

### (3) Macro-Economic Effects

Agencies are expected to estimate the effect of a regulation on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of United States goods and services, if accurate estimates are reasonably feasible and the effect is relevant and material. 5 U.S.C. 1532(a)(4). However, OMB guidance on this requirement notes that such macro-economic effects tend to be measurable in nationwide econometric models only if the economic impact of the regulation reaches 0.25 percent to 0.5 percent of Gross Domestic Product, or in the range of \$1.5 billion to \$3.0 billion. A regulation with smaller aggregate effect is not likely to have a measurable impact in macro-economic terms unless it is highly focused on a particular geographic region or economic sector, which is not the case with this proposed rule.

The Department's PRIA estimates that the total aggregate economic impact of this proposed rule ranges from \$870.3 million to \$1,575.5 million. However, as noted in the previous section summarizing the Department's PRIA, these are upper bound estimates and the actual costs and impacts expected to be incurred by employers, including state and local governments, if the proposed rule were adopted, are likely to be lower. Therefore, given OMB's guidance, the Department has determined that a full macro-economic analysis is not likely to show any measurable impact on the economy.

### (4) Summary of State, Local, and Tribal Government Input

Congress amended the FLSA in 1985 to readjust how the Act would apply to the public sector. The 1985 amendments allowed compensatory time off in lieu of cash overtime pay, partial overtime exemptions for police and fire departments, the use of unpaid volunteers in certain circumstances, and a temporary phase-in period for meeting FLSA compliance obligations. However, Congress enacted no special provisions for public agencies related to the section 13(a)(1) exemptions or the 541 regulations. Consequently, the same rules for distinguishing 541-exempt employees from nonexempt employees that apply in the private sector were initially applied to the public sector following the 1985 amendments.

Since 1985, State and local governments have confronted FLSA compliance issues and the 541 regulations have been among the

foremost of their concerns, particularly in the administrative exemption category. Many State and local governments classified nearly all of their non-supervisory "white collar" workers as exempt administrative employees without regard to whether their primary duty relates directly to agency management policies or general business operations or meets the discretion and independent judgment test. In the late 1980s, several Governors and State and local government agencies urged the Department to exempt classifications such as social workers, detectives, probation officers, and others, to avoid disrupting the level of public services that would result from increasing costs or limiting the hours of service due to overtime requirements. In 1989, former Labor Secretary Elizabeth Dole, in a widely disseminated response to 13 Governors, confirmed the nature of the administrative exemption's duties test as applied to public sector employees but solicited specific input with accompanying rationale for what should be changed. Responses were limited but argued generally that government services are unique because of the impact on health, safety, welfare or liberty of citizens. This, they argued, should allow exemption of positions in law enforcement and criminal justice, human services, health care and rehabilitation services, and the unemployment compensation systems, regardless of whether any particular employee's job duties include important decision-making on how the agency is operated or managed internally. They also urged the Department to redefine the professional exemption to recognize a broader contemporary use of that term in government employment.

In the midst of a growing wave of private lawsuits filed by public employees against their employers challenging their exempt status, a series of court decisions were rendered that sharply limited public employers' ability to successfully assert exemption under the "salary basis" rule. This led the Department to alter the "salary basis" rules to provide specific relief to public employers in a final rule issued in August 1992 (57 FR 37666; Aug. 19, 1992). Under this special rule, the fact that a public sector pay and leave system includes partial-day deductions from pay for absences not covered by accrued paid leave becomes irrelevant to determining any public sector employee's eligibility for exemption.

Public sector employers have been less vocal over FLSA issues since the Department's 1992 rulemaking allowing partial-day (or hourly) deductions from pay for employee absences not covered

by accrued leave and other special "salary basis" rules for budget-driven furloughs (29 CFR 541.5d). The U.S. Supreme Court's 1997 decision in *Auer v. Robbins*, 519 U.S. 452 (1997), a public sector case involving the City of St. Louis Police Department and disciplinary deductions from pay, may also have relieved many concerns of public agencies over pay docking for discipline.

Although public agency organizations were invited to the Department's stakeholder meetings to address concerns over the 541 regulations, they mostly did not respond to the invitations. The International Personnel Management Association, accompanied by the National Public Employers Labor Relations Association and the U.S. Conference of Mayors, suggested that progressive discipline systems are common in the public sector (some collectively bargained) and the "salary basis" rule for exempt workers, which prohibits disciplinary deductions except for major safety rules, threatens such systems. Representatives of the Interstate Labor Standards Association (ILSA) submitted written views suggesting that the salary threshold be indexed to the current minimum wage or some multiple thereof (e.g., 3 times the minimum wage for a 40-hour workweek or \$618 per week). One additional idea was to relate the salary levels to those of the supervised employees.

The proposed rule would revise and simplify the exemptions' duties tests, but would continue to apply the same basic duties tests in both the public and private sectors. The public sector is governed by a different set of pay-docking rules and additional proposed permissible disciplinary deductions to include sanctions for infractions such as sexual harassment and work place violence. However, a broader or separate duties test rule applicable solely to the public sector does not seem warranted at this time, as the case has not been made for such separate treatment. The Department is interested in receiving specific public comments on any issues of concern to public employees and public employers, and will carefully examine any such public comments submitted on this proposal during the rulemaking process.

### (5) Least Burdensome Option or Explanation Required

The Department's consideration of various options is described in the preceding section in the preamble on the Regulatory Flexibility Act and Executive Order 13272. The Department