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MARCH 11, 2019

DOL Issues Proposed Rule Raising FLSA Overtime Exemption Threshold To $35k

On March 7, 2019, the U.S. Department of Labor ("DOL") issued a proposed rule regarding overtime (the "Proposed Rule"), which will raise the minimum salary threshold required for workers to qualify for the "white collar" exemptions of the Fair Labor Standards Act ("FLSA") to $35,308 per year or $679 per week.

The Proposed Rule replaces the DOL's 2016 rule, which was enjoined by a Texas federal judge before it took effect. The enjoined rule had doubled the minimum salary required to qualify for the exemptions from $23,660 to $47,476. It had also increased the overtime eligibility threshold for highly compensated workers from $100,000 to $134,004 and created an index for future increases.

The Proposed Rule calls for a less drastic increase of the minimum salary level, which has been in place since 2004. The DOL also proposed regular increases of that threshold every four years after notice-and-comment periods preceding those increases. For highly compensated workers, the DOL raised the salary threshold from $100,000 to $147,414, which is about $13,000 higher than the enjoined rule.

The Proposed Rule will also allow employers to count certain nondiscretionary bonuses and incentive payments, like commissions, that workers receive for up to 10% of a worker's salary level. The Proposed Rule does not make any changes to the duties test, which helps identify individuals who are legitimate executive, administrative, and professional employees who are FLSA-exempt. The DOL estimates the Proposed Rule will take effect in January 2020.

The New York Minimum Wage Act and applicable regulations require significantly higher thresholds. To qualify for the executive and administrative exemptions (New York does not require a

minimum salary for professional employees) employees must meet the following salary thresholds, among other things:

New York City Large Employers (11 or more employees)
- Minimum salary threshold is currently $1,125 per week ($58,500 annually), as of 12/31/18.

New York City Small Employers (10 or fewer employees)
- Minimum salary threshold is currently $1,012.50 per week ($52,650 annually), as of 12/31/18; and
- $1,125.50 per week ($58,500) on and after 12/31/19.

Nassau, Suffolk, and Westchester Counties
- Minimum salary threshold is currently $900 per week ($46,800 annually), as of 12/31/18;
- $975 per week ($50,700 annually) on and after 12/31/19;
- $1,050 per week ($54,600 annually) on and after 12/31/20; and
- $1,125 per week ($58,500 annually) on and after 12/31/21.

Remainder of New York State
- Minimum salary threshold is currently $832 per week ($43,264 annually), as of 12/31/18;
- $885 per week ($46,020 annually) on and after 12/31/19; and
- $937.50 per week ($48,750 annually) on and after 12/31/20.

Takeaway for Employers

Employers should review their existing payroll practices to determine whether employees who are classified as exempt under the executive, administrative, or professional exemptions meet the new minimum salary requirements. If these employees do not meet the minimum salary requirements, employers should determine whether the employees' salaries should be increased or whether their positions should be reclassified as nonexempt. As a reminder, employers should track the hours of nonexempt employees for overtime purposes.

In additions, as the exemption status of an employee depends on meeting the salary threshold and a duties test, employers are encouraged to regularly review the duties test for executive, administrative, and professional exemptions to ensure proper classifications.

While the Proposed Rule will have a significant impact around the country, employers in New York are already dealing with substantially higher thresholds.

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If you have any questions employee classifications or exemptions under state or federal wage and hour laws, please do not hesitate to contact us.

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