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Department of Labor Issues Final Overtime Rule

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On September 24, 2019, the U.S. Department of Labor (DOL) issued a final overtime rule increasing the exempt salary requirement to \$35,568. The final rule is set to take effect on January 1, 2020.

To be exempt from overtime pay under the Fair Labor Standards Act, employees must: (1) be paid on a salary basis, (2) be paid at least the minimum salary level, and (3) meet the primary duties test. The new rule raises the salary level threshold from \$455 a week (\$23,660 annualized) to \$684 a week (\$35,568 annualized). Employees paid less than \$35,568 will be eligible for overtime.

Background Information

The current salary threshold of \$23,700 has been in place since 2004. In 2016, the Obama administration attempted to increase the salary level requirement to \$47,476. However, a federal judge in Texas blocked that rule in 2017. The DOL anticipates that 1.3 million workers will be eligible for overtime pay as a result of the new \$35,568 salary threshold.

Key Provisions of the New Rule

- Exempt employees must be paid at least \$684 a week, or \$35,568 annually. This threshold is slightly higher than the \$35,308 threshold proposed in the initial draft of the rule.
- Non-discretionary bonuses and incentive payments (including commissions) that are paid on an annual or more frequent basis may be used to satisfy up to 10% of the salary requirement.
- The salary level threshold for the highly compensated employee exemption is being increased to \$107,432, up from \$100,000.
- The DOL intends to update the salary level thresholds more regularly in the future through the notice and comment rulemaking procedure but has not announced the anticipated frequency of such updates.

Action Steps for Employers

- Review salary levels for employees classified as exempt under the administrative, professional, executive and highly compensated employee exemptions. Consider whether to increase the



salary of employees earning less than the new threshold or convert the positions to non-exempt by January 1, 2020.

- Now is a good time to review the primary duties analysis as well. Often, misclassification cases are based on a failure to meet the primary duties test as defined by the regulations. The primary duties test did not change but can be challenging for employers to properly apply. Also, the actual duties performed by employees often change over time. An updated analysis of the primary duties test may warrant converting certain positions to non-exempt even if the employee is paid the minimum salary required.
- Develop a communication strategy for employees who are converted to non-exempt positions and educate the employees on the company's policies regarding tracking and reporting time worked and managing overtime.
- Many exempt employees are permitted to work remotely, but such arrangements can result in off-the-clock time when converted to non-exempt status. Consider whether the company's policies and communications with the affected employees address this issue.
- Determine whether to meet up to 10% of the salary requirement through incentive compensation and put controls in place to ensure the catch-up payment is timely made if needed.

Next Steps

If you are a PBPO client and have questions regarding the final overtime rule or would like legal assistance implementing the recommended action steps, please contact us at info@pbpohio.org.

If you are not a client but would like to apply, please contact us at info@pbpohio.org.

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