

Client Alert

DOL Releases Highly Anticipated Final Rule Setting Forth Minimum Salary Thresholds for Exempt Employees

October 10, 2019 – On September 24, 2019, six months after issuance of a [substantially similar proposed rule](#) in March 2019 (the “Proposed Rule”), and more than three years after an earlier proposed rule issued during the Obama administration [on May 18, 2016](#), the U.S. Department of Labor (“DOL”) unveiled the final version of its highly anticipated overtime rule raising the federal minimum salary threshold (or so-called “salary level” test) for “white collar” overtime exemptions under the Fair Labor Standards Act (“FLSA”). Under this final rule (the “Final Rule”), workers must earn at least \$684 per week, or \$35,568 annualized, in order to qualify as executive, administrative, or professional (“EAP”) exempt employees. The rule also raises the salary threshold for “highly compensated employees” (“HCE”) to \$107,432 annualized and, in so doing, provides employers the option to count certain nondiscretionary bonus, incentive, or commission compensation as constituting up to 10 percent of an employee’s salary for purposes of meeting the HCE threshold.

While the Final Rule represents a more than 50% increase from the previous minimum salary threshold of \$455 per week/\$23,660 per year, last updated during the Bush administration in 2004, the increase in salary level is still roughly \$12,000 less than the \$913 per week /\$47,476 per year threshold previously set by the Obama administration. The Final Rule also increased the HCE salary level only \$7,342 from the \$100,000 threshold set in 2004, \$26,568 below the \$134,000 level set by the Obama-era rule and roughly \$40,000 below the level set forth in Proposed Rule.¹

As noted in our prior alerts, the Obama-era rule was initially blocked from taking effect as scheduled [on November 22, 2016](#) by order of U.S. District Judge Amos Mazzant of the United States District Court for the Eastern District of Texas, and thereafter officially struck down [on August 31, 2017](#) by Judge Mazzant, in a decision holding that by implementing the rule, the DOL had exceeded its rule-making authority.

With the advent of the new administration, after Judge Mazzant’s August 31, 2017 ruling, the DOL did not release further guidance regarding minimum salary thresholds until the Proposed

¹ The HCE Salary threshold under the Proposed Rule was to have been \$147,414. To provide some perspective on what the increase in the Final Rule for HCE signifies, the actual percentage increase in the Consumer Price Index for all urban consumers (“CPI”) from April 2004 until September 2018 was 73%, while the increase implemented in the Final Rule is 7.432%. As such the new HCE threshold announced is a significant retrogression from the current threshold when one takes into account the different “costs of living” in place at the time each threshold was implemented.

Rule in March of 2019. The 60-day public comment period with respect to the Proposed Rule ended on May 21, 2019, with the DOL revealing that it received more than 116,000 comments. It noted that the “vast majority” of these comments were “campaign comments” using “similar template language.” Like the Proposed Rule, one can surmise that many business groups advocated for a salary level in the low-to mid-\$30,000 range (which would, by implication, have resulted in more employees being classified as exempt than under the Final Rule). Pro-worker advocates, on the other hand, fought hard to keep the threshold amounts higher and closer to the salary level put forth by the Obama-era. Notwithstanding the significant number of comments received, the DOL, in its 245-page release on the Final Rule, explained that it maintained the same methodology it used in 2004 to arrive at the new salary level of \$35,568 annually. It further explained that the HCE salary level of \$107,432 was set at the present 80th percentile of earnings of full-time salaried workers nationally. While the agency also declined to adopt the Obama-era rule’s controversial method for automatic increases to the salary thresholds every three years, it expressed an intent to update them on a more frequent basis than once every fifteen years, doing so without any proposed schedule or formula.

The Final Rule will take effect on January 1, 2020.

Nothing in these changes to the minimum salary thresholds, however, in any manner alters the so-called “duties” test—the other important element in the existing rule used to determine whether employees are properly deemed overtime exempt under the FLSA.²

Irrespective of the minimum annualized salary thresholds for exempt employees under federal law, however, New York employers are reminded that the current thresholds in New York State are significantly higher than the federal standards set forth above. Specifically, as of December 31, 2018, New York employees must earn between \$43,264 and \$58,500 annually, depending on the region of the state in which the employee works, in order to be considered exempt from overtime pay requirements under New York state law. On December 31, 2019, that lower threshold will increase to \$46,020 annually, while the higher threshold of \$58,500 annually will remain in place (at least for the time being). As such, New York employers should be vigilant in remaining in compliance with these salary thresholds, which will continue to increase as noted.

² For purposes of clarity, an individual qualifies for the executive exemption from overtime under federal and New York state law if:

- a) His or her primary duties consist of the management of the enterprise of the employer;
- b) He or she customarily and regularly directs the work of two or more other employees within the employer;
- c) He or she has the authority to hire and fire other employees or his or her recommendations as to hiring and firing other employees carry particular weight;
- d) He or she customarily and regularly exercises discretionary powers*²; and
- e) His or her salary meets the applicable threshold above.

Alternatively, an individual qualifies for the administrative exemption from overtime under federal and New York state law if:

- a) His or her primary duties consist of the performance of office or non-manual field work directly related to the management or general operations of the employer;
- b) He or she customarily and regularly exercises discretion and independent judgment;
- c) He or she regularly and directly assists an employer or an employee employed in a bona fide executive or administrative capacity; or performs, under only general supervision, work along specialized or technical lines requiring specialized training, experience or knowledge*²; and
- d) His or her salary meets the applicable threshold above.

*New York state law requirement only.

While those employers subject to New York State law are likely already in compliance with the higher thresholds required to classify employees as exempt under either the salary or HCE tests, those employing workforces outside New York (or other states which have higher thresholds in place than those proposed under federal law) must familiarize themselves with this new federal rule, and review the salaries paid to certain employees, as well as the classification of certain positions as exempt accordingly. If you require any further information concerning minimum salary thresholds or classification related issues, or about any other wage and hour or employment-related issues, please feel free to contact:

[Jeffrey P. Englander](#)

(212) 735-8720

jenglander@morrisoncohen.com

[Keith A. Markel](#)

(212) 735-8736

kmarkel@morrisoncohen.com

[Christopher W. Pendleton](#)

(212) 735-8783

cpendleton@morrisoncohen.com

[Basil C. Sitaras](#)

(212) 735-8849

bsitaras@morrisoncohen.com