

LABOR AND EMPLOYMENT

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New Overtime Pay Regulation in Pennsylvania May Create Obligations for Employers Beyond Federal Requirements

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On January 31, 2020, the Pennsylvania Independent Regulatory Review Commission (IRRC) adopted an amendment promulgated by the Pennsylvania Department of Labor and Industry (DLI) to increase the minimum salary required to avoid overtime compensation for Executive, Administrative and/or Professional (EAP) workers. The new minimum salary is \$684 per week (\$35,568 annually).

The new required minimum salary in Pennsylvania matches the new federal threshold which became effective January 1, 2020, but in 2021 (one year after the new regulation is published in the Pennsylvania Bulletin) the Pennsylvania minimum will exceed the federal level. The amendment also attempts to align Pennsylvania's "duties tests" with the federal regulations, but gaps remain, including the differing salary thresholds beginning in 2021. This may present significant challenges for employers who must comply with both state and federal law.

BACKGROUND

On October 17, 2019, DLI submitted a final rule to amend regulations for the Pennsylvania Minimum Wage Act (PMWA), with the goal of clarifying the definitions for EAP workers who are not eligible for overtime pay. DLI first proposed regulatory changes on these issues in June 2018.

The proposed state regulatory changes were scheduled for a final vote of approval by the IRRC on November 21, 2019. The IRRC reviews final proposed regulations prior to implementation and acts as a clearinghouse for input from the General Assembly and the public. Nearly 1,000 written comments about the pending regulation were received by the IRRC from individuals, businesses, and associations,

including nonbinding votes of disapproval by the Labor and Industry Committees of the Pennsylvania Senate and House of Representatives.

On November 19, 2019, it was announced that the Wolf administration had agreed to withdraw this regulation after reaching an apparent compromise with lawmakers on legislation to increase the minimum wage in the state to \$9.50 an hour by 2022. The minimum wage bill passed the state Senate but not the state House, leading the Wolf administration to move forward with approval of the overtime regulations. The minimum wage both under Pennsylvania and federal law remains unchanged at \$7.25 an hour.

The DLI submissions to the IRRC regarding the overtime regulation, the text of the regulation, public comments submitted, and other materials are available at <http://www.irrc.state.pa.us/regulations/RegSrchRslts.cfm?ID=3213>.

STATE AND FEDERAL OVERLAP

Under both federal and state law, employees generally must be paid overtime for working more than 40 hours per week. There are several classes of employees who are exempt from this overtime pay requirement. In order to qualify for the exemption, employers generally must show that the employees perform certain executive, administrative or professional duties and that the employees receive a minimum weekly salary.

In September 2019, the U.S. Department of Labor (DOL) announced that under the federal Fair Labor Standards Act (FLSA), the minimum salary threshold necessary to exempt EAP workers would rise from

\$455 weekly (\$23,660 annually) to \$684 weekly (\$35,568 annually) effective January 1, 2020.

Likewise, pursuant to the newly amended state regulation, the minimum salary to claim an EAP exemption under the PMWA is raised to match this federal level of \$684 per week (\$35,568 annually). The increase will be effective upon publication of the new regulation in the Pennsylvania Bulletin, which is expected to occur after final review and approval by the Pennsylvania Attorney General. The state salary threshold would then rise above the federal level in subsequent years, in 2021 to \$780 per week (\$40,560 annually) and in 2022 to \$875 per week (\$45,500 annually), each on the anniversary date of the effective date of the regulation (the date it is published in the Pennsylvania Bulletin). Thereafter, the Pennsylvania regulation provides for adjustments every three years by the DLI to a rate equal to the 10th percentile of Pennsylvania workers in the exempt EAP classifications. The federal rules contain no mechanism for future adjustments.

The new state and federal regulations both allow employers to count a portion of certain bonuses/commissions toward meeting the salary level. Like the FLSA rule, the final DLI rule allows up to 10 percent of the minimum salary to include nondiscretionary incentive compensation, bonuses, and commissions.

