

# An Update on the DOL's 2016 Wage Injunction

By Bobbi Kloss

**Silent but ever present**, the Wage and Hour division of the Department of Labor (DOL) has been working its way back to updating the overtime exemptions for the Administrative, Executive and Professional exemptions otherwise known as White Collar exemptions. These White Collar exemptions set standards by which employees who meet the established standards are exempt from having to be paid time and one-half of salary for working over 40 hours in a work week. With a weekly earning threshold of \$455.00, as one of the requirements to meet the exemption test, which has not been increased since 2004, it is a guessing game as to how much of an adjustment will be made to that salary level. While the DOL had previously issued regulations with an increase to \$913 weekly, or \$47,476 annually, that ruling was halted in motion with an injunction.

## Recapping

In March 2014 President Obama signed memorandum instructing DOL to update regulations of qualifications for overtime pay. In July 2015 the DOL proposed changes to the Fair Labor Standards. In May 2016 Final Rules released with changes that were to go into effect Dec 1, 2016.

1. Raising the nation's exempt salary threshold from \$455 per week/\$23,660 to \$913 per week/\$47,476 annually.
2. Increased the salary threshold for certain Highly Compensated Executives to \$134,004 per year which is equal to the annualized value of the 90th percentile of earnings for full-time salaried workers nationally.
3. Automatic updating the salary and compensation levels every three years.

Then in November 2016 a preliminary injunction was issued which blocked the Final Rule from going into effect in December.

After a series of nationwide listening sessions held over third quarter 2018, it has been reported that the DOL has sent proposed regulations to the Office of Management and budget (OMB) for pre-publication approval. It is anticipated that the proposed regulations be published for public comment in March 2019. A delay though in timing may occur due to the events of the recent government shutdown. Until such time as the proposed regulations are released, we can only speculate on what the proposed salary threshold will be. It is speculated that the salary threshold may be set in the thirty-thousands.

## What's an Employer to Do?

Many employers had made an adjustment to their exempt employee's salary based upon the regulations published in May 2016. Many employers, however, remained with the status quo. It is time now to dust off the 2016 HR recommendations:

1. Identify employees currently classified as exempt who will fail the new salary test.
2. Model potential costs based on possible response (e.g. raise pay to a new threshold level, reclassify as nonexempt and pay overtime, or lower pay to offset overtime requirement).

Worth noting, until the proposed regulations are published, employers may look at setting their modeling using \$32,000 to \$35,000.00. While these are not published numbers, these are figures being reported as an anticipated increase.

3. Review job descriptions and tasks of impacted positions to determine if certain exempt tasks and responsibilities may be reassigned or maintained with the current position.
4. Consider how pay changes or other changes in job assignments may impact your organization (e.g., pay compression with next level, supervisory career paths).
5. Develop administrative implementation plans including payroll and HRIS systems, in order to ensure compliance and maintain compliance with the three-year automatic update provisions.

It is also important that employers review the duties test for exemption categories to take into account the potential salary increase. Misclassifications frequently occur in the White Collar exemption categories. The Department of Labor has tools and resources available to help correctly identify the exemption status. Most recently the DOL implemented the PAID program, the Payroll Audit Independent Determination program, to assist employers with voluntary compliance to audit their payroll records and work in good faith to pay any owed back wages to their employees. While initially rolled out as a 6-month pilot program in April 2018, it appears now as a permanent program.

While regulations continue to change, one thing is clear: it is time once again for Human Resources to strategize with the CEO and CFO to be vigilant and be prepared for whatever may come our way.

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