

DOL New Minimum Salary Level of \$47,476 for Exempt Employees Temporarily Thwarted

November 23, 2016

Earlier this year, the U.S. Department of Labor (DOL) published its Final Rule that more than doubles the minimum standard salary level for overtime-exempt “white collar” employees—individuals employed in an executive, administrative or professional (including the salaried computer exemption) capacity—to \$47,476 annually (\$913 weekly). Unless falling within another permitted exemption, employees paid less than this standard salary level would be entitled to minimum wage and overtime pay under the federal Fair Labor Standards Act (FLSA). The minimum total compensation for exempt “highly compensated” employees was similarly poised to increase to \$134,004 per year. The Final Rule also permits employers to use nondiscretionary bonuses and incentive payments to satisfy up to 10 percent of the new standard salary level and includes a mechanism for automatically adjusting these salary and compensation levels every three years.

The DOL’s Final Rule includes an effective date of December 1, 2016. In preparation, businesses have, or are on the verge of, increasing the salary of employees who otherwise qualify as exempt, or are converting them to non-exempt status and making them overtime eligible. For many employers, those plans will now change.

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On November 22, 2016, a federal court in Texas blocked the DOL's Final Rule from taking effect on December 1, 2016. This court action applies nationwide.

The U.S. District Court for the Eastern District of Texas granted emergency preliminary injunctive relief, on a nationwide basis, after concluding that the DOL had overstepped its bounds. The court held that while the FLSA's accompanying regulations give the DOL "significant leeway to establish the types of duties that might qualify an employee for the exemption, nothing in the [white collar] exemption indicates that Congress intended the Department to define and delimit with respect to the minimum salary level." The significant increase to the salary level, in the court's opinion, essentially created a "de facto salary-only test," and Congress "did not intend salary to categorically exclude an employee with [white collar] duties from the exemption."

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As a result of the court's actions, for now, the FLSA's current standard white collar exemptions will still apply, making an employee exempt so long as the individual: (1) is paid on a salary basis that does not fluctuate based on the number of hours worked or quality of work; (2) is paid at or above the current salary level of \$23,660 (\$455 weekly); and (3) meets the respective job duties test. As before, employees who fail to meet any of these criteria are non-exempt and must therefore be paid not less than the federal minimum wage (currently \$7.25 per hour) and at least one and one-half their regular rate of pay for hours worked over 40 in a workweek. Of course, state minimum wage and overtime requirements must also still be met.

What Might Happen Next?

The probability of a court issuing a permanent injunction or agency action rescinding or modifying the Final Rule could be influenced by the upcoming presidency of Donald Trump and change in administration. For now, the court's preliminary injunction preserves the status quo on a nationwide basis while the court determines the DOL's authority to make the Final Rule as well as the Final Rule's validity.

In light of this development, employers should consider the following:

- Employers that were about to or have already notified employees of a pay or classification change based on the Final Rule may wish to consider putting those changes on hold, consistent with any notification requirements under state law regarding wage changes. Other employers may choose to proceed with the changes for operational or organizational reasons. Before concluding which approach works for your organization, consider morale issues and the exact communications and promises made. Counsel should be consulted to assess the approaches being considered.
- The delayed or halted implementation of the Final Rule does not relieve employers of their obligation to ensure employees are properly classified under the FLSA as exempt or non-exempt. For instance, employees who satisfy the salary basis and salary level tests are nonetheless non-exempt if they do not primarily perform exempt job duties. An internal workplace audit, under the direction of counsel, could help to identify potential employee

misclassifications and avoid or mitigate costly litigation.

- The FLSA does not prevent a state from establishing more protective minimum wage and hour standards. If a state establishes a more protective standard than the provisions of the FLSA, then the higher standard applies in that state. In California, for example, the minimum annual salary level for exempt status is currently \$41,600 and will increase to \$43,680 on January 1, 2017. In New York, the minimum annual salary level for exempt status is currently \$35,100, and has been proposed by the NYSDOL to increase on December 31, 2016, to range from \$37,830 to \$42,900, depending on locality (and size of the employer if in New York City), and to increase annually each of the next four years. Other states could respond to the blocked Final Rule by implementing or amending state laws regarding the minimum wage and overtime exemptions. Employers should remain cognizant of all applicable federal, state and local laws.

For Further Information

If you have any questions about this Alert, please contact any of the attorneys in our Employment, Labor, Benefits and Immigration Practice Group or the attorney in the firm with whom you are regularly in contact.

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