The new Pennsylvania regulation also updates the duties tests used to qualify for the EAP exemptions, with the purpose as stated by DLI "to be more consistent with current Federal regulations interpreting the Fair Labor Standards Act (FLSA)." The new Pennsylvania regulation eliminates the "antiquated use of both a short and long" duties test for each of the executive, administrative, and professional exemptions. These tests were aligned with the federal regulations when enacted in 1977, but changes to the federal regulations eliminated the distinction in 2004. The new Pennsylvania regulation, like the federal rules, now has only a single test for each exemption. Under both sets of regulations, exempt workers must make more than the salary threshold as well as perform the duties outlined in the simplified duties test.

IMPORTANT DIFFERENCES BETWEEN STATE AND FEDERAL SCHEMES

Although the DLI regulation is intended to improve alignment between state and federal rules for the duties tests used to qualify for each of the EAP exemptions, the new rules still leave significant differences between the state and federal schemes. For example, the federal regulations provide exceptions so that teachers, lawyers, and doctors can qualify as exempt professionals without having to meet any minimum salary. Pennsylvania's regulations have never included these exceptions, and the new rules do not provide for them.

The absence of these state exceptions, among others, was often not a problem for employers in the recent past, given that Pennsylvania's salary thresholds were so low that most employees' salaries easily passed the thresholds. For example, since 1977, the required salary thresholds in Pennsylvania were (and are, until the new regulation is effective) as low as \$8,060 per year under the "long test" for executive and administrative workers and \$8,840 per year for professional employees. Many nonprofits and other employers of teachers, lawyers, and doctors receiving relatively low wages (including part-timers and adjuncts) could classify these workers as exempt from overtime pay under both state and federal law, so long as they met the professional duties test as well as the low state salary threshold.

As the new DLI rules raise the required minimum salary for all EAP workers without exception for teachers, lawyers and doctors, employers covered by the PMWA wishing to keep the exemption for these professionals must ensure that they also meet the Pennsylvania requirements, either by raising salaries or by tracking hours and paying overtime.

Similarly, the DLI rule does not address the FLSA's academic administrative exemption, which provides an exception to the minimum salary requirement for administrative employees who work for an academic department within an educational institution and who are paid a salary at least as high as that paid to entry-level faculty at the institution.

The new DLI rule may also create challenges for employers of computer professionals paid on an hourly basis. The FLSA provides an exception for some of these workers, but there is no corresponding provision under the new state regulation.

The new DLI rule likewise does not include any parallel to the federal short cut for highly compensated employees. In documents submitted to support its rule-making, the DLI explained that it does not believe it has legislative authority to add new exemptions and close these gaps.

In addition, the new state rule does not provide guidance as to the meaning of "compensated on a salary basis," including whether deductions from an exempt employee's salary are authorized to the same extent they are permitted under the FLSA. There are extensive regulations on this issue under the FLSA. But there is no corresponding guidance provided by the state rule.

The U.S. DOL recently proposed a modification to the fluctuating work week method authorized under federal regulations for calculating overtime pay. In contrast, the new DLI regulation does not address the fluctuating work week method.

These various differences may lead to litigation for Pennsylvania employers. Whenever Pennsylvania regulations are silent and do not have a counterpart to the federal rules and exceptions, courts in Pennsylvania have increasingly found that Pennsylvania employers must ensure that they comply with the state regulations in addition to federal regulations.

PRACTICAL TAKEAWAYS FOR EMPLOYERS

In short, the new overtime pay regulation in Pennsylvania will eventually create obligations for employers beyond federal requirements. In planning and budgeting, employers with workers in Pennsylvania should consider conducting PMWA and FLSA audits to examine the exemptions they claim for their employees. Businesses may want to ensure that the exemptions continue to be applicable under both state and federal regulations with respect to job duties and salary levels.

Some employers may need to consider taking action with regard to positions that will not qualify for the exemptions. This may include: (a) raising salaries of employees; (b) reassigning work; (c) hiring additional employees to reduce overtime exposure; and (d) tracking and paying overtime as needed starting January 1, 2020.

The revised overtime standards become effective upon approval by the Pennsylvania Attorney General and publication in the Pennsylvania Bulletin, and will require prompt action by many employers with workers in the state. ◆

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