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Department of Labor Proposes an Increase to the FLSA Exempt Employee Salary Threshold; Is 2023(4) the new 2019 or 2017?

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On August 30, 2023 the U.S. Department of Labor (“DOL”) announced the much anticipated Notice of Proposed Rulemaking (“NPRM”) which, if implemented, would increase certain otherwise salary exempt employees’ compensation under the Fair Labor Standards Act (“FLSA”) by over 50% to \$1,059 per week (the equivalent of \$55,069 per year). The DOL is also proposing, in a footnote to the NPRM, to add to the regulations an automatic updating mechanism; because the salary threshold amount referenced in the NPRM is based on 2022 data (which is not yet finalized), it is likely that the final annual salary threshold would be as high as \$60,000 by the time a final rule is issued.

The DOL last updated the Executive Administrative and Professional (EAP) exemption regulations in 2019. That update, which included setting the standard salary level test at its current amount of \$684 per week (equivalent to a \$35,568 annual salary), has been in effect since January 1, 2020. In 2016 the DOL attempted to increase the salary threshold, but that initiative was initially blocked in Q4 2017 and subsequently tackled in courts.

This is what we can glean now from the DOL’s NPRM:

- It would increase the standard salary level to the 35th percentile of earnings of full-time salaried employees in the lowest-wage Census Region (currently the South), which would be \$1,059 per week (\$55,068 annually) based on current data.
- It would apply the standard salary level to Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands, and increase the special salary levels for American Samoa and the motion picture industry.
- It would increase the highly compensated employee (HCE) total annual compensation requirement to the annualized weekly earnings of the 85th percentile of full-time salaried employees nationally, which would be \$143,988 per year based on current data; and
- It would automatically update these earnings thresholds every three years with current wage data to maintain their effectiveness.

An employer may elect under the FLSA to treat an otherwise exempt employee as non-exempt. Keep in mind that employers may not go the other way and elect to treat a non-exempt employee as exempt under the FLSA, paying an hourly wage at or above minimum wage (state minimum wage when higher than federal, like in Michigan) and time and one-half base hourly pay for time worked in excess of forty hours in a given work week. However, such an election by an employer is both cumbersome and often unwelcome by existing exempt employees.

The DOL welcomes public comments regarding the NPRM within 60 days from the publication date in the Federal Register, or on or before November 7, 2023, unless the public comment period is extended beyond November 7, 2023.

The exact timeline for the DOL's publication of a final rule, or when a final rule might go into effect, is murky. The 2019 proposed rule and the final rule took approximately ten months. If this rulemaking process follows a similar route, the final rule could be in effect around Q3 2024. The DOL also has an acting Secretary of Labor and not a confirmed Secretary of Labor which opponents have indicated violates the Senate's constitutional Advice and Consent powers; it is a virtual certainty that any final rule will be challenged in various courts.

The DOL is not proposing changes to the standard duties test, consistent with its approach in both the 2016 and 2019 rules.

The current DOL proposal includes a severability provision, which if enforced would have the operative effect of keeping those parts of the rule in place if one piece of the rule is eventually invalidated in court.

Two legal rulings loom large as far as prospective challenges to DOL proposed salary-based changes to overtime exemptions under the FLSA:

- In 2017, a Texas-based U.S. district court struck down an attempt by the Obama administration to raise the salary threshold to \$47,476. By focusing too heavily on the amount of money employees make instead of their job duties, the Obama DOL expanded overtime protections to employees Congress sought to exclude, Judge Amos Mazzant said in that ruling. Judge Mazzant—an Obama appointee backed by Texas's Republican senators—is still a sitting judge in the Eastern District of Texas.
- From the United State Supreme Court, Justice Brett Kavanaugh has recently intimated that overtime laws shouldn't consider pay at all. In a dissent (*21-984 Helix Energy Solutions Group, Inc. v. Hewitt*), Kavanaugh wrote: "The Act [FLSA] focuses on whether the employee performs executive duties, not how much an employee is paid or how an employee is paid. So, it is questionable whether the Department's [DOL] regulations—which look not only at an employee's duties but also at how much an employee is paid and how an employee is paid—will survive if and when the regulations are challenged as inconsistent with the Act."

Keep the DeLorean at the ready, we are in for an interesting start to 2024 (and beyond).

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