

Legal Notes: July 2015

No doubt, you've read the many recent articles about the proposed changes to the federal overtime law. Many of these stories don't do a good job of explaining the background to the law, how it has changed over the years and what prompted the Obama administration to make changes in the salary basis.

When initially passed, the Fair Labor Standards Act was meant to cover most employees. The default position was that most employees would be paid a minimum wage and overtime pay. Certain exemptions were written into the law for a specific set of jobs. These exemptions required that employee do a certain set of duties for a fixed salary; so called "exempt employees."

In 1938, relatively few employees were considered "exempt employees." Over time, with the huge shift in employment away from so-called "blue collar" jobs to "white collar" jobs more and more employers classified a greater percentage of their workforce as "exempt," a classic case of the exemption swallowing the rule. Earlier attempts to fix this issue, most recently in 2004, focused on the duties test; however, Obama's proposal instead focuses on the salary level. Why?

The duties test has always been notoriously vague. The test sets up four types of duties: executive, administrative, professional, and outside sales. Some people clearly fit into a category: me, for example. I'm a lawyer, so I fit into the professional category. For many though the test is much harder to interpret, with the administrative duty being a frequently misinterpreted area. So some employers took advantage of these large grey areas and called employees exempt that should not have been. Employees, not knowing the difference, or too afraid to complain, didn't challenge application of the rules. When employees did challenge their status, the rules created a field day for lawyers to argue over how the tests applied.

The Obama administration could have chosen to tinker with the duties test rules, making the rules clearer or tighter or whatever. Instead, the administration focused on the salary test. For years, no one really paid much attention to the salary test because almost all exempt employees met the very low threshold requirement (\$455 per week, or \$23,660 per year); all the action was in the duties test. The Obama proposal flips this around.

Now, the first question will not be the duties test, but whether the employee earns the minimum salary. By setting up the test this way, most employees will not qualify as exempt because of a clear failure to make the minimum salary. Employers will not be required to read the tea leaves whether the employee meets the duties test (Executive? Administrative? Professional?). The duties test will only come into play with employees who earn in excess of the new minimum salary (\$47, 892). My guess is that it will be much easier for employers to apply the duties test for employees at that salary level.