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On the Radar: Three Proposed DOL Fair Labor Standards Act Rules

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The U.S. Department of Labor (DOL) recently issued three Notices of Proposed Rulemaking (NPRM) on several aspects of the Fair Labor Standards Act (FLSA), including overtime pay, regular rates of pay, and joint employer status. This article describes the proposed changes that CAAs should be aware of, and what CAAs can do to prepare for them.

Each NPRM has a 60-day public comment period during which interested parties can submit comments on the proposed rule for the DOL's consideration. CAAs interested in providing comments can do so by following the applicable links to Regulations.gov, the online portal for comment submission.

Stay tuned for more information from CAPLAW on these rules as new developments arise.

DOL Proposes New Overtime Rule on Salary Threshold for Exempt Employees

CAAs may soon need to reevaluate which of their employees qualify as exempt from the FLSA's overtime and minimum wage requirements. In March 2019, the DOL issued an NPRM seeking to increase the salary threshold at or above which most workers must be paid in order to be treated as exempt employees under the FLSA. Under the proposed rule, the threshold would increase from the current level of $455 per week ($23,660 per year) to $679 per week ($35,308 per year). Should the proposed rule be adopted, employees who do not earn at least $679 per week will generally no longer qualify as exempt, and will be entitled to be paid for all hours worked, including at time-and-a-half for any hours worked over 40 in a workweek.

The FLSA requires employers to compensate employees at a rate of 1.5 times their regular rate of pay for each hour worked over 40 in a workweek. A number of exemptions to this overtime rule are available, however, including the "white collar exemptions," which cover certain executive, administrative, professional, outside sales, and computer employees. Generally, to qualify for an exemption from the overtime requirements, an employee must perform specific job duties associated with these roles, be paid on a salary basis, and receive compensation at or above a predetermined salary level. The rationale behind the salary level requirement is the belief that employees paid less than the salary level are unlikely to be bona fide executives, administrators, or professionals.

The 2019 NPRM is the most recent attempt by the DOL to raise the salary threshold for the white collar exemptions. The last attempt, made in 2016 under the Obama administration, sought an

increase to $913 per week, or $47,476 per year, and provided for automatic updates to the threshold every three years. It met resistance from many employers nationwide and was challenged in federal court by a number of states and business associations. In August 2017, the court invalidated the Obama administration's rule on the grounds that the DOL had exceeded its authority by setting the salary level too high. The current proposed rule officially rescinds the 2016 proposed rule. However, the DOL acknowledges in the current NPRM that the current salary levels for the white collar exemptions are too low to effectively serve their purpose.

While the current proposed rule again raises the salary threshold, the increase from $455 per week to $679 per week is more moderate than the 2016 proposed increase. The current rule applies the same methodology used when the salary level was last increased in 2004, setting it at approximately the 20th percentile of earnings of full-time salaried workers in the lowest-wage census region (then and now in the South) and in the retail sector. The current proposed rule makes no change to the job duties test associated with the white collar exemptions. Nor does it provide for periodic automatic updates to the salary threshold. The proposed rule would allow the DOL to revisit the threshold every four years, but does not require the DOL to do so, meaning that any future changes to the salary threshold would be subject to federal notice-and-comment rulemaking processes.

Because the rule has not been finalized, CAAs do not need to make any immediate changes. However, they should prepare for the likely issuance of a final rule by looking at exempt positions that are paid more than the current threshold but less than the proposed threshold and determining whether: (1) to raise salaries for employees in those positions to maintain their exempt status; (2) to reclassify employees in those positions as non-exempt and pay them overtime; or (3) to treat the employees as salaried, non-exempt employees.

The NPRM was published in the Federal Register on March 22, 2019. The DOL is inviting the public to submit comments on the proposed new overtime rule via Regulations.gov at https://www.regulations.gov/document?D=WHD-2019-0001-0001. **Comments are due by 11:59 p.m. EDT on May 21, 2019.**

DOL Proposes New Rule on Regular Rate of Pay

In March 2019, the DOL issued an NPRM related to the FLSA's regular rate of pay requirements. The FLSA requires employers to pay overtime to certain employees who work over 40 hours in one workweek at a rate of 1.5 times their regular rate of pay. As a result, it is important to define what an employee's regular rate is, so that the proper amount of overtime pay can be calculated. Given the evolution and widespread use of employee benefits and perks, the DOL issued the NPRM to attempt to clarify what can and cannot be considered part of an employee's regular rate.

