

4 Takeaways As DOL Finalizes Overtime Rule

By Vin Gurrieri

Law360 (September 24, 2019, 10:39 PM EDT) -- The U.S. Department of Labor on Tuesday finalized its rule hiking the salary threshold for the Fair Labor Standards Act's white collar exemptions, but experts wonder whether businesses will have enough time to comply and if the regulations will get stymied in court. Here are four things to watch now that the rule has been unveiled.

The 245-page final rule, which updates the FLSA's overtime and minimum wage exemptions for executive, administrative and professional — or EAP — workers, raises the salary threshold to \$35,568 per year or \$684 per week for those employees to qualify as exempt.

That's an increase from the \$23,660 annual salary that was last updated by the George W. Bush administration in 2004. But it's about \$12,000 lower than the Obama administration had proposed in a rule that was finalized in 2016 but later invalidated by a Texas federal court.

Tuesday's final rule, which will take effect on New Year's Day, also raises the so-called highly compensated worker threshold to qualify for the exemptions from \$100,000 to \$107,432 and eschewed a controversial mechanism for periodically increasing the salary level that had been part of the 2016 rule, among other things.

"The overturning of the 2016 rule that increased the salary level from the 2004 level has created a lot of uncertainty," said Susan Harthill, a Morgan Lewis & Bockius LLP partner who was the DOL's deputy solicitor of labor for national operations until late 2018. "The best way to create certainty is to issue a new regulation, which is what the administration's done. This is an effort to find a middle ground, and while it may be challenged by either or maybe both sides, the DOL's salary test sets a clear dividing line between employees who must be paid overtime if they work more than 40 hours per week and employees whose eligibility for overtime varies based on their job duties."

Andrew Melzer, co-chair of plaintiff-side firm Sanford Heisler Sharp LLP's wage and hour practice, told Law360 the rule is "certainly an improvement" from the Bush-era rule but could have gone further.



The U.S. Department of Labor raised the salary threshold for executive, administrative and professional workers to qualify for overtime and minimum wage exemptions to \$35,568 per year. (Getty)

"Over the passage of time, the salary test had gotten to be completely out of line with current economic conditions ... so it really didn't mean anything and really wasn't a screening mechanism as it was supposed to be," Melzer said. "It's better than it was, but it's a little disappointing that it doesn't go as far as we think it should have. The [2016] levels seemed a lot more fair and actually accomplished something of what was originally intended with the exemptions."

Litigation May Be on the Horizon

Just as the Obama administration's 2016 overtime rule was challenged in court by a coalition of business groups, management lawyers and workers' advocates both believe there may similarly be lawsuits challenging the latest version of the DOL's rule.

Christine Owens, executive director of the National Employment Law Project, hinted at possible litigation in a statement Tuesday that categorized the final rule as a "gift to corporate America."

The DOL, for its part, categorized it as a worker-friendly rule that will make about 1.3 million more workers overtime eligible, a figure Owens criticized as being far less than the number of newly overtime-eligible workers the 2016 rule would have covered.

"We are confident that legal action will be pursued to challenge this regulation, which was rushed through the usually lengthy regulatory process without any real consideration of the in-depth economic analysis presented by many organizations during the notice and comment period," Owens said. "We will not sit by while DOL refuses to be an ally of this nation's workforce."

However, Tammy McCutchen of Littler Mendelson PC, a onetime administrator of the DOL's Wage and Hour Division who helped craft the Bush-era rule and whose firm represented business groups that challenged the 2016 regulation, said she believes Tuesday's final rule will stick.

She noted that challenges to a regulation under the Administrative Procedure Act can claim either that the rulemaking process was "procedurally flawed" in some way or that the rule was "arbitrary and capricious."

As to the first argument, McCutchen said it will be difficult for potential challengers to show deficiencies in the DOL's rulemaking process since stakeholders have had multiple chances in recent years to offer their views on what the salary level should be either through written comments or during listening sessions held by the DOL — feedback that the final rule addressed.

