

Client Alert **Employment & Labor**

State Attorney Generals Brace for Battle with Department of Labor Over Newly Proposed Federal Overtime Salary Exemption Threshold

After the March 7, 2019 unveiling by the U.S. Department of Labor (“DOL”) of its long-awaited proposed rule, which would make more workers eligible for statutory overtime pay, the attorneys general (“AGs”) of 14 states and the District of Columbia announced on May 21, 2019 that they oppose DOL’s proposed rulemaking. Included among the states opposing DOL’s proposal are New Jersey and New York.

The existing annual salary overtime exemption threshold under the Fair Labor Standards Act (“FLSA”) is \$23,600 for full-timers (or \$455 per week). Employees who are paid below that salary must be paid overtime if they work more than 40 hours per week. The FLSA salary threshold test has not changed since 2004.

DOL’s newly proposed rule, characterized as an Executive Order 13771 “deregulatory action,” would, among other things, increase the qualifying salary threshold for overtime exemption to \$35,308 annually for full-time workers (or \$679 per week). In doing so, the rule, if promulgated, would effectively convert an estimated one million workers to hourly wage status and qualify them for time-and-one-half overtime pay for hours they work in excess of 40 in a given workweek.

The newly proposed rule also would clarify the type of compensation (such as payments made for vacations, holidays, illness, or failures to provide sufficient work) which would be excluded from the definition of an employee’s “regular rate” for purposes of calculating whether overtime pay is due, and increase the total annual compensation threshold for

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“highly compensated employees” (for whom overtime wages generally need not be paid) from \$100,000 to \$147,414 annually.

The proposed new rule stands in sharp contrast to the final rule promulgated by DOL during the Obama Administration in 2016, which would have raised the annual salary exemption threshold to \$47,476 for full-timers (or \$913 per week) and require automatic adjustments to the salary threshold standard every three (3) years. However, on November 22, 2016, a federal district court in Texas held that that rule was inconsistent with Congressional intent and issued a nationwide injunction staying its implementation. On October 30, 2017, DOL appealed the district court’s summary judgment decision to the Fifth Circuit Court of Appeals. On November 6, 2017, the appellate court granted the Government’s motion to hold the appeal in abeyance while DOL reexamined the salary threshold test.

The AGs argue that the proposed rule does not go far enough, championing instead the Obama-era 2016 Final Rule, which would have made roughly four million workers newly eligible for overtime pay. In the [May 21, 2019 letter](#) signed by each of the AGs, they contend, among other arguments, that the newly proposed rule would be arbitrary and capricious, and therefore unlawful under the federal Administrative Procedure Act, because it would unreasonably institute a markedly lower salary threshold level and improperly eliminate mandated periodic reviews of the salary threshold standard. Meanwhile, Congressional Democrats have announced plans to introduce legislation that would revive the Obama-era salary exemption threshold.

On March 29, 2019, DOL published its newly proposed rule, triggering a 60-day public comment period that expired May 28, 2019. Presumably, DOL will be reviewing the comments it received and publishing its final rule, though the final rule’s promulgation date is uncertain. Given the anticipated political and judicial battles over what the new threshold should be, it is not clear what overtime salary exemption threshold ultimately will emerge.

Takeaways for Employers

- Employers should closely monitor administrative, judicial and legislative developments relating to the proposed increase in the salary exemption overtime threshold.
- An increase in the threshold is likely, though the amount of the increase and the effective date of same remain uncertain.
- Once the threshold is increased, certain employees previously exempt from overtime will be eligible for hourly overtime pay depending on what dollar amount is established as the new salary threshold standard, and employers will be required to maintain time worked records for those newly converted hourly employees.

- In anticipation of the change in the threshold amount, employers should begin the process of identifying job classifications that potentially may be impacted by a change in the salary exemption standard.

Attorneys in our Employment and Labor Law Practice Group can assist employers regarding the issues raised in this alert.

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