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## W A G E A N D H O U R

# US Department of Labor Proposes New Overtime Rule ... Again

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*Special to the Legal*

After much anticipation, on March 7, the U.S. Department of Labor (DOL) issued its notice of proposed rulemaking, proposing to update, among other things, the Fair Labor Standards Act's (FLSA) salary level for the executive, administrative, professional, outside sales and computer exempt employees from \$455 to \$679 per week. The DOL estimates that under the proposed rule, which would go into effect in 2020, 1.1 million additional employees in the United States may become eligible to earn overtime compensation.

This may feel like Groundhog Day for employers that remember when the Obama administration's DOL announced a final rule (2016 rule), which set the minimum salary level at \$913 per week (\$47,476 per year) and required automatic triennial increases to the minimum salary threshold. Dozens of states and business groups requested a nationwide injunction blocking the 2016 rule from taking effect, which was granted days before the 2016 rule was set to take effect. After the change in administrations and while the case was on appeal, the DOL asked the U.S. Court of Appeals for the Fifth Circuit to hold the case in abeyance while the DOL issued a new proposed rule.

In the litigation regarding the 2016 rule, the judge's primary rationale for



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granting the injunction was that Congress intended for the applicability of the so-called "white collar" exemption to be based more so on the employee's duties rather than their salary. While the salary threshold was supposed to screen "out obviously nonexempt employees, making an analysis of duties in such cases unnecessary," the salary level in the 2016 rule created "essentially a de facto salary-only test," which the judge found to be contrary to Congress' intent.

### THE DOL'S LATEST PROPOSAL

Under current DOL regulations, an employee can qualify as an exempt

executive, administrative or professional employee if:

- The employee is paid on a salary basis (the salary basis test).
- The employee's salary meets a minimum specified salary amount (the salary level test).
- The employee's duties meet the criteria set forth in the regulations (the duties test).

The proposed rule targets the salary level test only and does not alter the salary basis test or the duties test. Under the proposed rule, the minimum salary amount to qualify for exempt status would increase from \$455 per week (\$23,660 per year) to \$679 per week (\$35,308 per year).

In fashioning the proposed rule, the DOL returned to the methodology used in creating the 2004 salary thresholds and set the salary level at approximately the 20th percentile of earnings of full-time salaried workers in the south and in the retail sector. The DOL explained that the salary test is a "tool to help define the white collar exemption on the basis that employees paid less than the salary level are unlikely to be bona fide executives, administrators, or professionals, and, conversely, that nearly all bona fide executives, administrators and professional are paid at least that much."

In addition to the proposed increase in the salary level, the proposed rule would allow for up to 10 percent of an employee's salary to come from nondiscretionary bonuses and incentive payments so

long as those forms of compensation are paid, at a minimum, on an annual basis. As with the 2016 rule, employers can make this payment on a catch up basis in the pay period following the end of the annual period. The proposed rule also would significantly increase the annual compensation threshold from \$100,000 to \$147,414 for employees to qualify for the highly compensated employee exemption.

The DOL indicates in the proposed rule that it “intends to propose an update to the part 541 earnings thresholds every four years” through the traditional notice and comment rulemaking process. This is in contrast to the 2016 rule that, had it taken effect, would have required an “automatic” increase in the salary level every three years keyed to the consumer price index for all urban consumers.

When the 2016 rule was announced by the Obama administration, some employers chose to increase employee salaries in an effort to maintain their exempt status. Employers who did not make changes to comply with the 2016 rule (or who initially made changes and then pulled them back after the 2016 rule was enjoined) must again consider whether to increase employee salaries or re-classify employees who earn below the newly proposed threshold and meet the other criteria to qualify for exempt status.

## POTENTIAL REGULATION ON THE STATE LEVEL

Pennsylvania employers have an added regulatory wrinkle potentially on the horizon as well. Last June, the Pennsylvania Department of Labor & Industry (DLI) proposed an increase in the salary threshold to qualify as an exempt executive, administrative or professional employee under the Pennsylvania Minimum Wage Act. The DLI’s proposal would raise the salary level over a period of three years (from \$610 to \$766 to \$921 per week), and after the level reaches \$921 per week would automatically increase to the 30th percentile of weekly earnings for full-time non-hourly workers in the northeast region in the second quarter of the prior year as published by the DOL, Bureau

of Labor Statistics. This would bring the required salary level to a slightly higher point than the 2016 rule.

On Sept. 21, 2018, Pennsylvania’s Independent Regulatory Review Commission (IRRC), the commonwealth body tasked with determining whether a regulation is in the public interest, submitted its comments on the DLI’s proposed changes to the salary threshold. The IRRC questioned the DLI’s determination that the cost to businesses following the salary level increase would be “well under one-tenth of one-percent of total U.S. payroll costs” and pointed out that the costs of compliance estimated by nonprofit organizations in particular far exceeded

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the DLI’s prediction. It also noted that many stakeholders had expressed concerns that Pennsylvania’s overtime rule would be misaligned with the anticipated DOL regulations, creating confusion for employers. Overall, the IRRC determined that DLI had not sufficiently justified its proposed regulation. The DLI is required to consider and respond to every comment received from the IRRC as it prepares any final rule. If and when the DLI issues any final-form regulations regarding the salary threshold, the IRRC then will have the opportunity to vote to approve or disapprove them.

## WHAT CAN EMPLOYERS EXPECT NEXT?

The DOL’s proposed rule is subject to a 60-day comment period. Employers and

other stakeholders can submit their comments on the proposed rule to the DOL.

While the notice and comment period has closed in Pennsylvania, no final version of the DLI’s proposed rule has been issued.

As with the 2016 rule, both the DOL and DLI proposals may face legal challenge should they be issued in final form. That being said, the DOL proposal is similar to the 2004 salary level increase which is roughly equivalent to earnings at the 20th percentile of salaried employees in the South and in the retail industry. It also does not provide for automatic updating, which was a controversial aspect of the 2016 rule.

Employers should anticipate an increase in the salary level to \$679 per week in 2020 and begin the process of assessing whether to make changes to the exempt status of executive, administrative, professional, outside sales, and computer exempt employees falling below that level. At the same time employers are analyzing potential changes to the exempt status of employees, it may also make sense to conduct a broader analysis of the exempt status of employees and consider potential modifications.

This is a dynamic time in the wage-and-hour arena at the federal, state and local levels. From the salary threshold to the minimum wage to pay equity, wage and hour laws are in flux. Employers in Pennsylvania and around the country should continue to monitor the salary level rulemaking process on both the federal and state level and begin the process of planning for changes that are looming on the horizon. •