Legal Update Article

Department of Labor Releases New Proposed Overtime Rule, Sets Minimum Salary at $35,308

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The U.S. Department of Labor (DOL) has issued a new proposed rule raising the annual minimum salary requirements for the Fair Labor Standards Act (FLSA) "white collar" overtime exemptions (executive, administrative, and professional). Under the new proposed rule, the salary level for the white collar exemptions will increase to $35,308, or $679 per week.

That is nearly a 50% increase from the current level of $23,660 ($455 per week), but well below the salary level set by the DOL under the Obama Administration, which would have set the salary level at $47,476 ($913 per week). The Obama-era rule was blocked by a permanent injunction issued by a Texas district court judge. The proposed rule rescinds the 2016 Obama rule.

Under the proposed rule, the annual compensation level for "highly compensated employees" also will increase. The current annual compensation level for highly compensated employees will increase from $100,000 to $147,414. That is *higher* than the level set by the Obama-era rule, which had the annual compensation requirement at $134,004. Highly compensated employees must still perform exempt duties for the exemptions to apply, but the duties test for such employees is easier to satisfy.

Consistent with the Obama-era rule, employers will be permitted to use nondiscretionary compensation, including commissions, to satisfy up to 10% of the new standard salary level. Under the new proposed rule, however, that 10% of compensation may be paid *annually,* rather than quarterly, as was the case under the Obama-era rule. This gives employers more flexibility in paying exempt employees nondiscretionary bonuses and commissions and satisfying the salary level requirement. The proposed rule also permits a catch-up payment at the end of the year if the nondiscretionary pay is not large enough to satisfy the required salary (no more than 10% of the standard salary level — $3,530.80). For highly compensated employees, the *standard* salary level ($35,308), in contrast, must be met without including any nondiscretionary pay, although such pay can be included in meeting the *annual* compensation requirement of $147,414.

The increase to $35,308 was expected in light of previous statements made by Labor Secretary Alexander Acosta following his confirmation.

Notably, the DOL has not proposed any changes to the duties test and has not proposed any automatic increases, although it anticipates updating the salary level every four years through notice-and-comment rulemaking. The Obama-era rule called for automatic increases every three years.

In setting the new proposed salary level, the DOL is using the same methodology used when it increased the salary level to $455 per week in 2004 — using the salary level

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for the 20th percentile for full-time salaried workers in the lowest census region (the South) and in the retail industry nationwide. It then projected what that rate will be in January 2020, the date it expects the rule to be effective. By contrast, under the Obama-era rule the DOL had selected the 40th percentile for full-time salaried workers. The DOL rejected proposals to set different salary levels for different regions of the country or different levels based on the size of the employer. The DOL estimates that 1.1 million currently exempt workers who earn more than $455 per week, but less than $679, will be affected by the proposed rule. The Obama rule, in comparison, was anticipated to affect 4.2 million workers who otherwise would have satisfied the duties requirements to the exemption.

The new salary levels will not apply to employers in Puerto Rico, the Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands. The current salary level of $455 will continue to apply in those locations.

Employers will have 60 days to submit comments to the DOL. A final rule will then be published after those comments have been considered. The DOL anticipates the rule will be effective January 2020.

Employers who currently have exempt white collar workers who earn more than $455 per week, but less than $679, yet satisfy the duties requirements, can comply with the new rule by either increasing the employee's salary to the new level, limiting hours so employees do not work overtime, or reclassifying employees as non-exempt.

Regardless of what the final DOL rule may include, employers also must consider how the new rule interacts with the corresponding exemptions under the myriad of state laws. Some states do not have overtime laws; others incorporate the FLSA as it stands; others incorporate the FLSA's overtime provisions, but with higher salary requirements; and others have their own exemptions and salary levels without reference to the FLSA.

Jackson Lewis will continue to monitor developments concerning the new overtime rule. In the meantime, if you have any questions about the forthcoming rule, including how to navigate through the available options for employees affected by the proposed salary increase, please contact the Jackson Lewis attorney(s) with whom you regularly work.