

The Department of Labor, Wage and Hour Division: Update Effective January 2020

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On September 24, 2019, the Department of Labor, Wage and Hour Division, promulgated final new standards for the salaried employee exemption from overtime pay. This new rule modifies existing 2004 Fair Labor Standards Act requirements and is slated to be effective January 1, 2020. Some commentators predict that the courts or Congress may block these new rules.

The basic change is to increase the minimum salary from \$23,600 per year to \$35,568 per year or \$684 per week. This is the lowest amount payable to an employee who is otherwise "exempt" from overtime pay. The definition of a "salary" remains a periodic payment of an equal amount without reduction for days off, late arrival, or early departure. Up to 10% of compensation may be in the form of non-discretionary incentives and commissions.

The other criteria for exemption have not changed. An employee must still be performing administrative, executive, professional, or information systems management functions to qualify for an exemption. The additional exemption for "highly compensated" employees ("HCE's") salary requirement has been increased to \$107,432 per year with a "minimal exempt duties" requirement. HCE must be paid the full amount that salary each pay period without regard to any incentive compensation.

Employers have several options in adjusting to this new rule including:

- (1) increase salaries to the minimum,
- (2) strictly control the overtime hours of works, or
- (3) convert salaried employees to hourly pay.

The timing of these changes may need to correspond exactly with the date the new rules go into effect. Implementation of these changes requires an evaluation of the employment relationship. Changing a binding employment contract prematurely or without employee consent may lead to a claim of breach of contract.

At Will Employment – Where the employee serves without a written contract on an indefinite basis, and in the absence of employer commitments regarding employment at a certain rate of pay for a period of time or an Employee Handbook pledge regarding changes in pay, an employer is free to offer a salaried employee on a prospective basis a new hourly pay status. There is no employment contract to breach and no basis for a finding of bad faith. However, depending on the groups or employees chosen, claims of discrimination are possible.

Offers of Employment and Appointment Letters – When an employer has offered a position to a prospective employee at a salary below the new minimum and that offer stipulates a period of time of employment, such as the following school year or during the term of a specific project, and that offer has been accepted, and employer is not as free to change the compensation amount or basis. This situation requires a careful assessment of whether the parties formed a true contract of employment and whether a modified agreement can be required by the employer.

Employment Contracts – If a formal written contract of employment has been signed by the employer and the employee, respect for the terms of that agreement are required. A review of the conditions for amendment and termination and the period of time that the agreement is intended to exist should be done. This change in the law was probably not anticipated by the parties and it would be most unusual for an employment agreement to include a provision for contract modification based on future changes in law. However, if a material term of any compensation arrangement has become unlawful, such as paying below the threshold for exemption, the parties are no longer bound to adhere to it. An arbitration clause requiring the parties to submit disputes to that process may be applicable.

Employee benefits can be affected by changes in compensation and hours of work. For example, a salaried employee who has been able to accomplish the work required in 30 hours per week, and wants to stay with that schedule, may lose eligibility for health, disability, life or retirement benefits under the terms of those plans. Each benefit plan typically contains its own criteria for eligibility and the scope of benefits and may be available only to "full time" employees based on a certain number of hours per week. A review of those eligibility standards is appropriate.

Employee morale is an important consideration in this process. Clear, thoughtful statements that address employee questions are essential so that employees see changes in their employment situation as fair and considerate.