

New Overtime Threshold Set to Increase

Under the U.S. Department of Labor's ("DOL") regulations, an employer must satisfy two tests to exempt its employees from overtime pay under one of the white collar exemptions. First, the employee must perform executive, administrative, or professional duties (the "duties test"), and second, the employee must be paid on a "salary basis" (the "salary basis test"). Under the current salary basis test, employees with a salary below \$455 per week (\$23,660 annually) must be paid overtime if they work more than 40 hours per week. So, workers making at least this salary level may be deemed exempt from receiving overtime based on their job duties. This salary level was set in 2004, and has not been updated since then. By most measures, the current salary threshold for purposes of determining the applicability of the white collar exemptions is and has been significantly outdated for a long time. In fact, the current federal poverty level for a household of four is an annual income of \$25,750.

On March 7, 2019, the DOL issued a long-awaited Notice of Proposed Rulemaking ("NPRM"), in which it announced a proposal to increase the overtime threshold from \$23,660 per year (or \$455 per week), to \$35,308 (or \$679 per week). This means that currently exempt executive, administrative and professional employees who earn a salary that is less than \$35,308 per year (but higher than \$23,660 per year) will automatically be eligible for overtime regardless of the nature of their duties. The DOL claims that this proposed rule will make more than a million workers eligible for overtime.

This NPRM surely comes as a sigh of relief for employers, as it is less than half of the salary threshold increase sought by the Obama Administration. In May 2016, the DOL issued a final rule increasing the threshold to \$47,476 per year. At least four million additional employees would have been eligible for overtime pay with this threshold increase. In response, the U.S. Chamber of Commerce filed a lawsuit against the Obama Administration's DOL, and received a permanent injunction from a district court in Texas just a few weeks prior to the effective date of the final rule. Following the Trump election, the litigation was stayed in the U.S. Court of Appeals for the Fifth Circuit, awaiting the outcome of this current proposal.

The new NPRM, which exceeds 200 pages in length, does not contain any of the automatic adjustments to the salary basis threshold that were included in the DOL's 2016 final rule. Rather, it simply contemplates periodic reviews to consider updating the threshold and provides that any updates would require notice-and-comment rulemaking; a process that has historically stunted the development and increase of the salary basis threshold.

In addition, the NPRM allows employers to use non-discretionary bonuses and other incentive payments (including commissions) that are paid annually or more frequently to satisfy up to 10% of the salary threshold. Importantly, the NPRM proposed no changes to the duties tests. Finally, the NPRM increases the total compensation requirement for highly compensated employees from the currently-enforced level of \$100,000 to \$147,414 per year. A copy of the NPRM can be obtained from the DOL's website at: <https://www.dol.gov/whd/overtime2019/>

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