

HR Heads-up

PERIODIC UPDATES ON IMPORTANT HR LEGAL ISSUES

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DOL Releases New Proposed Overtime Rules

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As most employers are aware, back in 2016 the Department of Labor (“DOL”) issued changes to the rules interpreting the Fair Labor Standards Act overtime exemptions. Those final rules were within days of going into effect when a court halted them from taking effect because the DOL exceeded its authority in making those changes to the rules.

On March 7, 2019, the DOL released the proposed rule to take a second “kick at the can” to modernize the overtime exemption standards. 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 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 that must be met in order to qualify as an exempt executive, administrative, or professional employee. The new proposed salary level is \$679 per week (equivalent to \$35,308 per year). The minimum salary can also be satisfied with salary equal to at least \$1,358 every other week; \$1,471 two times a month; or \$2,942 monthly. This is a significant increase over the FLSA’s current minimum salary level of \$455 per week (equivalent to \$23,660 per year), but is significantly lower than the \$47,476 annual minimum salary that was set by the DOL’s proposed rule in 2016.

Because this is a proposed rule, as part of the normal rule-making process, the DOL is taking comments for 60 days.

OTHER PROPOSED CHANGES

Highly Compensated Employees. The current DOL overtime exemption rules include an exemption for “highly compensated employees” who earn \$100,000 or more annually (additional factors must be met as well and this exemption does not exist under Wisconsin law). The DOL proposed rule would increase the total annual compensation requirement for highly compensated employees to \$147,414 per year. 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.

Bonuses and Incentive Compensation. The DOL also proposes to permit employers to use non-discretionary bonuses and incentive payments to satisfy up to 10% of the standard \$35,308 salary level as well as for the \$147,414 “highly compensated” salary level. Employers who wish to rely on non-discretionary bonuses and incentive payments to meet the minimum salary levels 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.

WHAT THE PROPOSED RULE DOES NOT DO

The proposed rule does not include an automatic indexing or schedule to update the minimum salary requirements over time. However, the DOL stated that it is committed to periodically reviewing and updating the salary level. The DOL has asked for guidance and comments as to how often it should update the salary levels, and has itself suggested that every four years would be appropriate. Any update would require a notice and comment rulemaking process.

Importantly, the proposed rule also does not seek to change the “duties” tests for executive, administrative, or professional employees. Despite speculation that the proposed rules would include changes to the duties tests, these tests, which can be difficult to interpret and apply, remain unchanged. Likewise, there were no changes proposed to what it means to be paid on a “salary basis.”

TAKE-AWAYS FOR EMPLOYERS

The new proposed rule appears to have struck a middle ground between the previous salary level and the higher \$47,476 level proposed in 2016. This is welcome news for most employers as it will have less of an impact on their operations and labor costs.

While the duties tests did not change for the executive, administrative, or professional exemptions, employers are still bound by the duties tests and must ensure that any employees they are treating as exempt from overtime fall within the confines of those tests. In our experience, some employers classify employees as exempt based on salary level alone and do not recognize or adequately consider the need to meet the duties test. Now is a good time for employers to reevaluate their classification of employees. The new rule will not take effect until the final publication of the rule, which is likely to occur sometime in late 2019. 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 also unknown whether the new proposed rule will generate litigation as was the case in 2016. If so, that could further delay any effective date.

Employers 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.