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Preparing for Possible Changes to the White-Collar Exemption Salary Threshold

As discussed in our [previous blog](#), the Department of Labor proposed a significant increase to the salary threshold of the white-collar exemption of the Fair Labor Standards Act. Other than projecting in December 2023 that it would issue a final regulation in April 2024, the DOL has been silent about its draft regulation or the 33,310 public comments it received on it.

Recap of the Proposed Change to the White-Collar Exemption

At present, the salary threshold for the white-collar exemption (executive, administrative and professional) is \$684 per week (\$35,568 annually). The DOL is suggesting a substantial increase to \$1,059 per week (\$55,068 annually). The DOL proposed automatically adjusting these thresholds every three years. The DOL projects that approximately 3.4 million workers would be affected by the proposed rule.

How to Prepare

While we do anticipate any final rule, if issued, will be enjoined, employers must be prepared for the contingency that a final rule with terms not substantially different from the proposed draft is issued and becomes effective, possibly within 60 days of being published.

In the event a higher salary threshold is set, what are an employer's options for currently exempt employees who perform exempt job duties but whose salary is below the new threshold?

1. **Increase pay/salary to the new threshold**: Easy (and in some cases, expensive) answers first! Here's one thing we do ask, though: take the opportunity to review the employee's job duties to be sure they line up with at least one of the available white collar exemptions (executive, administrative, professional).
2. **Calculate the hourly wage including anticipated OT**: Of course, employers can also elect to convert employees in the salary gap to hourly non-exempt workers. But, how to pick the right hourly wage? You have to know how much they're working. For employees who work exclusively at a job site with entry and exit times recorded (or recordable) or for those who log their time for other purposes, the assessment is easy. For exempt employees who do things like respond to emails from home, send and receive work-related texts on the weekends, it's harder. To get a good estimate, you may have to ask them to clock in and clock out for a period of time, or otherwise record and report their hours. (Yes, you may ask exempt employees to do this!).

- 3. Fluctuating work week (this isn't our favorite!)***: In this often misunderstood system, the employee is given a fixed weekly salary regardless of the number of hours they work in a workweek (even if it's well under 40 hours). If an employee works over 40 hours in a week, they will receive an additional 50% of their hourly rate for each overtime hour worked, but the hourly rate is calculated from the unchanging salary divided by the actual number of hours worked (so the hourly rate would be lower in a 50 hour week than a 45 hour week). While permitted under federal law, some states prohibit this method, and certain technical nuances are interpreted differently by the various federal courts. Use only with great caution and legal counsel.

As with any anticipated employment change, it's advisable to consult legal counsel to ensure compliance with all relevant laws/regulations and to better understand the specific implications of a new rule or law. Employers should monitor the outcome of this rule. While we anticipate that it will be enjoined, it's important to stay informed of any updates and be prepared to adapt policies/practices accordingly.

If you want to discuss the proposed rule or the steps ahead, please contact Lehr Middlebrooks Vreeland & Thompson, P.C. Please tune back in for updates on this issue!