

CLIENT ALERT: Department of Labor Publishes Revised White Collar FLSA Overtime Exemption Rule - By Daniel S. Field

The U.S. Department of Labor (USDOL) has issued new proposed regulations that would raise the minimum salary level for an employee to qualify as exempt from the Fair Labor Standards Act of 1938 (FLSA). The FLSA is the federal minimum wage and overtime law. The proposed new minimum salary test would primarily affect industries with low-salaried supervisors and managers who are now exempt from overtime requirements. According to the government, the new salary threshold "...would make more than a million more American workers eligible for overtime." The proposed rules are significantly more employer-friendly than a similar rule changes proposed by the Obama administration in 2016.

Under current law, employees paid less than \$455 per week (\$23,660 annually) must be paid overtime if they work more than 40 hours per week. Workers who are paid on a fixed salary of at least \$455 may be eligible for overtime if they meet certain job duties tests. The minimum salary level was last adjusted in 2004.

The USDOL's new proposal would boost the minimum salary level from \$455 to \$679 per week, the equivalent of \$35,308 per year. The update is based on current wage data, projected to January 1, 2020.

At the other end of the spectrum, the FLSA also exempts from overtime requirements certain highly compensated employees based largely on the level of their salary. The proposed regulations also increase the total annual compensation requirement for highly compensated employees from the current level of \$100,000, to \$147,414 per year. Highly compensated employees can qualify for exemption from the FLSA's overtime requirement based on a significantly relaxed job duties test.

The proposal also for the first time would allow employers to use certain supplemental payments, including nondiscretionary bonuses, incentive payments, and commissions that are paid annually or more frequently, to satisfy up to ten percent of the minimum salary level requirement. Employers are permitted to utilize any 52-week period as a year, such as a calendar year, a fiscal year, or an anniversary of hire year.

The proposed regulations are issued as part of a regulatory process and are technically referred to as a Notice of Proposed Rulemaking (NPRM). Although the new, proposed minimum salary threshold is fixed, the USDOL is seeking public comment on the NPRM's language allowing a periodic review to update the salary threshold. Any update would require the labor department to re-issue a notice-and-comment rulemaking.

The new regulation is subject to public comment for 60 days. The version that is ultimately enacted may vary slightly if minor technical changes are made during the review process.

The regulation will likely become effective in early 2020.

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