



School Law FYI

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Final Overtime Rules Take Effect January 1, 2020

For the last three years we have been writing about new overtime rules under the fair Labor Standards Act (FLSA). They were first proposed under the Obama Administration. On the eve of taking effect they were blocked by the courts. They have been revised and now reissued by the Department of Labor (DOL) under the Trump Administration. The “final” regulations have been issued and will go into effect on January 1, 2020.

Given the tortured history of the overtime rules, you may ask yourself whether this rule will really go into effect on January 1, 2020, or whether there will be further litigation. Despite all the drama over the last three years, you should be preparing as if this rule will go into effect as planned on January 1, 2020. The new rule avoids some of the more problematic areas that existed with the first attempt at revisions. However, worker advocacy groups have already threatened litigation over the final rule. While this may feel like déjà vu all over again (to quote Yogi Berra), employers should take these last few months to ensure they are in compliance with the overtime exemptions.

As a reminder, in order to be exempt under the white collar exemption categories, an employee must meet certain requirements related to salary threshold, salary basis, and primary duties. The final rule does not make any changes to the “job duties” tests for administrative, executive, or professional employees. (The non-discretionary bonus is a change to the definition of “salary basis” and is discussed below).

SALARY LEVEL CHANGES

The most talked about change is the change to the salary level. The new minimum salary threshold will be \$684 per week (annualized to \$35,568 per year). This is a slight increase from the March proposed rule of \$679 per week (equivalent to \$35,308 per year). [Payment can also be made bi-weekly at \$1,368; semi-monthly at \$1,482; or monthly at \$2,964]. And while you can employ an exempt employee on a part-time basis, there is no pro-rated amount for the salary level.

NON-DISCRETIONARY BONUSES MAY BE INCLUDED

Under the final FLSA rule, employers will be able to count certain bonuses and incentive compensation toward meeting ten percent of the minimum salary thresholds for executive, administrative, computer and professional employees. Specifically, employers may count non-discretionary bonuses, incentives, and commissions that are paid annually or more frequently. An employer may designate and utilize any 52-week period it chooses for this purpose (e.g., calendar year, fiscal year, anniversary year). If, by the

last pay period of the 52-week period, the employee's total compensation (salary plus non-discretionary bonuses, incentive compensation, and commissions) is less than \$35,568, the employer may make one final payment to meet this threshold no later than the next pay period following the end of the year. This payment may only be counted toward the prior year's threshold and not also count towards the current year's threshold. If an employer fails to make this catch-up payment, the overtime exemption will be lost for the 52-week period.

HIGHLY COMPENSATED EMPLOYEES

The final rule increases the total annual compensation level for highly compensated employees from the current \$100,000 per year to \$107,432 per year. This change for highly compensated employees is down significantly from the \$147,414 per year, which was proposed in the March rule. To be exempt as a highly compensated employee, an employee must also receive at least the new standard salary amount of \$684 per week on a salary or fee basis without regard to the payment of non-discretionary bonuses and incentive payments. In Wisconsin, this change is less important because Wisconsin law does not recognize a highly compensated classification.

WHAT THE PROPOSED RULE DOES NOT DO

The final rule does not contain an automatic indexing or schedule to update the salary level over time. However, DOL has stated it is committed to periodically reviewing and updating the salary threshold more regularly.

For school districts, no changes were made to the teacher's salary exemption, which has no salary level test. Academic administrative employees have their own separate exemption tests and can be paid at the \$684 per week salary amount or at the entrance salary amount paid to teachers.

ACTION PLAN FOR EMPLOYERS

While our warnings to you that changes will take effect soon may seem a little like the boy who cried wolf, employers should take the time to review their classifications and salary levels. Even if you have done this work before, your workplace or a specific employee's work might have changed over the last couple of years. Also, increasing the salary for an employee that does not meet the duties test might only make some matters worse.

Employers should evaluate not just whether changes will be necessary, but how best to make those changes and how those changes might be communicated. For example, employers with exempt workers who currently earn more than \$455 per week but less than \$684 per week, and who satisfy the duties requirements, may comply with the new rule be either increasing employees' salary to the new level; limiting hours to preclude overtime work; and/or by reclassifying employees as non-exempt.

If employers adjust salary levels to meet the new requirement, they should consider the impact on other exempt employees who also may request an increase, as the gap between their salary and other salaried workers diminishes.

While many employers have begun making changes over the last few years, if you have not, now is the time to do so.

Boardman & Clark Welcomes Matt Bell

The School Law Practice Group of Boardman Clark LLP is proud to announce that Matt Bell will become a member of the firm effective October 1, 2019. Matt has over 15 years of experience in representing school districts. Matt is a 2005 graduate of the Michigan State University College of Law. Prior to joining Boardman & Clark, Matt worked for the Madison Metropolitan School District for ten years, first as an Associate General Counsel and, most recently, as its General Counsel. Prior to working for the Madison School District, he was an attorney in Michigan working in the special education area. In his time at Madison Schools, he represented the District in administrative hearings, proceedings before all levels of Wisconsin courts, represented the District in mediations, IEP team meetings, manifestation determinations, and Section 504 team meetings, and consulted with district administrators regarding a wide variety of topics, including family law, pupil records, juvenile delinquency, employee discipline, McKinney Vento, Section 504, ADA, and Title IX. Prior to his time as an attorney, Matt worked as a school psychologist and director of special education.

For over 55 years, Boardman & Clark's School Law Practice Group has continuously served as general counsel and special counsel to school districts throughout Wisconsin. We currently represent over 125 school districts, CESAs, charter schools, and technical colleges. With the addition of Matt, our School Law Practice Group consists of 14 attorneys and one paralegal. Thirteen of our attorneys have over ten years' experience working with school districts, with seven of those having over 25 years of experience.

Boardman Clark Attorneys Named to Best Lawyer List

Twenty-seven Boardman Clark attorneys were selected by their peers for inclusion in the 2020 Edition of the Best Lawyers in America in 41 different practice areas. In the area of Education Law, Attorneys Eileen Brownlee, JoAnn Hart, Mike Julka, and Jim Ruhly were named to the list; in the area of Employment Law -Management, Attorneys JoAnn Hart, Mike Julka, Jennifer Mirus, and Jim Ruhly were named to the list; in the area of Labor Law-Management, Attorneys JoAnn Hart, Mike Julka, and Jim Ruhly were named to the list and in the area of Real Estate Law, Bill Fahey was named to the list. In addition, Mike Julka was named Lawyer of the Year in the Labor Law – Management area for Madison. Inclusion in Best Lawyers is based entirely on peer review, using the methodology designed to identify the consensus opinion of leading lawyers about the professional abilities of their colleagues. You can see the full list of recognized Boardman & Clark attorneys and read more about the Best Lawyers methodology on our website.

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