Legal Alert: If at First You Don't Succeed, Try, Try Again: The Department of Labor's New Proposed Overtime Exemption Rule

Thursday, March 14, 2019

Having failed in its previous attempt to modify the federal overtime exemption rule, the U.S. Department of Labor announced on March 7, 2019, a proposed rule that would change requirements for exemptions to the Fair Labor Standards Act. These federal exemptions permit employers to avoid paying overtime to certain employees who work over forty hours in a workweek. In some jurisdictions, state wage and hour law controls overtime exemption requirements because it is more protective of employees than the analogous federal requirements. In other jurisdictions, federal law is the controlling authority. For example, in Arizona, federal law is the controlling authority whereas, in California, state wage and hour law controls overtime exemption requirements.

The Department’s new proposed rule would:

- Increase the salary threshold for the executive, administrative, and professional exemptions from the currently enforced $455 per week ($23,600 annually) to $679 per week ($35,308 annually).
- Increase the total annual compensation requirement for “highly compensated employees” from the currently-enforced level of $100,000 to $147,414 per year.
- Include a commitment to periodic review for any update to the salary thresholds.
- Allow employers to use nondiscretionary bonuses and commissions, or other incentive payments, to satisfy up to ten percent of the standard salary level.
- Not include any changes to the job duties test.

The proposed rule’s salary threshold is not as difficult for employers to satisfy as would have been the case under the Department’s 2016 rule, which would have set the salary threshold for the overtime exemption at $47,472 annually, or $3,956 monthly. 29 C.F.R. § 541.600. In addition, the new proposed rule does not contain the mechanism in the Department’s 2016 rule that would have automatically increased the salary threshold every three years. On the other hand, the new proposed rule’s total annual compensation requirement for highly compensated employees is higher than the Department’s 2016 rule, which would have required an annual compensation of only $134,004.

The Department’s 2016 rule was scheduled to take effect on December 1, 2016, but it was enjoined by a federal court that issued a nationwide preliminary injunction preventing the rule’s implementation and enforcement. *Nevada v. United States DOL*, 218 F. Supp. 3d 520, 534 (E.D. Tex. 2016). The same court subsequently invalidated the rule, holding that the Department exceeded its authority by doubling the existing salary threshold and effectively jettisoning Congress’s duties test. *Nevada v. United States DOL*, 275 F. Supp. 3d 795, 805-08 (E.D. Tex. 2017). The court's decision is still before the Fifth Circuit U.S. Court of Appeals, which granted the Department’s motion to stay its appeal pending new rulemaking.
The Department estimates that one million more American workers would become eligible for overtime compensation if its new proposed rule takes effect. The public has 60 days from the date the proposed rule is published in the Federal Register to comment on it. The proposed rule will not go into effect until after this comment period has closed, the Department has reviewed the public’s comments, and the Department publishes a final rule, which may differ from the proposed rule and may be subject to a future legal challenge.

Despite the current uncertainty over the proposed rule’s adoption, it is not too early for employers to begin thinking about its potential impact. Among other considerations, employers will have to adjust the compensation levels of their exempt employees or, alternatively, convert those employees to hourly nonexempt employees and comply with the additional timekeeping and overtime requirements to which nonexempt employees are subject.

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