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DOL releases new overtime rule

The DOL has released its much-anticipated overtime rule increasing the annual salary thresholds for the FLSA's white-collar exemptions from federal minimum wage and overtime requirements. Effective January 1, 2020, the minimum salary to qualify for the executive, administrative, and professional exemptions will be \$35,568, and the annual compensation level for the highly compensated employee exemption will be \$107,432. Employers should re-examine employee classifications and develop pay plans for those who will no longer be exempt.

Volume 42

Issue 83

September 26, 2019

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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 both a minimum salary level test and a duties test and for highly compensated employees (HCEs) who satisfy a higher compensation level requirement and a less stringent duties test.

In 2016, the Obama DOL sought to significantly increase the salary thresholds for the EAP and HCE exemptions and to automatically adjust them every three years (See our [May 18, 2016 FYI Alert.](#)) A federal judge enjoined and later invalidated the final rule before it could be implemented. (See our [September 22, 2017 FYI.](#)) An appeal of that decision to the U.S. Court of Appeals for the 5th Circuit was held in abeyance pending further rulemaking by the DOL. (See our [November 1, 2017 FYI Alert.](#))

On March 7, 2019, the Trump DOL announced its proposal to increase the earnings thresholds for both the EAP and the HCE exemptions that included, among other things, raising the salary floor from \$455 to \$679 per week for an EAP exemption and increasing the total annual compensation level for HCEs from \$100,000 to \$147,414. (See our [March 12, 2019 FYI Alert.](#))

Final overtime rule

On September 24, the DOL released its final rule updating and revising the FLSA overtime regulations. The final rule updates the earnings thresholds for both the EAP and HCE exemptions and allows employers to count a portion of certain bonuses/commissions towards meeting the new salary levels.

Effective January 1, 2020, the final rule:

- Raises the “standard salary level” from the current level of \$455 to \$684 per week (equivalent to \$35,568 per year for a full-year worker).
- Raises the total annual compensation requirement for HCEs from the current level of \$100,000 to \$107,432 per year.
- Allows employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the standard salary level provided such payments are made on an annual or more frequent basis. If an employee does not earn enough in nondiscretionary bonuses or incentive payments in a given year (52-week period) to maintain exempt status, employers may make a “catch up” payment within one pay period of the end of the 52-week period.

Notably, the final rule makes no changes to the standard job duties tests nor does it amend the salary basis test. Rather than providing for automatic adjustments in the future, the DOL confirmed its intent to update the earnings thresholds in the future using notice-and-comment rulemaking.

Special salary levels for U.S. territories and the motion picture industry

The final rule also revises the special salary levels for workers in U.S. territories and in the motion picture industry. The DOL is maintaining a special salary level of \$380 per week for American Samoa. Additionally, it is setting a special salary level of \$455 per week for workers in Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands.

The DOL is also maintaining a special base rate threshold for employees in the motion picture producing industry. The new base rate is \$1,043 per week or a proportionate amount based on the number of days worked.

Benefit plan implications

The final 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 benefit or contribution formula. If a plan’s definition of compensation excludes overtime, the new overtime pay amounts required by the rule may cause the plan to become discriminatory in favor of highly compensated employees.

In closing

The DOL's final overtime rule updates the FLSA's overtime and minimum wage exemptions for white-collar workers. Increases to salary thresholds that have been in place since 2004 will take effect on January 1, 2020 — expanding overtime eligibility to an estimated 1.3 million workers. Employers that have not already done so will want to re-examine the classification of currently exempt employees and begin to develop pay plans for those who would no longer be exempt under the final rule.

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