

Labor and Employment Alert: Department of Labor Unveils New Overtime Threshold

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Today, the U.S. Department of Labor (DOL) issued a final rule that significantly expands the overtime protections in the Fair Labor Standards Act (FLSA). The rule increases the minimum salary an employee must receive before being considered overtime-exempt to \$684 per week – \$35,568 per year (the salary threshold is \$455 per week if employed in Puerto Rico). Employers can satisfy up to 10% of that \$35,568 salary through nondiscretionary bonuses, incentives, and commissions that are paid annually or more frequently. The salary level for highly compensated employees is increased to \$107,432. The rule becomes effective on January 1, 2020.

Currently, the FLSA exempts from its minimum wage and overtime requirements executive, administrative, professional, outside sales, and computer employees (commonly known as the “white collar” exemptions). To be exempt, employees must meet certain primary duties tests and be paid on a salary basis of at least \$455 a week (\$23,600 annually) or \$100,000 annually for highly compensated employees.

The DOL has long used the salary level test as a tool to help define the white collar exemption because employees paid less than the salary level are unlikely to be bona fide white collar employees, and, conversely, that nearly all bona fide white collar employees are paid at least that much. According to the DOL, “the salary level test provides certainty for employers and employees, as well as efficiency for government enforcement agencies.” By increasing the salary threshold from \$455 to \$684 per week, the DOL estimates that about 1.3 million currently exempt employees (and about 100,000 highly compensated employees) will no longer qualify for the exemptions and thus will become entitled to minimum wage and overtime under the FLSA. Notably, the new rule makes no changes to the duties tests.

In 2016, the DOL sought to increase the salary threshold to \$913 per week (or \$47,476 per year) and to \$134,004 for highly compensated individuals. But shortly after the rule was published, 21 states sued the DOL contending the agency overstepped its authority. A district court

in Texas blocked the rule from taking effect, and an appeal remains pending before the Fifth Circuit Court of Appeals. The DOL's 2019 rule officially rescinds the 2016 rule.

The DOL explained "the revised salary level reduces the likelihood of workers being misclassified as exempt from overtime pay, providing an additional measure of the effectiveness of the salary level as a bright-line test delineating exempt and nonexempt workers." Relatedly, the increased standard salary level "will reduce the burden on employers and may reduce legal challenges and the overall cost of litigation faced by employers in FLSA overtime lawsuits, specifically litigation that turns on whether workers earning above the current salary and earnings thresholds but below the levels set in this final rule pass the duties test."

Worker advocates have already threatened litigation over the new rule. But given the looming January effective date, employers should not delay their compliance efforts. Employers should review their workforce to determine whether any exemptions they have been relying upon will still apply in light of the increased salary threshold.

Contact your Vorys lawyer if you have questions about the effect the new rule will have on your business and FLSA compliance.