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Labor and Employment Alert: U.S. Department of Labor Proposes to Raise the Overtime-Exempt Salary Threshold to \$35,000

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On March 7, 2019, the U.S. Department of Labor (DOL) finally released its proposed rule to expand the overtime protections in the Fair Labor Standards Act (FLSA). The rule would increase the salary an employee must receive before being deemed overtime-exempt to \$679 per week – \$35,308 per year (and \$147,414 for highly compensated employees). The DOL also proposes having these salary levels automatically adjust every four years to prevent the thresholds from becoming outdated.

The FLSA exempts from its minimum wage and overtime requirements executive, administrative, and professional. To be exempt, employees must meet certain primary duties tests and currently be paid on a salary basis of at least \$455 a week (\$23,600 annually) or \$100,000 annually for highly compensated employees.

In 2016, the DOL adopted a rule that would increase the weekly salary level from \$455 to \$913 (\$47,476 per year), while the salary for highly compensated individuals would have increased to \$134,004. Additionally, for the first time since the FLSA was enacted in 1938, these salary levels would have automatically adjusted for inflation. By increasing the salary thresholds, the DOL estimated that about 4.6 million then-exempt employees would no longer qualify for the exemptions and thus would become entitled to minimum wage and overtime under the FLSA. These new overtime rules were supposed to become effective on December 1, 2016. Almost immediately, however, litigation ensued and the rule was enjoined and ultimately invalidated (although appeals regarding the rule's validity and invalidity remain pending).

In its proposed March 2019 rulemaking, the DOL seeks to formally rescind the 2016 rule. In its place, the DOL would adopt a \$679 per weekly threshold (and a \$147,414 annual threshold for highly compensated employees). The DOL also proposes to allow employers to count nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the standard salary level test, provided those bonuses are paid annually or more frequently. The DOL

stated that it "believes that the proposed update to the standard salary level will maintain the traditional purposes of the salary level test, and will help employers more readily identify exempt employees." Notably, the DOL is *not* proposing any changes to the standard duties test.

Finally, the DOL proposes to update these earnings thresholds every four years through further rulemaking. According to the DOL, "this would provide clarity and help workers and employers by having a regular and orderly process for future changes."

The DOL estimates that in 2020, 1.1 million currently exempt employees earning less than \$679 per week would gain overtime eligibility. An additional 201,100 currently exempt workers earning less than \$147,414 per year as highly compensated individuals would also gain overtime eligibility.

The DOL is now seeking public comments on the proposed rule. In 2017, when the DOL published a Request for Information asking for public input on what changes the DOL should propose concerning these issues, the DOL received over 200,000 comments. Whatever the rule's final parameters are, the rule is likely to be challenged in court. We will continue to monitor and report on the rule. In the interim, contact your Vorys lawyer if you have questions about the proposed rule.