

Employers Be Aware: The Minimum Salary Payable to Exempt Employees Will Increase Effective December 1, 2016

By: Thomas H. Reilly



Thomas H. Reilly

Contact

949.271.7211

Email: thomas.reilly@ndlf.com

Practice Specialties

Labor & Employment Law

Last May, President Obama announced the Department of Labor's new "white collar" overtime regulations, frequently referred to as the "Final Rule," which are applicable to all employers subject to the Fair Labor Standards Act ("FLSA"). Because the threshold for FLSA coverage is quite low, the Final Rule will affect most California employers. Accordingly, before December 1, 2016, California employers subject to the FLSA must review their white collar exemptions and ensure that salaries paid to white collar employees remain compliant.

Significant Changes

The most significant change implemented by the Final Rule is a sizable increase in the salary level that will qualify for the executive, administrative and professional exemptions. The Final Rule raises the salary threshold to the 40th percentile of weekly earnings for full-time salaried workers in the lowest-wage Census region of the country (which is currently the South). As a result, commencing on December 1, 2016, the minimum salary that may be paid to an exempt employee will increase from \$455 per week to \$913 per week (\$47,476 per year). Employees paid below this minimum salary threshold will no longer qualify for exemption and will be entitled to overtime pay. Under the Final Rule, "other compensation" such as bonuses and commissions, may be counted to satisfy up to ten percent of the minimum salary threshold, provided that such "other compensation" is nondiscretionary and paid at least quarterly. The only alternative to increasing minimum salary is to reclassify such employees as non-exempt (and entitled to overtime), which is undesirable for most employers.

Other significant changes implemented by the Final Rule include: (1) increasing the minimum salary required to maintain the "highly compensated individual" exemption from \$100,000 to \$134,000 per year; and (2) implementing automatic increases in the minimum salary qualifying for exemption commencing January 1, 2020, and continuing every three years thereafter.

Effect on California Employers

Although the increase in minimum salary will be nearly one hundred percent in many parts of the country, the effect will be somewhat mitigated in California, where companion state regulations require that employees must be paid a salary equivalent to at least two times the state minimum wage (currently \$10.00 per hour) to qualify for the executive, administrative or professional exemptions. Applying this formula, California employers are already required to pay exempt employees at least \$800 per week (\$41,600 per year) to qualify for a white collar exemption. Nonetheless, even in California, the Final Rule will result in a pay increase of \$5,876 per year for exempt employees who are paid the minimum qualifying salary.



Senate Bill 3, signed by Governor Brown on April 4, 2016, increases California's minimum wage for employers with 26 or more employees to \$10.50 per hour on January 1, 2017, \$11.00 per hour on January 1, 2018, and by an additional dollar per hour each year thereafter until it reaches \$15.00 per hour on January 1, 2022. The increases are delayed by one year for employers with 25 or fewer employees. Accordingly, California's minimum wage will rise to \$12.00 per hour on January 1, 2019, for employers with 26 or more employees, and \$12.00 per hour on January 1, 2020, for employers with 25 or fewer employees. When the \$12.00 per hour minimum wage threshold is reached, the minimum salary payable to an exempt, white collar employee under California law, i.e., \$960 per week, may eclipse the FLSA minimum salary.

Coverage Of The FLSA

The FLSA applies to employers whose annual sales total \$500,000 or more, and to employees "engaged in commerce or in the production of good for commerce," regardless of the size of the employer. Examples of employees who are involved in interstate commerce include those who "produce goods (such as a worker assembling components in a factory or a secretary typing letters in an office) that will be sent out of state, regularly make telephone calls to persons located in other States, handle records of interstate transactions, travel to other States on their jobs, and do janitorial work in buildings where goods are produced for shipment outside the State." (U.S. Department of Labor, Fact Sheet No. 14 – Coverage under the Fair Labor Standards Act.)

What To Do Now

A number of states and private employer organizations have filed lawsuits challenging the legality of the Final Rule. It seems unlikely, however, that these lawsuits will provide relief for employers in advance of the December 1 effective date. Therefore, California employers subject to the FLSA must review the salaries paid to their white collar employees and ensure they remain compliant.

The text of the Final Rule, which becomes effective on December 1, 2016, is available online at www.dol.gov/WHD/overtime/final2016/.

Thomas H. Reilly is of counsel to Newmeyer & Dillion LLP's Labor and Employment department. He specializes in advising employers in employment matters, including preparation of handbooks, policies and contracts; wage matters; performance counseling; reductions in force; leaves of absence; terminations; and related litigation. His email address is tom.reilly@ndlf.com.

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