valent GROUP Compliance Check

DOL Issues New Proposal on Overtime Exemptions

Highlights

- The salary level for administrative, executive and professional employee exemptions may increase to **$35,308**.
- The salary level for the highly compensated employee exemption may increase to **$147,414.**
- The proposed rule does not change the duties test for white collar exemptions.

Important Dates

May 18, 2016
DOL issued a final rule on overtime exemptions.

November 22, 2016
A federal court in Texas issued an injunction against the 2016 final rule.

March 7, 2019
DOL issued its new proposed rule on overtime exemptions.

Overview

On March 7, 2019, the U.S. Department of Labor (DOL) issued a proposed rule that would change the salary thresholds for certain exempt employees.

Under the proposal, the minimum salary level for the "white collar" overtime exemptions would increase **from $455 to $679 per week** (**$35,308 per year)**. This amount is significantly lower than the $913 minimum weekly salary level that the DOL set in its 2016 final rule (which never went into effect due to a federal court injunction).

The proposed rule would allow employers to use nondiscretionary bonuses and incentive payments (including commissions) that are paid annually or more frequently to satisfy up to 10 percent of the standard salary level.

The DOL's proposal would also increase the salary level for the "highly compensated employee" exemption **from $100,000 to $147,414 per year**. This is an increase from the 2016 final rule's annual threshold of $134,004.

Action Steps

These changes will not be effective until after a final rule is issued. Employers are not required to comply with the proposal, but they should become familiar with it and begin identifying which employees may be affected if the rule becomes final. Employers should also watch for future developments from the DOL.

This newsletter has been prepared and published for informational purposes only and is not offered or intended to be construed as legal advice. For legal advice, contact an attorney. © 2010-2017 Zywave, Inc. All rights reserved.

Background

The Fair Labor Standards Act (FLSA) is a federal law that requires virtually all employers in the United States to pay overtime wages to employees who work more than 40 hours in a workweek. The FLSA contains certain exemptions to its overtime payment requirements. Among these are the "white collar" exemptions for executive, administrative or professional (EAP) employees and for highly compensated employees (HCEs).

In general, an employee may qualify for a white collar exemption if he or she satisfies **all three** of the following:

- The "**salary basis test**" – The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed.
- The "**salary level test**" – The employee's salary amount must be at least as much as the standard salary level or the HCE salary level set by the DOL.
- The "**duties test**" – The employee must primarily perform EAP duties. If an employee's total annual salary is at least as much as the HCE salary level, the employee may meet the duties test if he or she performs at least one of the duties of an exempt EAP employee.

For the salary level test, the DOL set the currently enforced amounts in 2004. On May 23, 2016, the DOL issued a final rule that would have significantly increased both the standard and HCE salary levels starting in December 2016. In addition, the 2016 final rule would have further increased those amounts through automatic adjustments every three years. On Nov. 22, 2016, however, a federal court ruled that the 2016 final rule was unenforceable. Therefore, the final rule never went into effect, and the DOL has continued enforcing the 2004 salary levels.

New Proposed Rule

In the Notice of Proposed Rulemaking (NPRM) issued on March 7, 2019, the DOL proposed to update both the minimum weekly standard salary level and the total annual compensation requirement for "highly compensated employees" to reflect growth in wages and salaries. The DOL is also proposing revisions to the special salary levels for employees in the motion picture industry and certain U.S. territories. The DOL is not proposing any change to the duties test, despite speculation that it would do so.

The following are the key provisions of the proposed rule:

- Increase the standard salary level to $679 per week (the equivalent of $35,308 annually for a full-year worker), up from the currently enforced level of $455 per week.
- Increase the total annual compensation requirement needed to exempt HCEs to $147,414 annually, up from the currently enforced level of $100,000 annually.
- Allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level, provided these payments are made on an annual or more frequent basis, while inviting comment on whether the proposed 10 percent cap is appropriate, or if a higher or lower cap is preferable.

This newsletter has been prepared and published for informational purposes only and is not offered or intended to be construed as legal advice. For legal advice, contact an attorney. © 2010-2017 Zywave, Inc. All rights reserved.

The proposed rule does not provide for any automatic adjustments to the salary thresholds. Instead, the DOL is asking for public comment on the proposed rule's language for periodic review to update the salary threshold. An update would continue to require notice-and-comment rulemaking.

For more information on the proposed rule, see the DOL's Notice of Proposed Rulemaking: Overtime Update, which includes a Fact Sheet and Frequently Asked Questions.

This newsletter has been prepared and published for informational purposes only and is not offered or intended to be construed as legal advice. For legal advice, contact an attorney. © 2010-2017 Zywave, Inc. All rights reserved.