Manchester Area Human Resources Association

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LEGAL AND LEGISLATIVE UPDATE

by

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**SPRING AHEAD (NOT FALL BACK): Soon it Could be (but not yet)**

**Time to Review and Update Overtime Exemptions**

***U.S. DEPARTMENT OF LABOR RELEASES NEW***

***OVERTIME RULE PROPOSAL***

On Thursday March 7th the U.S. Department of Labor announced a Notice of Proposed Rulemaking (NPRM) regarding a new overtime exemption rule. This follows the failed rule change in 2016 where the overtime exemption salary threshold was going to more than double. That rule was challenged in court where it was halted and later scrapped. Under current law, employees with a salary below $455 per week ($23,660 annually) must be paid overtime if they work more than 40 hours per week. This salary level was set in 2004.

The new proposal would update the salary threshold using current wage data, projected to January 1, 2020. The result would boost the standard salary level from $455 per week to $679 per week (which is equivalent to $35,308 per year).

The Department of Labor is also asking for public comment on the NPRM’s language for periodic review to update the salary threshold. An update would continue to require notice-and-comment rulemaking.

In developing this recent rule proposal, the Department of Labor received extensive public input from six in-person listening sessions held around the nation and more than 200,000 comments as part of a 2017 Request for Information and public listening sessions.

**Key Provisions of the Proposed Rule**

The NPRM focuses primarily on updating the salary and compensation levels needed for these workers to be exempt. Specifically, the Department proposes to:

1. Increase the standard salary level to $679 per week (the equivalent of $35,308 annually for a full-year worker), up from the currently enforced level of $455 per week. (Estimates are that as many as 4 million Americans could be eligible to receive overtime.)
2. The new proposal does not call for automatic adjustments to the salary threshold.
3. Increase the total annual compensation requirement needed to exempt highly compensated employees (HCEs) to $147,414 annually, up from the currently enforced level of $100,000 annually.
4. Allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level, provided these payments are made on an annual or more frequent basis, while inviting comment on whether the proposed 10 percent cap is appropriate, or if a higher or lower cap is preferable.

If an employee does not earn enough in nondiscretionary bonus or incentive payments in a given year (52-week period) to retain his or her exempt status, the Department permits the employer to make a “catch-up” payment within one pay period of the end of the 52-week period. This payment may be up to 10 percent of the total standard salary level for the preceding 52-week period. Any such catch-up payment will count only toward the prior year’s salary amount and not toward the salary amount in the year in which it is paid.

The Department of Labor is asking for public comment on NPRM’s language for periodic review to update the salary threshold. An update would continue to require notice-and comment rulemaking.

The proposed salary threshold accounts for wage growth since the 2004 rulemaker, projected forward to January 1, 2020, the approximate date a final rule is anticipated to be effective. The Department proposes to update the standard salary level set in 2004 by applying the same method used to set that level in 2004 to current data – i.e., by looking at the 20th percentile of earnings of full-time salaried workers in the lowest-wage census region (then and now the South), and/or in the retail sector nationwide.

This proposed regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the proposed regulations may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official proposed regulation. The public will have 60 days to comment on the proposed regulation; the comment period will begin on the date of publication in the Federal Register.

More information about the proposed rule is available at www.dol.gov/whd/overtime2019. The Department encourages any interested members of the public to submit comments about the proposed rule electronically at www.regulations.gov, in the rulemaking docket RIN 1235-AA20.

Note: Employers should always check and make sure they are in compliance with current laws (especially the salary pay basis and the duties tests). However, employers should not yet make changes based on this proposed rule change. This is just the first step in a lengthy rulemaking process and more changes are possible before this rule is finalized and adopted. In the meantime, this notice is helpful for forecasting and budgeting purposes.

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***Disclaimer***

***Please note: This outline is intended as general guidance and not specific legal advice. Your legal counsel should be consulted with specific questions or for advice on how to proceed with these matters.***