not yet been officially published, the comments period has not yet begun. Although the final rules do have the potential to be altered or blocked by a court, we encourage you to begin preparing for these changes now. If and when these proposed rules become final, we plan to update this Client Alert.

This article is general in nature and does not constitute legal advice. Readers with legal questions should consult the author, John Vering, or any other shareholders in Seigfreid Bingham's Employment Law Group, including: Rachel Baker, John Neyens, Brenda Hamilton, Shannon Johnson, Mark Opara, or your regular contact at Seigfreid Bingham at 816-421-4460.