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Department of Labor Announces a New Salary Threshold for the Overtime Exemption

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On March 7, 2019, the Department of Labor (“DOL”) announced a proposed rule that would increase the salary threshold for the overtime exemption from \$23,660 annually (\$455 per week) to \$35,308 annually (\$679 per week). That means that currently exempt employees making at least \$23,660 but less than \$35,308 would no longer qualify as exempt from overtime. According to the DOL, this proposed rule would make more than a million more American workers eligible for overtime.

This is not the first time the DOL has attempted to increase the salary threshold for the overtime exemption. The DOL’s 2016 final rule to increase the overtime threshold to \$47,476 annually was enjoined by the U.S. District Court for the Eastern District of Texas on November 22, 2016, just days before the final rule was to take effect on December 1, 2016. That decision was appealed but has been held in abeyance since November 6, 2017 by the U.S. Court of Appeals for the Fifth Circuit pending further rulemaking regarding a revised salary threshold, therefore the 2016 rule never went into effect and the overtime regulations remained unchanged.

Although the \$35,308 salary threshold under the proposed rule would be approximately \$12,000 more than the current level, it is far less than the prior \$47,476 amount set forth in the enjoined 2016 final rule. Similar to the enjoined 2016 final rule, employers will be allowed to use up to 10% percent of nondiscretionary bonuses and incentive payments (including commissions) to satisfy the salary level. However, unlike the DOL’s enjoined 2016 final rule, there is no automatic adjustment to the salary threshold. Any future increase or change would continue to require the notice-and-comment rulemaking process.

The proposed rule also increases the total annual compensation requirement for “highly compensated employees” (HCE) from the currently-enforced level of \$100,000 to \$147,414 per year. This

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amount is higher than the amount set forth in the enjoined 2016 final rule which was only \$134,004.

Similar to the DOL's 2016 final rule, the DOL once again has made no changes in the "duties" test for exempt status. The DOL's retention of the current "duties" tests is an important concession by the DOL to businesses. That is because revising the "duties" test could have further increased the number of overtime-eligible employees and resulted in more litigation about whether employees who met the salary requirement were performing duties that made them exempt.

The DOL's proposed regulations, if finally approved, will not go into effect until sometime in 2020. In preparation, employers should analyze how many currently "exempt" employees would be affected, should track the number of hours worked (regular and over 40 in a week) by currently "exempt" employees now paid between \$455.00 and \$679.00 per week, and, most importantly, consider strategies to mitigate the regulations' impact.

If you have any questions about this final regulation or the Fair Labor Standards Act or the types of strategies that can be implemented to manage overtime, please contact the author of this Client Alert, your Butzel Long attorney, or any member of the Labor and Employment Law Group.

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