

## EXPERT ANALYSIS

### Update on the New Federal Overtime Regulations and the New York Minimum Wage

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On May 18, 2016, the U.S. Department of Labor (“DOL”) announced the DOL’s final rule extending coverage of overtime pay under the federal Fair Labor Standards Act (“FLSA”).<sup>1</sup> Along with the announcement, the DOL released guidance on the final rule and the FLSA’s requirements after the rule becomes effective on Dec. 1, 2016.<sup>2</sup>

As we advised in a previous Alert, the FLSA generally requires employers to pay employees the minimum wage and overtime pay for each hour they work in excess of 40 hours per week.

However, the FLSA includes many exemptions, including one for employees who are paid on a salary basis and earn a certain minimum amount per week. To be exempt, these employees also must meet the “duties test,” which determines whether the employee falls under one of the “white collar” exemptions, which include, among others, executive, administrative and professional employees.<sup>3</sup>

The final rule does not change the duties tests for the white collar exemptions, or that, to be exempt as a “highly compensated employee,” an employee must satisfy a minimal duties test.<sup>4</sup>

The key provisions of the final rule are as follows:

1. Increase the minimum salary level for the white collar exemptions from \$455 per week to \$913 per week (from \$23,660 to \$47,476 per year);
2. Increase the minimum salary level for the exemption for “highly compensated employees” from \$100,000 to \$134,004 per year; and
3. Automatically update the salary thresholds every three years. Automatic updates to the thresholds will begin Jan. 1, 2020.

The new rule will allow employers to include nondiscretionary bonuses and incentive payments, such as commissions, to satisfy up to 10 percent of the salary requirement.

#### MAINTAINING COMPLIANCE

Although there are efforts in Congress and threats of litigation to stop the implementation of the final rule, employers should begin reviewing the classifications they use for employees.

To qualify as exempt under a white collar exemption after the new rule takes effect, an employee generally must meet three tests:

- He or she must be paid a salary, rather than an hourly wage;



- His or her salary must be at least \$913 per week; and
- His or her primary duty must consist of the type of work normally associated with exempt executive, administrative, or professional employees.

In the guidance released with the announcement of the final rule, the DOL outlined several options for employers affected by the change in the salary requirements:

- (a) raise salaries to keep the exemption;
- (b) keep current salaries and pay overtime when employees work overtime;
- (c) redistribute work responsibilities or hours, or adjust schedules, so that employees are not working more than 40 hours per week; and
- (d) adjust wages, reallocating employees' earnings between regular pay and anticipated overtime so that the total compensation stays about the same.

### NEW YORK STATE'S MINIMUM WAGE AND OVERTIME

New York historically raised its salary requirement for employees to be considered exempt with each increase in New York's minimum wage. The most recent increase to the minimum wage occurred on Dec. 31, 2015, and the current New York salary requirement for exemption increased to \$675 per week on that date.

Until the federal increases set forth in the final rule go into effect on Dec. 1, 2016, New York employers need to ensure they are meeting the current New York requirement.

### NEW YORK STATE'S MINIMUM WAGE INCREASES

New York State's minimum wage will increase over the next several years. The minimum wage will vary based on location and on the number of employees, eventually reaching \$15.00 per hour for employers in New York City and Nassau, Suffolk and Westchester counties.

For New York City employers with more than 10 employees, the minimum wage will increase to \$11.00 per hour effective Dec. 31, 2016, to \$13.00 per hour effective Dec. 31, 2017, and to \$15.00 per hour effective Dec. 31, 2018.

For New York City employers with 10 or fewer employees, the minimum wage will increase to \$10.50 per hour effective December 31, 2016, to \$12.00 per hour effective Dec. 31, 2017, to \$13.50 per hour effective Dec. 31, 2018, and to \$15.00 per hour effective Dec. 31, 2019.

Employers in Nassau, Suffolk and Westchester counties will see slower increases. The minimum wage will increase to \$10.00 per hour effective Dec. 31, 2016. The minimum wage will then increase by \$1.00 per hour each December 31 thereafter, eventually reaching \$15.00 per hour effective December 31, 2021.

Employers in all other counties will see minimum wage increased to \$9.70 per hour effective Dec. 31, 2016. The minimum wage will then increase by \$0.70 per hour each Dec. 31 thereafter, eventually reaching \$12.50 per hour effective Dec. 31, 2020. Thereafter, the minimum wage will increase to \$15.00 per hour through annual increases determined by the State Director of the Division of Budget in consultation with the State Department of Labor.

Beginning Jan. 1, 2019, the Director of the Division of Budget will conduct an annual analysis of the state of the economy in each region, as well as the effect of the minimum wage increases, to determine whether to temporarily suspend or delay any scheduled minimum wage increases.

It is expected that the State Department of Labor will publish schedules for the salary levels necessary for an exemption from overtime pay in conjunction with the new wage law, although these New York thresholds likely will be less than the federal thresholds effective Dec. 1, 2016.

Employers should review their payroll each December and ensure that it reflects the correct minimum wage rate for the following calendar year. Employers with employees performing work at the minimum wage level in multiple regions for a single employer should make sure the employees are being paid the correct wage for all hours worked in each location.

## NOTES

- <sup>1</sup> The full text of the final rule is available here: <http://bit.ly/1WEffgY>.
- <sup>2</sup> Available here: <http://1.usa.gov/1W1eQFp>.
- <sup>3</sup> For a more detailed analysis of the white collar exemptions and the exemption for “highly compensated employees,” please click here: <http://1.usa.gov/1W1eQFp>.
- <sup>4</sup> The rule also does not change the special provisions that apply to employees of educational institutions, such as the specified salary level rules for academic administrative personnel. For a more comprehensive discussion of the final rule’s effect on the FLSA requirements for educational institutions, please click here: <http://1.usa.gov/1TSHuZh>.



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