March 28, 2019

New FLSA Proposed Rule Would Provide Overtime to Millions More Americans

On March 7, the United States Department of Labor issued a Notice of Proposed Rulemaking that would make over a million more American workers eligible to receive overtime by, for the first time since 2004, raising the minimum salary thresholds for workers to qualify for the "white collar" exemptions from the Fair Labor Standards Act's overtime requirements. This proposed rule rescinds and replaces a rule issued under the Obama administration, which was enjoined by a Texas federal judge days before it was set to take effect.

The Department of Labor's proposed rule increases the minimum salary threshold from $455 per week (approximately $23,660 per year) to $679 per week (approximately $35,308 per year). While this is a significant increase, it is well below the $913 per week (approximately $47,476 per year) threshold set by the Obama administration's Department of Labor. Employees, even if they perform exempt duties, who are paid on a salary basis below the proposed salary threshold would be deemed nonexempt and eligible for overtime for all hours worked over 40 in a workweek. The proposed rule also raises the annual salary threshold for workers to qualify for the "highly compensated employee" exemption. The current threshold is $100,000, which would be increased to $147,414 under the proposed rule. This represents a higher increase than the level set by the Obama-era rule, which had proposed raising this threshold to $134,004.

Consistent with the Obama administration rule, employers would be permitted to use nondiscretionary compensation, including but not limited to commissions, to satisfy up to 10 percent of the new standard salary thresholds. Unlike the Obama administration rule, employers may pay such nondiscretionary compensation annually, rather than quarterly. As such, if an employee's salary falls below a threshold, the proposed rule would allow employers to make a "catch-up" payment within one pay period after the end of a 52-week period to bring the employee's salary into line with the required threshold. Unlike the Obama administration's proposed rule, the current proposed rule does not contain a mechanism for automatic increases over time. Rather, it calls for periodic review to update the salary thresholds, which would require notice-and-comment rulemaking.

The proposed rule was published in the *Federal Register* on March 22. Comments on the proposed rule may be submitted to the Department of Labor within 60 days of this date. Legal challenges to the validity of the proposed rule are possible. Nonetheless, employers should monitor its status as it weaves its way through the rulemaking process. In the meantime, employers should begin to audit their exempt positions in light of this proposed rule to determine whether the changes affect any of their employees' exempt status and to analyze potential risks.

The Department of Labor's proposed overtime rule, if and when finalized, is only one piece of the wage and hour puzzle employers must put together in order to ensure they are properly paying their employees. Employers also must consider corresponding requirements under the myriad of state, and sometimes local, laws.

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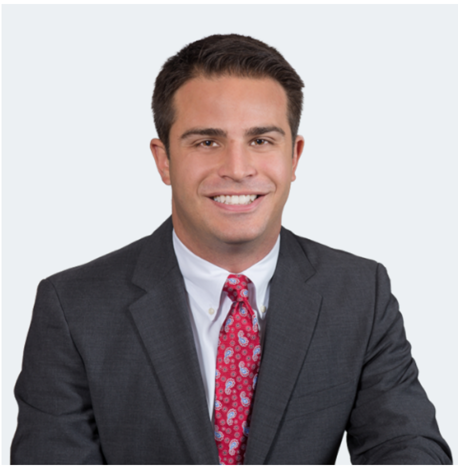

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