

FLSA Overtime Changes are Coming...eventually

By: Lee Geiger on March 11, 2019 on graydon.law

Well...we finally have some indication from the DOL on how it intends to update Fair Labor Standards Act ("FLSA") regulations covering overtime exemptions for employees who fit into the "white collar" exemptions for Executive, Administrative and Professional employees. The overtime threshold, currently at \$23,660/year or \$455/week, has not been updated since 2004. Those who have been monitoring this closely know that it has been like watching a car crash in very, very slow motion. The overtime battle began in 2016 when the Obama-era DOL issued a final rule essentially doubling that threshold and including a bunch of other changes such as automatic updates and an increase in the "highly compensated employee" levels. A Texas judge enjoined the DOL from enforcing that rule in November 2016, just days before it went into effect.

The Trump administration vowed to create a new overtime rule that would update the 2004 threshold but not be as burdensome to employers. Legal nerds (like me) waited in anticipation, expecting the Trump-era DOL to issue a new rule shortly after his inauguration. Nothing happened. Surely, the new rule would come out in the summer of 2017 summer to take effect in January 2018? Nope. In 2018, the DOL sought public comment on the overtime thresholds, but no new rule emerged. Last week, the DOL finally shed some light on its plans.

New Salary Threshold

On March 7, 2019, the DOL proposed to increase the minimum salary threshold for Executive, Administrative and Professional employees to \$35,308/year or \$679/week - an approximate \$12,000 increase and nearly the exact middle of the current and Obama-era thresholds. The proposal does not include an automatic annual increase provision, but the DOL hinted that updates every four years would be appropriate.

Highly Compensated Employee Changes

The increase to \$35,308 shocks no one. What was surprising was the increase in the exemption threshold for "highly compensated employees." That threshold spikes from \$100,000 under current regulations up to \$147,000 - an approximate 50% increase and a

number that is \$13,000 higher than ever previously proposed. The impact of this change is debatable. On one hand, it's a BIG jump. On the other, most workers who are paid more than \$100,000 already fall into one or more exemption.

What does this mean for your company?

The DOL must still jump through a few bureaucratic hoops before the new rules take effect. Some speculate that the new thresholds will be effective in January 2020, but don't bet on it. Companies should perform a job audit and take a close look at employees' job duties and compensation to make sure they are properly classified as exempt or non-exempt. **VERY IMPORTANT:** remember that the test for determining exemption is **Salary Level + Salary Basis + Job Duties = Exempt**. If you only look at the salary level threshold, you're missing a huge chunk of the equation. It is critical to examine the duties that the employee performs. Review more than just the duties listed on the job description. We recommend that managers and Human Resources review the actual daily duties that the employee performs.

Misclassification of employees carries a high risk. Employers can be on the hook for fines and back pay for up to three years. In rare instances, even criminal charges may be filed. Fix the problems on the front end so that you don't have to explain a six-figure classification "whoops" to the CEO of your company. You'll sleep much better at night. As always, we're happy to help with the audit however needed.