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Department of Labor Announces Final Rule Increasing the Salary Threshold for the Overtime Exemption

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On September 24, 2019, the Department of Labor (“DOL”) announced its final rule that would increase the salary threshold for the overtime exemption from \$23,660 annually (\$455 per week) to \$35,568 annually (\$684 per week). This Final Rule was a slight increase from the amount set forth in the proposed rule issued by the DOL on March 7, 2019 (\$35,308 annually / \$679 per week). This means that currently exempt employees making at least \$23,660 but less than \$35,568 would no longer qualify as exempt from overtime. According to the DOL, this proposed rule would make over one 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 current overtime regulations remained unchanged.

Although the \$35,568 salary threshold under the final 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.

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The final rule also increases the total annual compensation requirement for “highly compensated employees” (HCE) from the currently-enforced level of \$100,000 to \$107,432 per year. The final rule’s HCE level is approximately \$40,000 less than what was proposed back in March 2019. Regardless, the final rule is significantly less than the amount set forth in the enjoined 2016 final rule which was only \$134,004 for highly compensated employees.

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 final rule will be effective on January 1, 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 \$684.00 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.

This topic will be covered in greater detail at Butzel Long’s 32nd Annual Labor, Employment, Benefits, and Immigration Law Forum on November 14, 2019. You can register for this seminar at the following link: [resources-events-labor2019.html](https://www.butzel.com/resources-events-labor2019.html).

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