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CLIENT ALERT

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The Next Chapter for Reforming the FLSA White-Collar Overtime Exemptions: The Trump Administration's Proposal for a New Salary Threshold

The most commonly used exemptions from overtime requirements under federal wage and hour laws are the so-called White Collar Exemptions, i.e., executive, administrative and professional employees, under Section 13 of the Fair Labor Standards Act (FLSA) and the regulations promulgated under it in 29 CFR Part 541. To qualify for one of these exemptions, there is a dual test regarding (i) the duties performed by the employee, and (ii) a fixed, threshold salary that must be received by the employee. Since 2004, the annualized salary threshold has been \$23,660.

During the second term of the Obama administration, the Department of Labor (DOL) issued a proposed revision to the annualized salary threshold in the regulations by increasing it to \$47,476. It was estimated that this new salary threshold would have resulted in an expansion of overtime protections for an estimated 4 million employees who previously were exempt from overtime requirements. This new DOL rule was scheduled to go into effect on December 1, 2016, but a federal judge in the U.S. District Court for the Eastern District of Texas issued a nationwide injunction against enforcement of the new rule on November 22, 2016.

As that case continued on appeal to the Fifth Circuit Court of Appeals, the Trump Administration indicated that it would prefer to issue a new regulation rather than support the Obama Administration's 2016 version. After some delay, on March 7, 2019, the DOL issued its current proposal for a new annualized salary threshold of \$35,308. Note that this proposal is not immediately effective. At this stage, the proposed revision to the regulations is only an effort by the DOL to capture comments it has gathered through meetings with stakeholders. It will be subject to a brief 60-day period of public comments after it is published in the Federal Register, at the conclusion of which the DOL will determine what modifications, if any, to make to its proposal and the regulations. It is anticipated that this process could take as long as a year to complete (based upon prior revision efforts and the fact the current proposal is well in excess of 200 pages in length), which means that a final revision to the regulations may not go into effect until mid-2020, barring further legal challenges or an unlikely amendment to the FLSA itself that would negate some or all of the DOL's rule-making role.

As stated above, the most notable feature of the new proposal is a change to the required salary level of exemption that would increase to \$679 per week (\$35,308 annualized), which is an increase from the current \$455 per week (\$23,660 annualized), which dates back to the last amendment to these regulations in 2004, under the Bush 43 administration. The DOL's new proposal also would allow up to 10% of the salary to consist of certain qualified commissions and/or bonuses. The DOL indicated that almost all stakeholders

concluded that an increase was warranted, although there was little consensus on the amount of this increase. The DOL decided to use the same formula employed in 2004 for the last increase (noting that the methodology for this increase had not been questioned by or challenged in the courts). The proposed regulation omits the controversial provision of the 2016 rule that included an automatic annual increase to the salary level, proposing instead a public comment review process every four years. One more notable change in the proposed regulation is to increase the current threshold for use of a streamlined test for well-compensated employees from \$100,000 (set in 2004) up to \$147,414 (which is over \$13,000 more than the level used in the 2016 version). Preliminary estimates suggest that the proposed increase in the salary level to an annualized \$35,308 would cause over 1 million workers currently considered exempt to become non-exempt and eligible for overtime.

Until a new official revision to Part 541 goes into effect, federal law remains unchanged, and provides that an individual will qualify for an exemption as an executive, administrative or professional employee if he or she earns a salary of at least \$455 per week (\$23,660 annualized) and satisfies the duties test. However, employers should keep two other considerations in mind. First, certain exemptions and/or professions within Section 13 of the FLSA do not absolutely require a fixed salary (e.g. teachers, attorneys, doctors, outside salespersons, certain business owners, or certain computer professionals). Second, some states require different elements for overtime exemptions. In California, for instance, employers must pay exempt employees a threshold annualized salary that is well in excess of the new proposed salary level under federal law, and satisfy a more difficult duties test to qualify for a white collar overtime exemption.

If you have an opinion on the new salary level or another element of the proposed regulations, you are encouraged to share this opinion with the DOL directly, or through a trade association or other external representative, within the 60-day comment period. In the meantime, you should consult with your employment attorney to determine your status of potential compliance with the upcoming new regulation.



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