

## **Client Alert on Overtime Eligibility:**

### **U.S. Department of Labor Poised to Issue Final Rule Expanding Overtime Eligibility by Raising Salary Threshold for White Collar Exemptions.**

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Employers should be aware that the U.S. Department of Labor's (DOL's) controversial new regulations raising the salary threshold for the so-called white collar exemptions under the Fair Labor Standards Act (FLSA) could take effect within the next few months. The Final Rule was submitted last week by the DOL to the White House Office of Management and Budget, a necessary first step before publication in the Federal Register. The Final Rule is expected to be published in the Federal Register within the next 30 – 60 days, and no later than July. The rule will then likely take effect 60 days after publication.

The exact terms of the Final Rule will not be known until it is published. However, the changes are expected to be consistent with the changes set forth in the proposed rule published by the DOL last year. Employers can expect several key changes to the current regulations that will greatly expand, by millions of employees, the number of workers eligible for overtime pay.<sup>1</sup>

#### *Minimum Weekly Base Salary for Exemption to be Raised*

First, the base salary threshold for exemption from overtime under the FLSA's so-called white collar exemptions (e.g., executive, administrative, professional) will be raised from the current amount of \$455 per week (\$23,660 annually).<sup>2</sup> The exact increase will not be known until the Final Rule is published, but employers should expect a significant increase. The DOL in its previously issued proposed rule had called for the salary threshold to be raised to \$921 per week (\$47,892. annually), pegging the salary level to the 40<sup>th</sup> percentile of earnings for full-time salaried workers. This proposed change was based on labor statistics for 2013.

According to the DOL, an increase to the requisite salary level is needed to mark the appropriate dividing line between exempt and nonexempt employees. The salary level was last updated in 2004.

When the Final Rule takes effect, exempt employees earning less than the new minimum base salary – which could be close to \$50,000 annually -- will be eligible for overtime pay unless their salaries are raised.

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<sup>1</sup> [webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28355](http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28355); 29 CFR Part 541.

<sup>2</sup> In addition to meeting a minimum salary threshold, employees must also perform certain duties in order to qualify as exempt from overtime under the FLSA. See further discussion in this alert regarding anticipated changes to the duties test.

### *Salary Threshold for Highly Compensated Employees to be Raised*

Second, the revised regulations are also expected to raise the salary threshold for exemption for highly compensated employees. According to the proposed rule, the minimum salary level would increase from the current \$100,000 / year threshold to \$122,148 / year. The proposed rule linked the salary threshold for this group to the 90<sup>th</sup> percentile of earnings for full-time salaried employees, based on labor statistics from 2013. The exact increase included in the Final Rule will not be known until its publication.

### *Automatic Updates to Minimum Salary Thresholds*

Third, the new regulations will include a formula to automatically update every year the minimum base salary levels required for exemption. These updates will be determined through a formula based on information from the Bureau of Labor Statistics regarding changes to the cost of living. Employers will have to keep up-to-date on any changes to the minimum base salary levels for exemption.

### *Duties Test for Exemption from Overtime*

The proposed rule did not include any changes to the duties test for exemption from overtime, but did include a request for public comment regarding possible changes to the duties test. The Final Rule, therefore, could include changes to the duties test as well as the increases in threshold salary levels.

### *What Should Employers Do Now?*

Significant changes to the salary threshold for exemption are coming within the next few months. Affected employers should be analyzing the salary levels associated with their current exempt positions and developing a plan for dealing with the anticipated salary-level changes. The threshold decision is whether to accept conversion of lower-paid exempt employees to non-exempt status, or whether to increase salary levels in order to maintain current exemptions. If salaries are to be raised, the employer should consider the impact on other employees whose compensation levels will not be increasing (e.g., worker frustration due to wage compression). Conversely, if conversion to non-exempt status is anticipated, the employer should review and perhaps tighten its policies regarding compensable work and overtime (e.g., policies prohibiting overtime work absent advance authorization; prohibiting after-hours work such as responding to emails from home). Employers should also review their timekeeping procedures, as employers must track all hours of work for non-exempt employees. Lastly, regardless of whether an affected employer chooses to raise salaries or accept conversion to non-exempt status, a thoughtful internal communication strategy is advised.

If you have questions or concerns about the new rules, or other wage and hour questions, please contact HRW.