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DOL Proposes $35,308 Overtime Threshold

Volume 42

Issue 28

March 12, 2019

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The DOL has announced details of its long-awaited proposal to increase the salary thresholds for exemptions from federal minimum wage and overtime requirements. The proposed overtime rule would raise the minimum salary for the so-called white-collar exemptions and the annual compensation level for the highly compensated employee exemption under the Fair Labor Standards Act to $35,308 and $147,414, respectively. The DOL anticipates the changes would go into effect in January 2020 and affect an estimated 1.3 million workers. Employers will have an opportunity to comment following the proposed rule's publication in the *Federal Register*.

Background

The Fair Labor Standards Act (FLSA) establishes federal minimum pay standards for public and private sector employers. Employees covered by the FLSA must be paid at least the federal minimum wage and, in most cases, overtime at time and one-half of the employee's regular rate of pay for all hours worked over 40 in any workweek. Regulations enforced by the DOL's Wage and Hour Division provide exemptions from these requirements for salaried executive, administrative, and professional (EAP) employees (so-called "white-collar" employees) who satisfy minimum salary and job duties tests, and for highly compensated employees (HCEs) who meet higher compensation and less demanding duties tests.

In May 2016, the Obama administration issued a rule that would have extended the FLSA's minimum wage and overtime protections to more than 4 million workers. The rule would have more than doubled the minimum salary threshold for an EAP or white-collar exemption from $455 a week annually to $913 per week, increased the total annual compensation level required to exempt HCEs from $100,000 to $134,004, and automatically adjusted the threshold every three years. (See our May 18, 2016 *FYI Alert*.)

A federal judge initially blocked the Obama administration's final overtime rule from taking effect and later invalidated it altogether. (See our September 22, 2017 *For Your Information*.) Although the DOL subsequently appealed, it asked the U.S. Court of Appeals for the 5th Circuit to hold the appeal in abeyance pending the DOL's further rulemaking. (See our November 1, 2017 *FYI Alert*.)

Proposed rule

On March 7, the DOL announced the details of its long-awaited proposal to increase the salary thresholds for both the EAP and the HCE exemptions. According to the DOL, the proposed rule would make more than a million currently exempt workers overtime-eligible.

Highlights of the rule include:

- Raising the salary floor for an EAP exemption from $455 per week ($23,660 per year) to $679 per week ($35,308 per year)
- Allowing up to 10% of the EAP salary threshold to be satisfied through nondiscretionary bonuses, incentives, and/or commissions that are paid on an annual or more frequent basis
- Allowing employers to make a "catch up" payment to EAP employees at year-end or no later than the first pay period after year-end to satisfy the $35,308 minimum
- Increasing the threshold for the HCE exemption from $100,000 to $147,414 in total annual compensation
- Special salary levels for the following U.S. territories — Puerto Rico, Virgin Islands, Guam, Commonwealth of the Northern Mariana Islands, and American Samoa
- Updated base rate for employees in the motion picture producing industry
- No changes to the job duties tests

Notably absent in the proposal were automatic increases in the salary thresholds. Rather, the DOL indicated that it would use the notice-and-comment rulemaking to update salary levels every four years.

> **Buck comment.** Employers in states that already have higher minimum salary requirements to qualify for certain white-collar exemptions (such as New York and California) and employers that made changes in employee classifications and/or their pay structures to comply with the 2016 rule may not be significantly impacted by the proposed overtime rule.

Benefit Plan Implications

The proposed rule could impact employee benefit plans in several ways. Employers may face larger required contributions to their retirement plans if overtime compensation is included in the plan's contribution formula. If a plan's definition of compensation excludes overtime, the new overtime pay may cause it to become discriminatory in favor of highly compensated employees.

Behind the new minimums

The DOL used the same methodology in setting the proposed EAP salary level that it used in 2004 — the 20th percentile of earnings for full-time salaried workers in the lowest-wage census region (currently the South) and/or in the retail sector nationwide. The agency used the same methodology that the 2016 rule used to set the annual compensation level required for the HCE exemption — the 90th percentile of weekly wages of all full-time salaried employees nationally. In developing the newly proposed minimums, the DOL used 2017 data projected to January 2020, but indicated that it would use 2018 data in developing the minimums for the final rule.

What's next

The proposal will be subject to a 60-day public comment period following the rule's publication in the *Federal Register*. Following review of public comments, the DOL will issue a final rule. Currently, the DOL anticipates that the new rule will be effective in January 2020.

In closing

For now, the federal minimum wage and overtime thresholds that have been in place since 2004 remain in place. While the minimum salary levels in the final rule may differ, the standard duties test will not. Employers should make sure that their employees are currently classified properly, and then begin to consider the potential impact of the proposed rule and viable compliance strategies if it were to take effect unchanged.

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