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Final OT Rule May Go Beyond Salary Hike, Lawyers Say

By **Ben James**

Law360, New York (June 30, 2015, 8:38 PM ET) -- The U.S. Department of Labor's newly proposed rule to expand overtime pay protections won plaudits from worker advocates, but some management-side lawyers warned that the final version could contain changes to the duties tests for overtime eligibility that weren't pitched when the proposal was unveiled Tuesday.

The DOL's **proposed rule** called for hiking the minimum salary a worker must earn to qualify for a "white collar" exemption from the Fair Labor Standards Act's minimum wage and overtime pay requirements from \$455 per week — or \$23,660 annually — to \$970 per week or \$50,440 per year, and automatically updating the salary threshold to keep it from becoming outdated.

Business groups and congressional Republicans were quick to criticize the proposed rule. But the presidents of the AFL-CIO, SEIU and United Steelworkers all issued statements voicing support for the proposal, and employment lawyers who represent workers also said the proposal was a positive development.

"It puts millions of workers in a position where they are clearly entitled to overtime, whereas before they were forced to litigate over it," said Outten & Golden LLP partner and class action group co-chair Justin Swartz.

"The new salary level is a win for transparency and bright line rules, and spares practitioners and the courts from delving into the morass that is the duties test as frequently," added Van Kampen Law PC founder Josh Van Kampen.

After President Barack Obama directed Secretary of Labor Tom Perez to revise the DOL's regulations in March 2014, observers speculated that the DOL would increase the salary threshold and might also make changes to the duties tests that factor into overtime eligibility.

In order to qualify for a white collar FLSA exemption, a worker must be paid a fixed salary that meets the minimum threshold, and his or her primary duty must be the performance of exempt work.

The DOL said Tuesday it was not making specific proposals to modify the applicable duties tests but did ask for comment on whether the tests were working as intended, and added that the agency was concerned that the current tests might allow for exemption of employees performing a "disproportionate amount" of nonexempt work.

On Tuesday, former heads of the DOL's wage and hour division — the agency branch that issued the proposal — either expressed concern about, or were openly critical of, the way

the proposal dealt with the duties test question.

Little Mendelson PC shareholder Tammy McCutchen, who headed the WHD from 2001 to 2004, said some employers were worried the DOL would ambush them with changes to the duties tests in the final rule.

"I have to share the concerns of the people in the business community, that I've talked to this morning, that the DOL will have changes to the duties test in the final rule that we have not had a chance to see and comment on," she said.

"I am a little concerned about what may transpire with the duties test at the end of the day," added Ogletree Deakins Nash Smoak & Stewart PC shareholder Alfred Robinson, a former acting WHD director. "I am surprised that they were not more forthcoming in submitting proposed changes in duties tests, as opposed to kind of leaving a blank page and asking people to fill it in. From my perspective, I think it would have been better to propose some changes to the duties test and have people comment."

If sweeping changes to the duties test are part of the final rule that shouldn't come as a surprise to anyone, said Paul DeCamp, former head of the WHD and current leader of Jackson Lewis PC's wage and hour practice group.

Courts typically give agencies a latitude on final regulatory language — under the "logical outgrowth" doctrine — as long as the regulated community has been kept apprised of the topics under consideration, according to DeCamp.

Here, the DOL clearly believes it has laid the groundwork to revise the duties tests because it has announced the tests are in play, he added.

"I don't think that the DOL is necessarily hiding the ball as much as being cowardly in its approach to rulemaking," DeCamp said.

DeCamp noted that 15 months had elapsed since Obama called for the regulations to be revised, and that the agency had held numerous meetings with employers, workers and other stakeholders during that time.

"This cake is not baked yet, and it is irresponsible for the department to leave so much of the regulatory landscape completely up in the air," said DeCamp. "If the department genuinely does not yet know which way it wants to go on the duties issue, the department should not have issued that NPRM. It is premature because the duties analysis is so critical to how one applies these exemptions."

Not everyone thinks changing the duties tests in the final rule is in the cards. Swartz said it was possible but unlikely, while Van Kampen said the DOL was "concentrating its fire on the new standard salary test."

However, the proposal released Tuesday asked for input on several questions related to the duties tests.

"While the department is not proposing specific regulatory changes at this time, the department is seeking additional information on the duties tests for consideration in the final rule," the proposal said.

The questions posed included what, if any, changes needed to be made, and whether the DOL should look at California's approach as a model.

In addition to meeting salary requirements, California requires workers to spend more than 50 percent of their time on tasks deemed exempt from minimum wage and overtime

requirements. Federal regulations, however, look at a worker's "primary duty" to assess if they qualify for one of the FLSA white collar exemptions.

"If the DOL moves to a California standard for the duties test, the first thing I'm going to do is go out and hire about 100 new associates to help me defend all the new litigation that our firm's clients will face," DeCamp said.

Businesses concerned about the impact of the new regulations should make their voices heard during the comment period and bring up potential changes to the duties tests, even though no specific moves have been proposed, according to attorneys.

The DOL said in an email Tuesday that "while no specific changes are proposed for the duties tests, the NPRM contains a detailed discussion of concerns with the current duties tests and seeks comments on specific questions regarding possible changes. The Administrative Procedure Act does not require agencies to include proposed regulatory text and permits a discussion of issues instead."

--Editing by John Quinn and Emily Kokoll.

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