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WSHB CASE UPDATE: DOL PROPOSES INCREASE TO MINIMUM SALARY THRESHOLD

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WHY THIS PROPOSAL IS IMPORTANT

Employees in salaried positions earning under \$35,308.00 annually will become newly-eligible for overtime pay if a new rule proposed by the U.S. Department of Labor is enacted. Employers with salaried positions under that amount should begin preparing to perform an audit of exemption classifications to ensure ongoing compliance in the event this rule is enacted.

THE DOL PROPOSAL

On March 7, 2019 the U.S. Department of Labor ("DOL") proposed a new rule that would make an estimated 1.1 million American workers newly-eligible for overtime pay.

The Fair Labor Standards Act ("FLSA") is a federal law which establishes, among other things, overtime pay eligibility. Within the authority granted by the FLSA, the DOL promulgates rules for determining which employees are "exempt" from, among other things, the overtime requirements.

The most common classes of employees who are considered exempt from overtime requirements under the FLSA are those who qualify for the executive exemption, the professional exemption, or the administrative exemption. These three exemptions are often referred to as the "white-collar" exemptions. While some of the criteria for the white-collar exemptions differ from one another, one requirement that all of the white-collar exemptions share is that the employee must earn at least \$455.00 per week (equivalent to \$23,660.00 per year), which amount was set by a DOL rule enacted in 2004.

In March 2019 the DOL proposed a new a rule which, if enacted, would raise the earnings threshold from \$455.00 to \$679.00 per week (equivalent to \$35,308.00 annually). The newly-proposed rule would not modify the other criteria on which the

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determination is currently made regarding whether an employee otherwise qualifies for one of the white-collar exemptions (these additional criteria are included in the "job duties test").

The Obama administration previously attempted to enact increases to the minimum earnings threshold, but that effort was halted by a Federal Court in Texas just before it was set to become effective in December 2016. One important distinction between the newly-proposed rule and the one that the Obama administration tried to enact relates to the issue of automatic increases. Where the Obama administration's rule was set to increase the earnings threshold as a matter of course without additional action by the DOL, the newly-proposed rule merely contains a provision encouraging the DOL to revisit the earnings threshold every four years, with no requirement that increases occur.

Another important component of the newly-proposed rule is the modification to the definition of a "highly compensated individual." Like those who qualify for one of the white-collar exemptions, highly compensated individuals are exempt from the overtime requirements of the FLSA. To qualify as a highly compensated individual, an employee need not meet all of the requirements of job duties test for the white-collar exemptions but must instead earn \$100,000.00 or more annually. The newly-proposed rule would raise that earning threshold to \$174,414.00.

The earning thresholds that are currently in place were set in 2004 at the 20th percentile of earnings for full-time, salaried workers in the lowest-wage census region. The amounts in the newly-proposed rule were calculated using the same methodology applied to 2017 census data. The Department of Labor anticipates slight changes to the final rule before enactment, updating the income thresholds with 2018 census data.

WHAT THIS MEANS FOR EMPLOYERS

Employers with salaried positions under \$35,308.00 annually can expect to be affected by the new rule and should be prepared to adjust accordingly by considering the impact of reclassifying all employees earning less than \$35,308.00 as non-exempt, including using a time clock for all hours worked, and eligibility for overtime pay and specific meal and rest periods. If enacted, the newly-proposed rule would take effect January 1, 2020.

The experienced team of employment attorneys at Wood Smith Henning & Berman LLP have already begun assisting clients in understanding and preparing for compliance with this impending enactment. For more information, please contact Robert Hellner at (469) 210-2052 or at rhellner@wshblaw.com.