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Salary Minimum For Exempt Employees May Soon Be Doubled By Tyler J. Volm

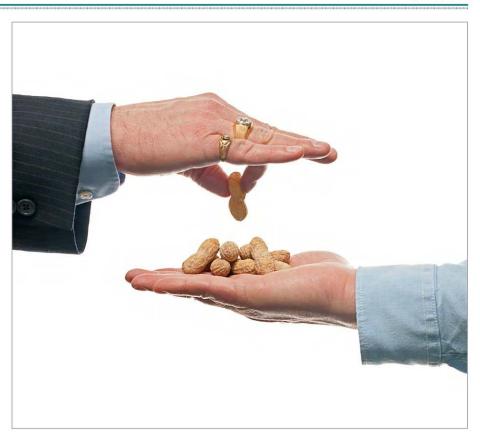
United States Department of Labor ("DOL") regulations require non-exempt (also called "hourly") employees to be paid overtime at one and one-half times their regular hourly rate for all hours worked over 40 in a workweek pursuant to the Fair Labor Standards Act ("FLSA"). In 2014, the DOL was tasked with updating these FLSA overtime regulations and recently released the long-awaited proposed revisions.

Non-exempt or hourly employees are distinct from exempt employees who are paid on a salaried basis (as opposed to an hourly basis) and satisfy certain duties tests. Categorising an employee as exempt allows the employer to take advantage of certain benefits. For example, an employer is not required to pay exempt employees overtime pay or track the employee's hours for FLSA purposes (though the employer may still choose to track exempt employee hours for other purposes including billing and performance). In most instances, an exempt employee must be paid their same weekly or monthly salary regardless of whether or not they worked 40 hours in a workweek (an exempt employee's salary would similarly not increase if they worked more than 40 hours in a workweek). Categories of exempt employees include professional, executive, administrative, new regulations take effect. In fact, the DOL es-

outside sales, and some computer professionals. These are often referred to collectively as the "white collar" exemptions.

In order to qualify for an exemption, the employee must meet both the duties test (their duties must be primarily executive, administrative, etc.), and the salary basis test. The rules describing the different duties tests for each category of exempt employee are beyond the scope of this article, but employers should carefully review these rules alongside their exempt employees' job descriptions and actual duties to confirm that employees are properly classified, as this is an area of focus for DOL enforcement actions. With respect to the salary basis test, under the current regulations employees must be paid an annual salary of at least \$23,660 to be exempt from the FLSA overtime regulations.

The biggest proposed change is a sharp increase in the salary an employee must be paid to qualify for one of the exemptions. Under the proposed rules, the DOL is more than doubling the annual salary threshold from \$23,660 to \$50,440 for exempt employees. The obvious impact of this increase is that many more employees will qualify for overtime pay once the



timates that nearly five million workers will be affected. According to the Economic Policy Institute, this number could be much higher, impacting an estimated 13.5 million workers. The DOL rationalised the implementation of such a large increase in the salary threshold because the last increase occurred in 2004 and the DOL perceives the current salary threshold to be way behind the times. According to the DOL, the percentage of full time salaried workers paid overtime has decreased from 62% in 1975 to

just 8% today. The new rules also propose to automatically update the salary threshold on an annual basis, so employers will have to keep a close eye on annual changes to this amount for their currently exempt employees earning at or near the \$50,440 salary minimum.

Final changes to the overtime rules are expected in late 2016. The proposed salary minimum of \$50,440 was based on the first quarter of 2015 and may change by the time the final rules

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speculating that the final rule will set the salary threshold at about \$40,000 per year. The DOL received over 270,000 comments on the proposed rules during the public comment period.

Although the new rules will not likely go into effect until early 2017, employers should look ahead to these anticipated changes to the overtime rules, especially as it will affect those Although the final threshold salary amount is employees earning an annual salary between \$23,660 and \$50,440. Although it will require an individualised assessment tailored to each employer and class of employee, a basic economic analysis audit will help determine whether it makes sense to increase the employee's salary to the higher level, switch the employee to hourly pay with eligibility for overtime, or split the position by sharing job duties between two or more employees.

Employers must remain vigilant in enforcing rules that prohibit non-exempt employees from working unauthorised overtime, but must still pay employees for any overtime worked. Federal and state agencies are expected to increase their enforcement actions as soon as the final rules go into effect. Remember, the employer bears the burden of demonstrating that they have properly classified their exempt employees

are announced later this year. Some pundits are as such. Penalties for misclassification or failure to pay overtime can include back pay (calculated at the overtime rate), interest, and additional penalties and fines for intentional noncompliance. Criminal enforcement is also authorised by the FLSA. In addition, an employee who prevails in a lawsuit may recover attorney fees and costs.

> still being determined by the DOL, an early assessment now, perhaps using a few different thresholds (\$40,000 and \$50,440), will help ease the transitional burden once the final regulations are in place.

> Tyler J. Volm is an attorney at Barran Liebman LLP in Portland, Oregon. His practice focuses on employment litigation and advice and labor relations. He works with business owners and managers to ensure compliance with changes in the law, and defends employers against complaints when they arise. Tyler is a Director on the Multnomah Bar Association's Young Lawyers Section Board, and a volunteer attorney with the Lewis & Clark Small Business Legal Clinic. Tyler earned his B.A. at the University of Oregon, and graduated cum laude from Lewis & Clark Law School with a Business Law Certificate in 2008. Tyler is licensed to practice in Oregon and Washington.

