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HR CONNECTION

Is a new FLSA overtime rule finally in the homestretch?

As a child, I would watch my uncle Larry with fascination as he studied the Daily Racing Form. This iconic publication — founded in 1894 and still in existence today — boasts of “125 years of horse racing news and handicapping analysis.” For those, like my uncle, who believed that correctly predicting which of “the ponies” was going to win a race was akin to a religious experience (and sometimes quite lucrative), the Daily Racing Form was their bible. I’ve been channeling my long-deceased uncle’s spirit to help me predict when, or even if, this seemingly ever-elusive update to the federal Fair Labor Standards Act (FLSA) overtime rules will ever cross the finish line.

For the sake of clarity, and so anyone unfamiliar with the FLSA overtime rules won’t need to channel the spirit of Frances Perkins to understand, here’s a quick overview. The FLSA requires employers to pay overtime wages of one-and-one-half times each employee’s regular hourly rate of pay for all time worked over 40 hours in a workweek. However, there are exceptions to this rule called “exemptions.” The most common exemptions are for employees with jobs classified as executive, administrative, learned or creative professionals, or highly compensated. These are referred to as the white-collar exemptions.

For a job to qualify for a white-collar exemption, the following tests must be satisfied: 1) a duties test, 2) the salary



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basis test, and 3) the salary-level test.

Although all three tests are required, it’s the salary-level test’s minimum salary that is at the core of recent update attempts and the associated controversies.

Back to the future

I will always remember where I was on

Nov. 22, 2016. Just days before its Dec. 1 effective date, Judge Amos Mazzant from the U.S. District Court for the Eastern District of Texas issued a preliminary injunction causing the Obama Administration’s updated overtime rule to come to a very unexpected screeching halt.

Under the 2016 update, the minimum annual salary amount was set to increase, from the \$23,660 (\$455 weekly) set by the DOL in 2004, to \$47,476 (\$913 weekly). The new rule also included a provision to automatically update (increase) the minimum salary amount every three years.

Now, more than two years after the Trump administration began its quest to renovate 29 CFR Part 541, and more than 116,000 public comments, the rule’s 2019 edition is in the homestretch, arriving at the White House Office of Management and Budget (OMB)

for final review on Aug. 12, 2019.

The overtime rule’s fresh new look includes a minimum annual salary of \$35,308 (\$679 weekly). The minimum threshold for the highly compensated employee exemption also increases with this update. To qualify for the highly compensated exemption, the employee’s annual compensation must be at least \$147,414 (currently \$100,000), including a minimum weekly salary of at least \$679 (currently \$455). Further, the employee must perform office or non-manual work, including one or more duties or responsibilities from the executive, administrative or professional exemptions.

Also included is a novel new provision allowing employers to include “certain nondiscretionary bonuses and incentive payments” as up to 10% of the new salary threshold. Employers would be required to pay 90% of the minimum weekly salary amount ($\$679 \times 0.90 = \611.10) each workweek and, if at the end of the 52-week period, the employee’s wages do not equal or exceed the minimum salary level, the employer must provide a “catch-up” payment for the shortfall within one pay period.

To illustrate, let’s look at Amanda and Bethany. Both hired on Jan. 1; they are classified under the creative professional exemption, are paid a weekly salary of \$611.10 (\$31, 771.20 annually), and are eligible for nondiscretionary annual performance bonuses. On Dec.

31, Amanda received a \$4,500 bonus, and Bethany received a \$2,000 bonus. While the total of Amanda's salary and bonus for the year (\$36,277.20) exceeds the minimum salary threshold of \$35,308.00, the total of Bethany's salary and bonus for the year (\$33,777.20) does not. Therefore, to preserve Bethany's exempt status covering the previous 52 weeks, the employer must pay her an additional \$1,530.80 (\$35,308.00 - \$33,777.20) no later than the next payroll. Sound complicated? It is, and several things could go wrong for the employer.

But, we're in N.Y. State...

I know you're probably thinking, "we're in New York State, so this is all a moot point." That's only partially true. Although New York State has an exhaustive list of minimum wage and minimum salary rates, they only apply to the state's two statutory exemptions—the executive and administrative exemptions. Therefore, classifying an employee as exempt under any of the other white-collar exemptions — i.e., highly compensated, learned professional or creative professional like Amanda and Bethany in the example above—the FLSA dictates the rules, including the

minimum salary amount. (Time for an installment of Frank's Fun Facts: to determine the State's minimum weekly salary in your area, multiple the current minimum wage by 75. For most areas outside NYC, that's $\$11.10 \times 75 = \832.50 , or for employers covered by the fast-food minimum wage, $\$12.75 \times 75 = \956.25 .)

Is this for sure?

Probably...remember, most of us who followed the 2016 rule were positive its Dec. 1 effective date was assured. With that said, it's clear many Democrats, worker advocates and others who strongly supported the Obama Administration's update are finalizing legal strategies and waiting breathlessly for the opportunity to turn the tables and block the Trump administration's rule from taking effect.

My question is, with a new overtime rule in the starting gate, why are those claiming to be worker advocates trying to have it scratched from the race? (Sorry, I couldn't resist!) In all seriousness, why delay or altogether block a rule that moves the needle in the right direction? If the goal is to increase the wages and improve the lives of millions of workers, isn't an increase of \$11,648 over the

current minimum salary threshold, or at the very least overtime eligibility, a significant leap in the right direction? Then, regardless of who wins the next election, millions of workers would have already received a salary increase to at least meet the threshold or have been overtime-eligible for more than a year by Inauguration Day 2021.

Otherwise, even with a new president occupying the White House in 2021, given the rulemaking process, the soonest their administration could have a new rule in place would be 2022. That means, under the best circumstances, if opponents are successful in blocking this update, nothing changes for at least three years.

Am I missing something?

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