"I can't see a court claiming that there was a procedural miss," McCutchen said.

She also said challengers will have a tough time meeting the "very high" arbitrary and capricious standard in part because the \$35,000 threshold was calculated using a methodology that has been used in the past by the DOL and has never been challenged.

"In our litigation ... [challenging the 2016 rule], the court ruled in our favor and said we met the standard because the salary level was so high that it was replacing the job duties test," she said.

However, McCutchen also noted that litigation targeting the rule may also open the door for business advocates to challenge whether the DOL has the authority to set the minimum salary, noting that such

an argument might find friendly ears among federal judges who strictly interpret statutory language since a salary requirement for EAP exemptions isn't in the FLSA.

Limited Window to Comply

The DOL set Jan. 1 as the date the new regulations will take effect, leaving employers only a few months to achieve compliance. That will include making decisions about employees whose salaries are below the new threshold, attorneys said.

Hunton Andrews Kurth LLP partner Ryan Glasgow acknowledged that it will be "a fairly quick turnaround" for employers to meet the New Year's Day deadline.

"There's a lot more that goes into this than may appear on the surface," he said, noting that businesses have to identify which of their currently exempt workers are paid less than the new salary level and analyze whether those individuals should be given a raise to meet the new threshold or be reclassified as nonexempt, overtime-eligible workers.

Once that determination is made, Glasgow noted that employers will still have to make sure timekeeping and payroll systems are updated, and that any employees who have been reclassified are trained in the new timekeeping processes they will be expected to follow.

"That in and of itself can be a complicated process and I don't think it's going to be a one-size-fits-all approach for any particular employer," Glasgow said. "I think it will probably result in more of an employee-by-employee, or at the very least job-by-job, analysis."

Glasgow said the rule will have a "far-ranging" impact and that the workers most likely to feel the brunt of it will be front-line supervisors — those who directly supervise hourly workers.

"I expect that's where most of the activity is going to occur," Glasgow said. "My gut tells me that most of those employees are going to see a salary increase rather than being reclassified from exempt to nonexempt."

Industries Affected

Morgan Lewis' Harthill noted that, according to the DOL, the industries most likely to be impacted by Tuesday's final rule include education, wholesale and retail businesses, and businesses that provide professional services.

But she also said not to overlook the impact of the EAP rule on nonprofits and state and local governments — which are subject to the FLSA and which often offer salaries that are lower than in the private sector.

"In the 2016 rule, the higher salary level would have had an impact obviously on nonprofits and state and local governments because they often have lower salaries and the same here — there'll be an impact on them, but it obviously won't be as marked because the salary level is not as high as the 2016 level," Harthill said.

Job Duties Test Remains Untouched

Although it changed the standard salary level and other aspects of the EAP regulations, the DOL did not alter its so-called job duties test — which helps identify individuals who are legitimate EAP employees that are FLSA-exempt.

If employees make more than the salary threshold, employers can conduct an analysis of their job duties. If those duties primarily involve EAP duties as defined by existing regulations, then salaried employees can be deemed as overtime exempt.

Al Robinson of Ogletree Deakins Nash Smoak & Stewart PC, a former acting administrator of the DOL's Wage and Hour Division, said he believes the rule is structured in such a way that it makes both the salary level test and the duties test play a role in figuring out if an exemption applies to any individual employee.

"In my mind, I think the standard salary level amount ... is reasonable and complements the duties test so that together the duties and salary requirement can work in tandem to enable employers to discern who qualifies for an exempt status," Robinson said.

Mark Shoffner, a partner at Bell Nunnally & Martin LLP, said it's "welcome news" from employers' perspective that the duties test isn't being revised as part of Tuesday's final rule.

"The duties test is so fraught with uncertainty — there are so many gray areas in the duties test — that I think if both the salary issue and the duties issue were thrown into the mix at the same time, compliance would be more difficult," Shoffner said. "All in all, I think it's a net positive for employers that the DOL didn't touch the duties test here."

--Editing by Kelly Duncan and Emily Kokoll.