Increased Overtime Salary Threshold is About to Take Effect - Are You Ready?

by Dennis J. Merley - Thursday, November 07, 2019

As we reported in DOL (Finally) Announces New Overtime Rule To Be Effective Jan. 1, 2020, the salary threshold for overtime exemption under the federal Fair Labor Standards Act (“FLSA”) will increase from $455.00 to $684.00 per week on New Year’s Day. Are you prepared?

Our previous article on this topic suggested that various groups were poised to mount a legal challenge to this new rule but thus far, no such challenge has materialized yet. Unless something changes quickly, we should plan on greeting the new year with a new overtime exemption rate.

With the effective date of the new rate less than two months away, we thought it would be helpful to revisit some of the critical questions that were being asked two years ago when a major change to the overtime exemption threshold was first posited.

What is the annualized overtime threshold?

The annual salary that an employee must earn to be exempt from overtime will be $35,568 (up from $23,660).

Can we make some people in a job classification exempt and others not?

Absolutely. If some of your employees are exempt because they meet the salary test and others remain below the threshold, there is no problem from the DOL’s standpoint. Exemption is based on the particular circumstances of each employee and there is no requirement that
everyone be treated exactly the same.

**Do we still have to pay $35,568 even if we only operate 9 months a year?**

No – the test is whether the employee earns $684.00 a week for each week that they work (excluding first and last weeks if they start or end in the middle). There is no obligation to account for times when the employer is not operating.

**What is the salary requirement for part time salary workers?**

The same as it is for full time employees – $684.00 per week. The exemption threshold is not prorated for people working less than full time.

**If someone is going to earn less than $684.00 per week, does that mean that we must pay them hourly?**

No. Non-exempt people can be paid on a salary basis as long as (a) they are paid more than the minimum wage for all hours worked and (b) they are paid overtime for all hours worked in excess of 40 in the week. In other words, the DOL doesn’t care how you pay the non-exempt people as long as they receive the amount of pay they are entitled to receive under the law.

**If we pay salaries to non-exempt employees, do we still have to observe the rules about not docking an employee’s pay?**

No. The no-docking rule for salaried employees relates only to maintaining the exemption from overtime. If the employee is not exempt, those rules do not matter and employees can be docked for missed time.

**Some of our people who will no longer be exempt resent having to now punch a time clock. What can we do about that?**

While there is a record keeping requirement for non-exempt employees, there is no required method or form for keeping these records. For employees who work a strict schedule with very little variation, an employer could choose for example to simply retain the actual work schedule and just note any changes on that schedule if they occur. For employees with more variable schedules, different methods are available.

In fact, the DOL says that actual start and stop times are not needed – employers need only maintain records of the total number of hours worked. The employer should just be sure that whatever method they are using to record hours is accurate.

**How does the non-discretionary bonus exception work?**

Assuming that the employee performs bona fide exempt duties, exemption will apply if they
receive at least 90 percent of the threshold ($615.60) as a salary and earn at least 10 percent of the standard salary level (approximately $68.40 per week) in non-discretionary bonuses or incentive payments (including commissions), provided that such payments are paid on an annual or more frequent basis.

Non-discretionary bonuses are those that are paid based on standard formulas or conditions, and are not based upon the whim or subjectivity of the employer.

Looking at these bonuses on an annual basis is a change from the 2016 proposal, which required them to be paid at least quarterly. The change to annual bonuses provides greater flexibility to employers seeking to take advantage of this provision since many bonuses are only paid annually.

What won’t change on January 1?

Quite a bit. The duties tests for the white collar exemptions have not changed, nor have the exemptions for inside or outside sales. The manner of determining which deductions are permissible under the salary method also has not changed.

In addition, while computer professionals are subject to the new salary standard, the alternative wage measurement ($27.63/hour) for exemption remains the same and is now closer to the salary test on an annualized basis.

Bottom Line

January 1 will be here before you know it. If you haven’t conducted the necessary evaluations of your work force and begun implementing changes, you probably will be working overtime to get this done in time.