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W A G E A N D H O U R

'Tis the Season for Overtime Regulations for Both the DOL and L&I

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Special to the Legal

It's beginning to feel a lot like ... Groundhog Day in the wage-and-hour world. On Sept. 24, the U.S. Department of Labor (DOL) issued its final overtime rule (DOL's final rule) that raises the minimum salary threshold for executive, administrative and professional employees from \$455 per week (\$23,660 per year) to \$684 per week (\$35,568 per year) to qualify as exempt from overtime pay under the Fair Labor Standards Act (FLSA). The DOL estimates that its final rule, which will become effective Jan. 1, 2020, will extend overtime pay eligibility to 1.3 million workers. The salary threshold in the final rule is nearly identical to the \$679 per week proposed earlier this year by the DOL.

Meanwhile, the Pennsylvania Department of Labor & Industry (L&I), which in June 2018 had issued proposed rulemaking to update the executive, administrative and professional (EAP) exemptions to the Pennsylvania Minimum Wage Act (PMWA), announced Oct. 17 that it submitted its final regulation (L&I's final rule) to Pennsylvania's Independent Regulatory Review Commission and legislative oversight committees. L&I's final rule begins with the new federal level of \$684 per week (\$35,568 per year), but it does



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not end there. In its press release, L&I stated that, "the Wolf administration does not believe the new U.S. DOL rule truly reflects what Pennsylvanians are being paid." L&I's final rule provides for a phased-in increase of the salary level to \$684 per week (\$35,568 per year) as of Jan. 1, 2020, then to \$780 per week (\$40,560 per year) in 2021 and to \$875 per week (\$45,550 per year) in 2022. Following these increases, beginning in 2023 the salary level will be automatically adjusted every three years "at a rate equal to the 10th percentile of Pennsylvania workers who work in exempt executive, administrative or professional classifications." L&I estimates that following implementation of its final rule, an additional 82,000 Pennsylvania employees will be eligible for overtime by 2022.

L&I's final rule is set to go before Pennsylvania's five-member Independent Regulatory Review Commission (IRRC) on Nov. 21. The IRRC is tasked with

considering, among other things, whether L&I is acting within its statutory authority, whether the final rule is consistent with the PMWA, what the economic impact of the final rule would be on the regulated entities and whether the final rule is reasonable. Of note, following L&I's issuance of its proposed rulemaking in 2018, the IRRC expressed concern that L&I had not justified the proposed regulations and that the PMWA salary level would not be aligned with its federal counterpart. Following these comments, L&I embarked on a "listening campaign" and has lowered the final salary level from the level included in its proposed regulations of \$921 per week (\$47,892 per year) to \$875 per week (\$45,550 per year).

Under current DOL and L&I regulations, an employee can qualify as an exempt executive, administrative or professional employee if:

- The employee is paid on a salary basis (the salary basis test).
- The employee's salary meets a minimum specified salary amount (the salary level test).
- The employee's duties meet the criteria set forth in the regulations (the duties test).

Both the DOL and L&I's final rule address the salary level test and do not alter the salary basis test. While the DOL made no changes to its duties test, L&I revised some of the duties language

to bring that language closer to DOL regulations.

Likewise, the DOL and L&I final rules both allow for up to 10% of an exempt EAP employee's salary to come from nondiscretionary bonuses and incentive payments so long as those forms of compensation are paid, at a minimum, on an annual basis.

The DOL's final rule increases the annual compensation threshold from \$100,000 to \$107,432 for employees to qualify for the highly compensated employee exemption (which is far less than what was proposed by the DOL earlier this year). Of note, the PMWA does not contain a highly compensated exemption.

While Pennsylvania has endorsed "automatic" updating of its regulations every three years, notably absent from the DOL final rule is any requirement that the regulations be updated on a specific schedule. Rather, the DOL indicated in one of the guidance documents issued with the final rule that "the department believes such a commitment could deprive the department of flexibility to adapt to unanticipated circumstances, and believes that prevailing economic conditions, rather than fixed timelines, should drive future updates."

As employers well remember, in 2016 the Obama administration's DOL announced a final rule (2016 rule), which set the minimum salary level at \$913 per week (\$47,476 per year) and required automatic triennial increases to the minimum salary threshold. Dozens of states and business groups requested a nationwide injunction blocking the 2016 rule from taking effect, which was granted. After the change in administrations and while the case was on appeal, the DOL asked the U.S. Court of Appeals for the Fifth Circuit to hold the case in abeyance while the DOL issued a new proposed rule.

When the 2016 rule was announced by the Obama administration, some employers chose to increase employee salaries in an effort to maintain their exempt

status. For those employers, both the DOL and L&I final rule will not alter their employees' exempt status under the FLSA or the PMWA. Employers who did not make changes to comply with the 2016 rule (or who initially made changes and then pulled them back after the 2016 rule was enjoined) must again consider whether to increase employee salaries or reclassify employees who earn below the new threshold and meet the other criteria to qualify for exempt status.

WHAT'S NEXT

In Pennsylvania, employers should stay tuned to see whether L&I's final rule will pass muster with the IRRC. Of note, it has been reported that Gene Barr, president and CEO of the Pennsylvania Chamber of Business and Industry, is urging the IRRC to reject L&I's final rule. On the federal level, absent an injunction by a court, the DOL's final rule is set to go into effect Jan. 1, 2020.

IMPLEMENTATION OF THE DOL FINAL RULE AND TIPS FOR EMPLOYERS

- For EAP employees currently classified as exempt and earning close to the new federal salary threshold, employers may choose to increase the salary level to maintain exempt status (especially where the employee works substantially more than 40 hours per week).

- In contrast, previously exempt employees who will be making less than the new salary level of \$684 per week (\$35,568 per year) as of Jan. 1, 2020, will need to be reclassified as nonexempt. For those employees, employers will need to assess how much (if any) overtime the newly reclassified employees likely will work and determine an hourly wage rate or salary for those employees taking into account those estimates.

- Employers should consider the impact of the DOL's final rule generally, assessing its impact not only on individual employees and departments but more broadly looking at its effect on workflow and business operations.

- For organizations that have a significant number of exempt employees currently earning less than \$684 per week, compliance with the final rule will potentially have ripple effects throughout the organization, impacting the work of both exempt and nonexempt employees.

- Given the Jan. 1, 2020, effective date of the DOL's final rule, employers should analyze the associated impact on their businesses and begin the process of making any needed modifications immediately.

- Employers in Pennsylvania should continue to monitor the status of L&I's final rule with the knowledge that additional increases to the salary level may well be on the horizon.

While Pennsylvania has endorsed 'automatic' updating of its regulations every three years, notably absent from the DOL final rule is any requirement that the regulations be updated on a specific schedule.

- Multistate employers should be aware that Pennsylvania is not the only state that is trying to follow in the footsteps of California and New York, which for several years have maintained a higher salary level requirement. There are efforts afoot to increase the salary level in Maine, Massachusetts, Colorado, Washington and, most recently, Michigan. Employers in these (and other) jurisdictions should stay tuned as the wage-and-hour landscape remains in a state of constant change. •