The proposed rule would exclude various payments and benefits from an employee's regular rate of pay, including pay for working on a holiday or forgoing leave (such as sick leave, vacation leave, or other paid time off), compensation for bona fide meal periods, and reimbursable expenses for travel and other work-related purposes incurred to further the employer's interest. Other excludable benefits include the costs of: specialist treatment provided onsite; gym access, gym memberships, and fitness classes; wellness programs, including flu vaccination clinics, weight loss programs, and smoking cessation programs; employee discounts on retail goods or services; and tuition benefits, such as discounts for continuing-education programs, tuition-reimbursement programs, and educational loan repayment programs.

CAAs should be aware of the proposed rule and understand that, should it be finalized in its current form, employers will need to conduct a review of overtime-eligible employees' regular rates of pay. These rates will need to be adjusted for any new inclusions and exclusions adopted by the final rule for purposes of calculating overtime compensation.

The NPRM was published in the Federal Register on March 29, 2019. The DOL is inviting the public to submit comments on the proposed regular rate of pay regulations via Regulations.gov at https://www.regulations.gov/document?D=WHD-2019-0002-0001. **Comments are due by 11:59 p.m. EDT on May 28, 2019.**

DOL Proposes New Rule on Joint Employer Status

In April 2019, the DOL issued an NPRM clarifying its interpretation of joint employer status under the FLSA. Two or more employers may be jointly and severally liable for an employee's wages due under the FLSA. Given this level of potential liability, it is important for employers to identify circumstances in which a joint employment arrangement may exist.

The proposed rule would narrow the scope of the joint employer definition under the FLSA, thus reducing the number of potential joint employers who could be liable for underpayment of wages under the Act. If finalized, the rule could impact CAAs that participate in arrangements in which employees engage in work that benefits the CAA and one or more other entities. Examples of these arrangements include: hiring temporary staff through a staffing firm; placing participants in the CAA's workforce development programs at other entities' worksites; and sharing services of one or more administrative or program staff with another organization.

Since 1958, FLSA regulations have specified that two or more persons or entities may be joint employers of an employee if they are "not completely disassociated" with respect to that person's employment. According to the NPRM, current FLSA regulations are not clear on what it means to be "not completed disassociated" where an employer suffers, permits or otherwise employs an employee to work one set of hours in a workweek and that work simultaneously benefits another person or entity. Noting that in this situation, the employer and the other entity are almost never "completed disassociated," the proposed rule seeks to clarify the criteria for joint employer status by replacing the "not completely disassociated" test with a four-factor balancing test. That four-factor test assesses whether a potential joint employer actually:

1. Hires or fires the employee;
2. Supervises and controls the employee's work schedule or conditions of employment;
3. Determines the employee's rate and method of payment; and
4. Maintains the employee's employment records.

If application of the balancing test indicates that an entity actually controls these aspects of an individual's employment, then that entity is liable, both individually and together with other joint employer(s) under the test, for the employee's wages due under the FLSA. Under the proposed rule, only actions actually taken regarding the employee's terms and conditions of employment (rather than the theoretical ability under a contract to take such actions) would be relevant to a determination of joint employer status.

The proposed rule also states that additional factors may be relevant to the joint employment analysis but only if they indicate that the potential joint employer is:

- Exercising significant control over the terms and conditions of the employee's work; or

- Otherwise acting directly or indirectly in the interest of the employer in relation to the employee.

The NPRM was published in the Federal Register on April 9, 2019. The DOL is inviting the public to submit comments on the proposed joint employment regulations via Regulations.gov at https://www.regulations.gov/document?D=WHD-2019-0003-0001. **Comments are due by 11:59 p.m. EDT on June 10, 2019.**