

Insights: Alerts

DOL Publishes New Rule on Overtime Eligibility

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On September 24, 2019, the U.S. Department of Labor issued a much-anticipated rule regarding eligibility for overtime. The particular aspects of the rule employers need to be aware of are:

- The salary test for exempt employees under the so-called “white collar exemptions” for executive, administrative, and professional employees (EAP) is raised to \$684 per week or \$35,568 annually.
- The salary test for exempt employees under the highly compensated employee (HCE) exemption is raised to \$107,432.
- Employers can use payment of nondiscretionary bonuses to cover up to 10% of the salary requirements, provided the bonuses are paid at least annually.
- The new rule goes into effect on January 1, 2020.

A significant issue not addressed by the new rule is the duties test for the EAP exemptions. Current rules require only that executive or administrative activities are the “primary duty” of the exempt employee. There had been some concern in the business community that any new rule would change the duties test by delineating more specific duties and adding a requirement for percentage of time spent on exempt activities into the definition.

This rule marks the first change in the salary tests for exempt employees since 2004. The current test for the EAP exemptions has remained at \$455 per week (\$23,660 annually) since then and the HCE test has been \$100,000. Most commentators for both business and labor have agreed that raising the EAP salary test is overdue. The new rule regarding nondiscretionary bonuses qualifying as part of the salary test is viewed as an appropriate nod to modern workplace realities where more employees receive part of their compensation through incentive bonuses.

Under the Obama administration, the DOL issued a rule raising the salary tests significantly higher than the new rule – \$47,476 for EAP exemptions. This rule was supposed to take effect on December 1, 2016, but the rule was enjoined in a lawsuit filed in the Eastern District of Texas. The judge in that case found that the huge jump in the salary test did not pass muster under the standard for administrative rulemaking and represented an “arbitrary and capricious” action by the Department. The injunction was appealed to the Fifth Circuit Court of Appeals, but the case has been held in abeyance pending issuance of a new rule that would supersede the enjoined rule. That new rule is what has just been issued, and it is anticipated that the pending appeal will be dismissed.

What should employers do now?

The new rule is scheduled to take effect on January 1, 2020, just over 90 days from the date of issuance. There is a chance that the new rule will be challenged in court, as was the Obama-era rule, but the chance of this more moderate rule being enjoined seems considerably less likely. Accordingly, employers need to take action now to ensure compliance with the new rule. Specifically, employers need to:

- Review salaries (and bonuses) for all EAP and HCE exempt employees to see if they meet the new thresholds. For those that do not, a decision must be made whether to raise the salaries or change the job to non-exempt status.
- Implement any adjustments prior to January 1, 2020 and formulate an appropriate communication program to announce any changes. Simply raising the salaries of all employees currently below the new threshold without consideration of salary compression and other fairness issues could be a mistake, and changes need to be handled carefully.
- Use this opportunity to consider other wage and hour issues which might need attention, such as employees who might be misclassified or whose job duties need to be clarified. For instance, an employer might be able to reclassify misclassified employees now using this change in the law as cover. This would be a good time to consider a thorough wage and hour audit.

The Labor & Employment attorneys at Kilpatrick Townsend stand ready to answer any questions or help with auditing or implementation of any changes in compensation.

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