Five Things Employers Should Know About The DOL's New Overtime Rule

By Ellen E. Hoeppner / Mar 11, 2019

On March 7, 2019, the U.S. Department of Labor issued its much-anticipated proposed rule to update the Fair Labor Standards Act's overtime exemptions. If finalized, the rule would raise the salary threshold to qualify for the executive, administrative, and professional (EAP) exemptions to $35,308 per year — up from the $23,660 annual salary under the current rule. Beyond the salary increase for the EAP exemptions, the rule also proposes a salary level increase for "highly compensated" employees; inclusion of certain nondiscretionary and incentive payments in the salary computation; review of the salary level every four years, and; maintenance of the existing duties test for executive, administrative and professional employees. The DOL hopes the new rule will go into effect in 2020, though it is likely to be the subject of legal challenges. Employers may find it beneficial to begin reviewing their practices now to determine whether changes need to be made to comply with the new rule and consulting with counsel regarding the anticipated rule's application.

1. Increase in the Salary Level for Certain Exemptions

The biggest change proposed by the new rule is the increase in the salary level for employees to qualify for the executive, administrative and professional exemptions under the FLSA. Under the proposed rule, employees will have to earn at least $679 per week (or $35,308 annually) to qualify for these exemptions.

2. Increase in the Salary Level for Employees to Qualify for the Highly Compensated Exemption

The rule also proposes an increase in the salary level required for employees to qualify for the highly compensated employee exemption. Under the proposed rule, employees will have to earn at least $147,414 annually to qualify for the exemption. This represents nearly a $50,000 increase from the existing requirement.

3. Inclusion of Certain Income in Satisfying the Salary Level

The proposed rule would allow employers to count certain nondiscretionary bonuses and incentive payments (such as commissions) that workers receive for up to 10 percent of a worker's salary for the purpose of meeting the new salary level requirements.

4. Proposed Increases Every Four Years

One of the major questions surrounding the new rule was whether the DOL would include a mechanism for automatic increases in the salary level, as had been proposed under the Obama administration. In the new proposed rule, the DOL did not adopt an automatic-increase model. Instead, it proposed updating the salary levels every four years, but only after a notice and comment period allowing the public and opportunity to weigh in.

5. No Changes to the Duties Test for the Exemptions

For an employee to qualify for one of the exemptions under the FLSA, the employee must satisfy a salary test and a job duties test. The job duties test examines whether the employee's actual job functions meet the requirements of the applicable exemption. Under the proposed rule, there are no changes to the duties test.

Employers with questions about how to implement the changes proposed in the new rules can contact Ellen Hoeppner at (313) 309-4256 or ehoeppner@clarkhill.com, or another member of Clark Hill's Labor and Employment team.