

DOL Publishes Final Overtime Regulations

The U.S. Department of Labor has released its long-awaited Final Rule updating regulations under the Fair Labor Standards Act governing overtime exemptions for executive, administrative, and professional employees, commonly known as the “white collar exemptions” or “EAP exemptions.” The Final Rule is scheduled to be published in the Federal Register on May 23, 2016.

The DOL estimates 4.2 million workers will be eligible for overtime as a result of the Final Rule and that it will result in an increase in wages of \$1.2 billion per year.

Details regarding the changes made in the Final Rule were announced on the DOL’s website on May 17, 2016, including a video explaining the need for the change, as well as detailed “FAQs,” “fact sheets,” and guidance publications targeting some employers who will be particularly affected by the final rule — including non-profits, educational institutions, small businesses, and state and local governments.

Below is a summary of the Final Rule (and how it differs from the proposed regulations published in July 2015).

Salary Level Will Increase from \$23,660 (\$455 per week) to \$47,476 (\$913 per week) beginning December 1, 2016

The new salary level is \$47,476, more than double the current salary level, but lower than the salary level DOL originally proposed in July 2015 (\$50,440).

How did DOL arrive at the \$47,476 figure? The proposed salary level was based on national data regarding the salary levels for all salaried workers, and set at the 40th percentile. The Final Rule retains the 40th percentile standard, but sets the rate based on the salary for workers in the lowest income Census region (currently, the South), instead of nationwide salary levels.

Notably, in 2004 (the last time the DOL increased the salary level for these exemptions), the DOL set the salary level at \$455 per week, also using, in part, salary data from the South. But in 2004, the salary level was set at the 20th percentile. That is now raised to the 40th percentile.

The DOL states the salary level was reduced from the level identified in the proposed rule in response to public comments regarding regional variations in pay. But the new salary level still requires all employers, including those in lower salaried regions, to pay exempt workers a salary greater than the current salary level for exempt workers in both New York (\$35,100) and California (\$41,600), one of the major criticisms leveled at the DOL’s proposal.

Salary Level for Highly Compensated Employees Will Increase from \$100,000 per year to \$134,004

The salary level for highly compensated employees (HCEs) — who are required to satisfy a more relaxed duties test — is also getting a hefty increase, and, in time, may outpace increases to the standard exempt salary level. The salary level for HCEs, unlike the standard salary level, is based on nationwide data for full-time workers, and set

at the 90th percentile. This change is consistent with the proposed regulations. The proposed regulations identified the salary level for HCEs as \$122,148, but that was based on 2013 data; 2015 fourth quarter data from the Bureau of Labor Statistics identifies \$134,004 as the 90th percentile.

DOL Will Update Salary Level Every Three Years, Beginning 2020

For the first time in the history of the FLSA, adjustments to the salary level will occur automatically every three years, and will not require specific rulemaking.

Typically, many years pass between increases to the salary level — the last increase occurring 12 years ago, and the increase before that taking more than 25 years.

The new three-year increases will be set at the 40th percentile for the lowest wage Census region for the standard salary level and the 90th percentile for salaried workers nationally for HCE employees. The DOL will publish the new rates 150 days before the effective date.

While the new salary levels will be effective December 1, 2016, the three-year adjustments will occur on January 1, beginning in 2020. The rates, therefore, will be published beginning August 1, 2019. The DOL estimates that the salary level will increase to \$51,168 at the time of the first adjustment in 2020.

The proposed rule, consistent with the Final Rule, called for automatic increases. But the proposed rule indicated annual increases would be required. The Final Rule abandons this, giving employers more time between changes to prepare.

No Changes to Duties Tests

The Final Rule does not contain any changes to the duties tests for the white collar exemptions, a relief to many employers.

While the DOL had not proposed any specific language modifying the duties test, it sought comments from the public on whether such changes should be made, including whether to adopt the California rule that exempt employees must spend more than 50 percent of their time performing exempt work. This would have narrowed the exemptions, particularly for exempt employees who perform non-exempt duties concurrently with exempt duties.

Employers Will Be Permitted to Use Nondiscretionary Bonuses, Commissions, and Incentive Pay to Satisfy Up to 10% of Salary Level Requirement

Under current regulations, employers have not been permitted to use commissions, nondiscretionary bonuses, or other incentive payments to satisfy the salary level requirement. Exempt employees paid on a salary level have been required to receive the full salary exclusive of such compensation. Under the Final Rule, this restriction is lifted, and employers will be able to satisfy the new salary level in part through commissions, nondiscretionary bonuses, and other incentive compensation.

But there are limits to the use of such pay to meet the new exempt salary requirements: only 10 percent of the salary level can be paid in the form of this incentive pay and it must be paid quarterly (the proposed rule stated the

DOL would require employers to make the payments on a monthly basis). The Final Rule, however, will permit employers to make a “catch up” payment — i.e., if the employee has not earned sufficient commissions to satisfy the salary level requirement on a quarterly basis, the employer can make up the difference without losing the exemption. The proposed rule did not permit a “catch-up” payment.

Potential Challenges to Final Rule

Under the Congressional Review Act, Congress will have 60 session days to review the Final Rule. But even if Congress were to disapprove the Final Rule, the President would surely veto any such vote.

In March 2016, the “Protecting Workplace Advancement and Opportunity Act” was introduced, which would nullify the Final Rule and bar the DOL from issuing any future rule with automatic increases to the salary level without separate rulemaking. The future of that legislation will likely depend on the next election.

Regardless of potential challenges, employers should take the next several months to audit their payment practices to ensure compliance going forward.

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