



DOL Releases New Overtime Rules

[As we reported last month](#), the Department of Labor (“DOL”) was on the cusp of releasing its long-anticipated proposed changes to rules governing the Fair Labor Standards Act overtime exemptions. On March 7, 2019, DOL released the proposed rule. In developing the proposed rule, the DOL received extensive public input during six in-person listening sessions held around the nation in the fall of 2018 and received over 200,000 comments as part of its Request For Information process. The DOL is taking comments on the proposed rule for 60 days. Currently, the rule is projected to take effect in January 2020.

The proposed rule is significant both in what it did and what it did not do.

SALARY LEVEL CHANGE

The most anticipated change was the salary level. The new proposed salary level is \$679 per week (equivalent to \$35,308 per year) [Salary payments can also be made of at least \$1,358 bi-weekly; \$1,471 semi-monthly; or \$2,942 monthly. As a reminder, while you can have a salaried exempt employee work part time, there is no pro-ration of the salary amount for part-time employees]. Under currently-enforced law, the salary level is \$455 per week (equivalent to \$23,660 per year). The current level was set in 2004. In establishing the new amount of \$679, the DOL used the same salary level methodology it used in 2004 but projected the amount to January 2020, the month that the new rule is expected to take effect. The DOL felt that using the same methodology as 2004 would be beneficial because it is familiar to employees and employers; it can be used without causing significant hardship or disruption to employers or the economy; and, it has withstood the test of time.

OTHER PROPOSED CHANGES

The DOL also proposes to permit employers to use non-discretionary bonuses and incentive payments to satisfy up to 10% of the standard salary level. For employers to take credit for non-discretionary bonuses and incentive payments toward a portion of the standard salary-level test, they must make

such payments on an annual or more frequent basis.

If an employee does not earn enough in non-discretionary bonus or incentive payments in any given year (52-week period) to retain his or her exempt status, the DOL permits the employer to make a “catch-up” payment within one pay period of the end of the 52-week period. This payment may be up to 10% of the total standard salary level for the preceding 52-week period. Any such catch-up payment will count only toward the prior year salary amount and not toward the salary amount in the year in which it is paid.

Finally, the DOL proposes to increase the total annual compensation requirement for highly compensated employees to \$147,414 per year. This is an increase over the \$100,000 level set in 2004 (and higher than the \$134,004 which is where it was set in 2016). To be exempt as a highly compensated employee, an employee must also receive at least the new standard salary amount of \$679 per week on a salary or fee basis without regard to the payment of non-discretionary bonuses and incentive payments.

WHAT THE PROPOSED RULE DOES NOT DO

The proposed rule does not contain an automatic indexing or schedule to update the salary level over time. However, the DOL stated that it is committed to periodically reviewing and updating the salary threshold. It has asked for guidance and comments on this issue as to how and when it should update the salary level, but right now the DOL is suggesting every 4 years would be appropriate. Any update would continue to require notice and comment rulemaking process.

Surprisingly, the proposed rule does not propose any changes to the “job duties” tests for administrative, executive, or professional employees, which many commentators had anticipated. Likewise, there were no changes proposed in the definition of “salary basis.”

TAKE-AWAYS FOR EMPLOYERS

The new proposed rule appears to have struck a middle ground between the 2004 salary level and the 2016 salary level. This is welcome news for most employers as it will have less of an impact on their operations and labor costs.

For school districts, no changes were made to the teacher salary exemption, which has no “salary level” test.

While the duties tests did not change for administrative, executive, or professional employees, school districts are still bound by the duties tests and must ensure that any employees that they are treating as exempt from the overtime rules fall within the confines of those tests. It has been our experience that many employees who are classified as exempt employees may not actually meet the duties test, and therefore, districts who are paying individuals as exempt employees may not be in compliance with the law. Now is a good time to reevaluate your classification of employees.

The new rule will not take effect until the final publication of the rule. There still may be changes to the final rule, but for now, no other significant changes are anticipated. The final rule will have a definitive

effective date (right now projected to be January 2020). It is unknown whether the 2019 proposed rule will generate litigation like the 2016 rule did. If so, that could further delay any effective date.

School districts may wish to consult with legal counsel to ensure compliance with both state and federal wage and hour laws in reviewing any policies or practices concerning overtime and exempt employees.

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