

## Client Alert

### **DOL Releases Highly Anticipated Minimum Salary Threshold Rule**

March 18, 2019 – On March 7, 2019, almost three years after its earlier proposed rule issued during the Obama administration [on May 18, 2016](#), the U.S. Department of Labor (“DOL”) released its highly anticipated proposed 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 the new proposed rule, workers must earn at least \$679 per week, or \$35,308 annualized, in order to qualify as executive, administrative or professional (“EAP”) exempt employees. The new proposed rule will also raise the salary threshold for “highly compensated employees” (“HCE”) to \$147,414 and, in so doing, further provides employers the option to count certain nondiscretionary bonuses, incentives or commissions as constituting up to 10 percent of an employee’s salary for HCE threshold purposes.

The new proposed rule represents a nearly 50% increase from the previous minimum salary threshold of \$455 per week/\$23,660 per year, originally enacted in 2004. The increase in salary level is, however, roughly \$12,000 less than the \$913 per week/\$47,476 per year threshold previously set by the DOL under the Obama administration [on May 18, 2016](#). By contrast, the proposed HCE salary level increased nearly \$50,000 from the \$100,000 threshold set in 2004, and is actually \$13,000 higher than the \$134,000 level set by the Obama-era rule.

As noted in our previous alerts, the Obama-era rule was initially blocked from taking effect as scheduled [on November 22, 2016](#) by U.S. District Judge Amos Mazzant of the United States District Court for the Eastern District of Texas. Following the confirmation hearing of Labor Secretary Alex Acosta in March 2017, during which he acknowledged that the \$23,660 annual salary level was due for an update, the DOL in July 2017 published a request for information to solicit public feedback on changes to the salary level test. A month later, [on August 31, 2017](#), the Obama-era rule was officially struck down by Judge Mazzant, who held that the DOL exceeded its rule-making authority.

After closing the public comment period in September 2017, the DOL revealed that it had received approximately 165,000 comments on different elements of the salary level test, including whether it should exist at all, the appropriate salary level, and whether geography should be considered in its calculation. As expected, many business groups advocated for a salary level in the low-to mid-\$30,000 range (which would have led to more employees earning

less classified as exempt), while worker advocates fought hard to keep the number close to the level set by the Obama-era rule. Notwithstanding the significant number of comments received, the DOL, in its nearly 220-page release on the proposed rule, explains that it ultimately arrived at the new salary level of approximately \$35,000 by applying the same methodology used to set the 2004 threshold.

While DOL raised the minimum salary threshold, it did not change the so-called “duties” test, the other important element in the existing rule to determine whether employees are overtime exempt under the FLSA.<sup>1</sup> The agency also declined to adopt the Obama-era rule’s controversial method for automatic increases to the salary threshold every three years. It did, however, ask for public comment on a plan to increase the salary threshold every four years on a continuous basis, with a plan to take public comment prior to each increase.

Once published in the Federal Register (likely this week), the public will have 60 days to submit comments to the proposed rule.

Please note, as set forth in our [prior alert](#), that irrespective of the minimum annualized salary thresholds for exempt employees under federal law, those in New York State are higher. 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. New York employers should be vigilant in remaining in compliance with these thresholds, which will increase again at the end of this year.

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 thresholds in place higher than those proposed under federal law must familiarize themselves with the new federal guidance, and review the salaries paid to certain employees, as well as the classification of

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<sup>1</sup> 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\*; 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\*; and
- d) His or her salary meets the applicable threshold above.

\*New York state law requirement only.

certain positions as exempt. If you require any further information concerning minimum salary thresholds or classification issues, or about any other employment-related issues, please feel free to contact:

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