

THE DAILY RECORD

Friday, April 5, 2019 / Volume III / Number 66 / \$2.00 • Western New York's trusted source for legal and real estate news

HR CONNECTION

FLSA overtime rule is deja vu all over again

As I have each March for more than a decade, I again attended the annual Employment Law and Legislative Conference (ELLC) organized by the Society for Human Resource Management (SHRM), in Washington, DC. I've long equated it to summer camp for employment law geeks like me. It's a chance to leave behind the daily responsibilities of home — like taking the trash out, walking the dog, and eating my vegetables — to spend a few days learning from subject matter experts, meet new people, and reconnect with friends. (For the record, my SHRM friends Louis, Joe, and Meredith will confirm to my wife that I did eat my vegetables and had absolutely no junk food — certainly no rich delicious desserts.) There was plenty to learn and discuss, but the big-ticket item for me was somewhat of a flashback to 2016.

Proposed changes to FLSA overtime threshold

Anyone involved with the compliance side of HR, and specifically Fair Labor Standards Act (FLSA) compliance, knows that absolutely nothing is ever as simple as it may first appear. That's why I take every available opportunity to catch up with Tammy McCutchen, former federal Department of Labor (DOL) Wage and Hour Division (WHD) administrator, and preeminent employment law attorney. The SHRM ELLC provided a



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great opportunity to spend time with McCutchen, and as usual it was packed with valuable information on FLSA issues. Especially important were McCutchen's insights on the recently released DOL proposal to increase the overtime exemption salary threshold. However, before I launch into the proposed changes, there are two related points to keep in mind: First, New York State has its own minimum salary threshold, which currently exceeds the proposed federal threshold. As of Dec. 31, 2018, New York's salary thresholds are: \$1,125/week, \$58,500/year (NYC large employer); \$1,012.50/week, \$52,650/year (NYC small employer); \$900/week, \$46,800/year (Long Island and Westchester); and \$832.50/week, \$43,290/year (all other areas). The proposed federal salary threshold is \$679/week, \$35,308/year.

I am often asked, "if the state's threshold is higher than the proposed federal threshold, why should businesses pay attention to this proposal?" Because only the executive and administrative exemptions are defined by New York statute, with all other exemptions defined by federal law. That means when

an employee is classified as exempt under any of the other white-collar exemptions — such as highly compensated, learned/creative professional, etc. — the FLSA dictates the rules, including the minimum salary amount.

The ghost of 2016

The second point to remember is the 2016 proposed increase to the federal overtime salary threshold is not dead. This little-recognized fact could have a devastating effect on businesses under the right (or terribly wrong) circumstances.

The 2016 proposal called for, among other things, a minimum salary of \$913/week (\$47,476/year), as well as an increase to the highly compensated employee threshold, taking it from \$100,000 to \$134,004 annually. The 2016 proposed rule also included a provision which allowed employers to satisfy up to 10% of the salary requirement through non-discretionary bonuses, commissions, and other incentive pay as long as it was paid at least quarterly. So, the minimum salary for an employee with an eligible incentive pay plan could be reduced from \$913/week to \$821.70 (\$913 – 10%), as long as the difference was paid in the form of eligible incentive pay at least quarterly. Finally, the 2016 proposal included annual automatic adjustments to the minimum salary amount.

2019 proposed salary threshold

In its proposed rulemaking released in March 2019, the DOL intends to formally rescind the 2016 proposed rule. As I indicated, the 2019 version sets the minimum salary at \$679/week (\$35,308/annually) and sets the threshold for highly compensated white-collar employees at \$147,414 annually (minimum salary \$679/week and \$112,106 from bonuses, commissions, and/or incentive pay). As with the 2016 proposal, the DOL will allow employers to use nondiscretionary bonuses, commissions, and incentive payments to satisfy up to 10% of the minimum salary amount, and expands the timing of eligible payments from quarterly to those made “annually or more frequently.” The DOL also hopes to ensure decades don’t pass before another review by proposing updates to these thresholds every four years through the required rulemaking process.

What’s old could be new again

As I alluded to earlier, the 2016 version of the update is still alive. According to McCutchen, who was instrumental in winning the injunction against

the 2016 rule, “the 5th Circuit Court of Appeals, whenever they want to, could uplift the state of the appeal and rule on that decision...it’s not outside [reasonable] boundaries because nobody thought we would win the injunction in the first place.”

McCutchen went on to describe the “worst-case scenario” for employers:

Republicans lose the White House in 2020, meaning new Democratic leadership at the DOL;

The new rule is not yet final or effective before inauguration day in 2021;

The new administration moves to restart litigation in the Fifth Circuit to defend the 2016 final rule; and

The Fifth Circuit reverses the lower court’s injunction, mandating the implementation of the 2016 final rule as written.

In such a scenario, McCutchen predicts an effective date within 30 to 60 days of the court issuing its mandate. To make things far worse for businesses, the rule would likely be effective retroactive to its original implementation date of Dec. 1, 2016, meaning employers could be required to calculate and

pay overtime to every exempt employee who, after Dec. 1, 2016, worked more than 40 hours and made less than \$913 per week.

“Imagine how destructive that would be to businesses, financially and otherwise,” McCutchen pondered aloud. “Imagine the litigation that would lead to.”

With the Notice of Public Rulemaking published in the Federal Register on March 22, 2019, the public has until May 21, 2019 to submit comments to the DOL on the proposed rule. To submit a comment, go to www.regulations.gov and search for RIN: 1235-AA20.

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