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Department of Labor Issues Final Rule Increasing Salary Thresholds for Overtime Exemptions

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On September 24, 2019, the U.S. Department of Labor ("DOL") issued its Final Rule increasing the minimum weekly salary level required for the Fair Labor Standards Act's executive, administrative, and professional ("EAP" or "white collar") exemptions. These increased minimum salary requirements go into effect on January 1, 2020.

The Final Rule increases the minimum weekly compensation from $455 per week to $684 per week. Under the new regulations, employers may include nondiscretionary bonuses and incentive payments (including commissions) towards up to 10% of the standard salary level, if such payments are made at least annually.

Additionally, the Final Rule increases the "highly compensated employee" ("HCE") exception's salary threshold from $100,000 per year to $107,432 per year. That increase is significantly lower than the increase to $147,414 per year that the DOL originally proposed in March 2019.

The DOL estimates that 1.3 million employees will become overtime eligible as a result of the Final Rule.

Employers may wish to consider the following steps before the Final Rule becomes effective on January 1, 2020.

- Identify the salary levels of employees in your workforce currently classified as exempt under the white collar exemptions to determine whether they meet the DOL's $684 a week minimum threshold. Be mindful of job-sharing or other part-time exempt arrangements in which a currently exempt employee may be earning less than $684, because the Final Rule does not allow for proration.

- If an employee's salary comes close to the threshold for EAP status, evaluate whether the employee receives non-discretionary bonuses or commissions on an annual or more frequent basis that would enable them to meet the minimum pay requirement. The Final Rule includes a new provision that allows employers to count such non-discretionary incentive payments toward up to 10 percent of the minimum EAP salary level.

- Determine whether to adjust the salaries of or reclassify as non-exempt employees who fall below the minimum salary threshold.
- Review job duties for exempt positions. While the Final Rule does not alter the duties tests for the EAP and HCE exemptions, the DOL estimates that there are approximately 255,400 salaried workers in the United States making between $455 and $684 a week who do not meet the duties test and are already overtime eligible, but their employers do not recognize them as such.
- Consider whether current policies and practices regarding approval for and monitoring of overtime hours are adequate to prevent unintended and avoidable increases in labor costs.
- Develop an action plan to be ready to implement any changes when the Final Rule takes effect, including appropriate communications to reclassified employees about timekeeping and meal and rest break requirements.
- Keep in mind that some states impose higher salary requirements, and not all states recognize the highly compensated employee exemption.

We describe below key components of the Final Rule.

Minimum Weekly Compensation Requirement Increased to $684/Week

At present, to qualify for one of the white collar exemptions, an employee must be paid a guaranteed salary or fee of at least $455 per week (or $23,660 annually). The Final Rule increases the minimum salary to $684 per week (or $35,568 annually), with a lower minimum of $455 per week for Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands, and $380 per week for American Samoa. The Final Rule also sets an updated weekly "base rate" of $1,043 per week for the motion picture producing industry.

Employers will be permitted to factor in nondiscretionary bonuses, incentive payments and commissions to satisfy up to 10 percent of the EAP salary test requirement. However, to credit such payments, the employer must make the payments on an annual or more frequent basis. An employer also may make a "catch-up" payment in the event that an employee does not receive enough in discretionary bonuses and incentive payments (including commissions) in a given year (52-week period) to remain exempt. The employer has one pay period to make up for the shortfall (up to 10 percent of the minimum salary level for the preceding 52-week period), and the catch-up payment will count only toward the prior year's salary amount—not toward the salary amount in the year in which it was paid.

The DOL's stated purpose is to ensure that the standard salary level is "updated to reflect current earnings." The DOL applied the same methodology used to calculate the currently enforced 2004 level. The level is tied to the 20th percentile earnings of full-time salaried workers in the lowest-wage census region (then and now the South), and/or in the retail sector nationwide. The DOL explained that using the 2004 methodology "would restore the salary level to its traditional purpose of serving as a dividing line between nonexempt and potentially exempt employees, would address concerns that led to the 2016 rule's invalidation, and would ensure that the FLSA's intended overtime protections are fully implemented."

Increased Minimum Salary for the HCE Exception

The HCE exemption was introduced in the DOL's 2004 amendments to the exemption regulations. Under the current HCE exemption, employees who earn total annual compensation—which may include salary, commissions, and nondiscretionary bonuses—of at least $100,000, and whose base salary is at least the minimum for other exempt employees, are exempt if they customarily and regularly perform at least one of the duties or responsibilities enumerated in the white collar exemptions tests.

The minimum annual compensation level for the HCE exemption has remained at $100,000 since 2004. Under the Final Rule, the new total annual compensation level for HCE exemptions will be $107,432 per year. The new threshold is set equal to the 80th percentile of annual wages of all full-time salaried workers and is significantly lower than the $147,414 per year threshold originally proposed by the DOL in March 2019.

Increased Minimum Salary for the HCE Exception

To qualify for exempt status, employees also must meet certain requirements as to their job duties. Employers have to establish that the employee's "primary duty" is performing exempt work for an exemption to apply. The Final Rule makes no changes to the longstanding duties test.

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