

LABOR AND EMPLOYMENT

ALERT

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U.S. Department of Labor Announces New Overtime Pay Rule with January 1 Effective Date

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On September 24, 2019, the U.S. Department of Labor (“DOL”) announced a much-anticipated final rule, which, according to DOL estimates, will make 1.3 million American workers newly eligible for overtime pay. The final rule updates the “white-collar” weekly earnings threshold necessary to exempt executive, administrative and professional employees (“EAPs”) from the Fair Labor Standards Act’s (“FLSA’s”) overtime pay requirements. The new rule also allows employers to count a portion of certain bonuses/commissions toward meeting the salary level. The new thresholds account for growth in employee earnings since the thresholds were last updated in 2004. The final rule will become effective January 1, 2020. [Details from the DOL about the final rule are available here.](#)

In particular, the final rule from the DOL will:

- 1) Raise the “standard salary level” from \$455 per week to \$684 per week (equivalent to \$35,568 per year for a full-year worker);
- 2) Raise the total annual compensation requirement for “highly compensated employees” (“HCEs”) from \$100,000 per year to \$107,432 per year;
- 3) Allow employers to use nondiscretionary bonuses and incentive payments (including commissions) paid at least annually to satisfy up to 10 percent of the standard salary level; and
- 4) Revise the special salary levels for workers in U.S. territories and the motion picture industry.

Further, the DOL intends to update the standard salary and HCEs’ total annual compensation levels more regularly in the future through notice-and-comment rulemaking.

With January 1, 2020 as the rule’s effective date, this leaves employers only a few months to comply. Doing so will likely include making decisions about employees who currently are classified as exempt but whose salaries are below the new threshold. According to the DOL, the industries most likely to be impacted by the final rule include education, wholesale and retail businesses, and businesses that provide professional services. However, the EAP rule may also impact nonprofits and state and local governments — which are subject to the FLSA and which often offer salaries that are lower than in the private sector. That said, the DOL did not alter its so-called “job duties test” — which helps identify individuals who are legitimate FLSA-exempt EAP employees. If employees make more than the salary threshold, employers can still conduct an analysis of job duties. If those duties primarily involve EAP duties, then employers may deem those salaried employees as overtime exempt.

Additionally, just as a 2016 Obama-era DOL overtime rule was challenged in court, both management lawyers and workers’ advocates think the new rule in the Trump Administration could potentially face legal challenges, although others suggest that such lawsuits may fail to meet the “arbitrary and capricious” standard required to challenge agency rulemaking under the Administrative Procedures Act. Litigation targeting the rule could also open the door for business advo-

cates to challenge whether the DOL has the authority to set the minimum salary, since the FLSA does not contain a salary requirement for EAP exemptions.

Between now and January 1, 2020, employers should consider conducting an FLSA audit to review job duties and salary levels in order to determine how best to comply with the new salary threshold for exempt status. Following best practices, many businesses may also find it beneficial to involve employment counsel in any audit, in order to protect company communications on legal compliance. ◆

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