

CLIENT ALERT: Department of Labor Imposes New White Collar Salary “Floor” for Overtime Exemption – By Daniel S. Field and Alexandra Pichette

Minimum 2020 Salary Will Be \$35,568

Employers Can Credit Some Non-Salary Payments Toward Salary Minimum

On September 24, 2019, the U.S. Department of Labor (DOL) released a final rule significantly increasing the minimum salary level required to qualify for exemption from the Fair Labor Standard Act’s (FLSA) overtime pay requirements. The new rule, which amends some of the FLSA’s regulations, is set forth at 29 C.F.R. Part 541, and becomes effective on January 1, 2020.

Under the new rule, to qualify for the executive, administrative, or professional exemptions (the so-called “white collar exemptions”) an employee must now earn at least \$35,568 per year or \$684 a week, up from \$23,660 per year or \$455 per week. Employees must also meet existing duties and salary basis tests to qualify for exemption. The duties tests remain unchanged.

“In recognition of evolving pay practices,” the regulations will now allow employers to use certain supplemental payments to satisfy up to 10% of the minimum salary level requirement. These supplemental payments include nondiscretionary bonuses and incentive payments, and commissions, that are paid annually or more frequently. If an employee does not earn sufficient nondiscretionary bonuses and incentive payments, employers are, in some cases, permitted to utilize a “catch-up period” at the end of any 52-week period, such as a calendar year, a fiscal year, or an anniversary of hire year, to ensure that the employee will meet the salary threshold. In certain circumstances, employers may also credit non-salary payments to an employee who does not work a full year, on a pro rata basis.

The new rule also increases the compensation threshold for the “highly compensated employee” (HCE) exemption, who are exempt from overtime based largely on their total compensation. The minimum increases from \$100,000 per

year to \$107,432 per year. To qualify, at least \$684 per week (\$35,568 per year) must be paid on a salary or fee basis. However, unlike lower paid workers, HCE total annual compensation may include a substantial proportion of non-salary commissions, non-discretionary bonuses and other annual incentive pay.

The new salary “floor” for exempt white collar workers is significantly lower than the \$47,476 level published by the Obama DOL, before it was blocked by a federal judge in 2016. Nevertheless, the DOL asserts that the new rule will have broad impact, affecting more than one million American workers.

Since 2004, employees have had to earn at least \$23,660 annually (or \$455 per week) in addition to meeting the executive, administrative or professional job duties test to be considered “exempt” from the FLSA’s requirement that employees receive overtime pay when they work more than 40 hours in a week.

Employers now will need to determine whether to start paying overtime premiums to workers who meet the job duties test but who earn less than \$35,568 per year, or to increase these workers’ salaries to meet the new threshold. And a new option will be the ability to meet the new “floor” and maintain the exemption by providing a certain amount of creditable supplemental incentive pay, such as non-discretionary bonuses or commissions.

Notably, the DOL declined to finalize an important aspect of its earlier, proposed rule (discussed in greater detail in MBJ’s [previous alert on the topic](#)). The DOL had previously proposed automatic review of the Part 541 regulations and salary thresholds every four years. The DOL’s new rule opts instead for updating Part 541 regulations “more regularly,” using normal notice-and-comment rulemaking.

Employee advocates are promising to take action in an attempt to block implementation of the new rules. We will continue to monitor developments that could delay the effective date of January 1, 2020.

The final rule has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. The final version of the rule may reflect minor technical or formatting changes made during the OFR review process.

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