

Proposed Increases to Federal Overtime Salary Thresholds Provide an Opportunity to Review FLSA Compliance

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On March 7, 2019, the U.S. Department of Labor (the “DOL”) announced a proposed rule that would raise the annual minimum salary requirements for the white collar overtime exemptions under the Fair Labor Standards Act (“FLSA”) that would increase the number of employees eligible for overtime pay. Unless exempt, employees covered by the FLSA must be paid an enhanced rate of not less than time and one half their regular rates of pay for work in excess of 40 hours in a workweek. If adopted, the proposed rule would formally rescind the overtime rule that the DOL issued in 2016 but that was invalidated by a federal court.

Key components of proposed rule. If implemented, the new rule would:

- Raise the minimum salary level for the “white collar” (executive, administrative and professional) overtime exemptions of the FLSA from \$455 per week (\$23,660 annually) to \$679 per week (\$35,308 annually). This is considerably less than the 2016 rule, which would have set the salary level at \$913 per week (\$47,476 annually).
- Raise the total annual compensation requirement for the highly compensated employee exemption from \$100,000 to \$147,414. This is significantly higher than the 2016 rule, which would have set the requirement at \$134,004.
- Allow employers to count nondiscretionary bonuses, commissions and incentive payments that are paid annually (or more frequently) to satisfy up to 10 percent of the salary threshold.

To qualify for an exemption from overtime, a position must satisfy both the salary requirement and the applicable “duties test.”¹ Notably, the DOL’s new rule does not alter the duties test, and does not provide for automatic increases to the salary thresholds going forward as the 2016 rule had. However, the proposal discusses the DOL’s intention to recommend additional updates to the minimum salary requirements every four years through notice-and-comment rulemaking.

¹ For more information about the white collar exemptions, including the duties test, see the Department of Labor, Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA), https://www.dol.gov/whd/overtime/fs17a_overview.htm.

The rule does not impact positions in states that already set higher minimum salary levels for white-collar exemptions (such as New York, which has a state-wide minimum of at least \$43,264 and a New York City minimum of at least \$58,500 for employers with 11 or more employees).

The rule is currently pending publication in the Federal Register. Once it is published, the public will have 60 days to comment. The DOL will then issue a final rule that will set an effective date for implementation, which we expect will be January 2020 at the earliest, assuming that it is not delayed by legal challenges.

Employers should plan to audit for compliance with FLSA exemptions in 2019.

Given the potential costs of compliance with the new rule, employers should prepare to audit for compliance with FLSA exemptions this year.

At this early stage, employers can begin assessing whether any positions in their workforce would be affected by the increased salary requirements. If the rule is adopted, the employer then should decide on one of the following two options for each affected position:

- Reclassify the position from exempt to nonexempt and, after the rule becomes effective, begin paying overtime for the position because the salary falls below the minimum requirement; or
- Implement a salary increase sufficient to maintain the exemption under the new minimum salary requirement. Remember that nondiscretionary bonuses, commissions and incentive payments can be counted as up to 10 percent (\$3,530.80) of the total salary requirement.

While we encourage our clients to regularly audit for compliance with FLSA exemptions, the pending rule change creates a prime opportunity for employers to consider FLSA compliance more generally, including whether any positions should be reclassified because they fail to satisfy the “duties test.”²

Emphasize FLSA compliance in transactional due diligence. We expect the rule change to be a focus for transactional due diligence in 2019 and 2020. Depending on the composition of the target’s workforce, a prudent investor or buyer will want to know the costs associated with compliance with the rule change, whether the target has budgeted for those costs and whether the target has any FLSA compliance issues generally.

² See *id.*

Please do not hesitate to contact us with any questions.

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