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W A G E A N D H O U R

Pa. Proposes Significant Increase to Overtime Salary Thresholds

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Special to the Legal

In response to Gov. Tom Wolf's call to "modernize" Pennsylvania's overtime rules, on June 23, the Pennsylvania Department of Labor and Industry (L&I) proposed rulemaking to update the decades-old regulations applicable to three classes of overtime-exempt employees under the Pennsylvania Minimum Wage Act (PMWA): executive, administrative and professional (EAP). The proposal includes, among other changes, an increase in the salary thresholds to qualify for the EAP exemptions. The proposed weekly salary thresholds rise over three years (from \$610 to \$766 to \$921), and would substantially exceed those currently set by the federal Fair Labor Standards Act (FLSA) (\$455).

To many employers this will sound eerily similar to the final regulations the U.S. Department of Labor (DOL) issued in 2016 and that were enjoined by a federal court days before they were set to go into effect. Those regulations would have significantly increased the weekly salary requirements for EAP employees to remain exempt from overtime (from \$455 to \$913 per week). Pennsylvania's



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proposed changes are but the latest example of states and localities seeking to adopt more protective wage-and-hour legislation and regulations.

BACKGROUND

When it was enacted in 1968, the PMWA largely was modeled on the FLSA. Both contain EAP exemptions and delegate responsibility for defining those exemptions—in Pennsylvania, to L&I. While the applicable FLSA regulations were last updated in 2004, the PMWA's regulations have not been updated since

1977. The FLSA salary thresholds for the EAP exemptions currently exceed those provided by the PMWA, and therefore apply to employees in Pennsylvania.

With a changing of the guard in Washington, and the 2016 FLSA regulations no longer being defended in litigation by the administration, the increased salary level that many expected at the federal level has not materialized.

Some states have taken the initiative to raise their counterpart overtime salary thresholds beyond the federal floor, including New York and California. Through its proposed rulemaking to update its EAP exemptions, Pennsylvania is following suit. The Wolf administration estimates that when fully implemented, the regulations will extend overtime eligibility to 460,000 workers in Pennsylvania.

CHANGE TO A SINGLE STANDARD DUTIES TEST

Presently, the PMWA regulations contain two different tests to qualify for the EAP exemptions—the "short test" and the "long test," which is similar to what was required under the FLSA prior to the 2004 regulations. To qualify under the short test, an employee must perform the first

duty listed in each of the EAP exemptions and meet the higher salary threshold. For example, the first listed duty for an employee to qualify for the executive exemption is “the management of the enterprise in which [the employee] is employed or of a customarily recognized department or subdivision.” To qualify under the long test, an employee must perform every duty listed in one of the EAP exemptions and meet the lower salary threshold.

The proposed regulations remove the short and long tests in favor of the single “standard duties test” adopted by the DOL in 2004. Under the standard duties test, the employee would need to perform all of the duties listed in one of the EAP exemptions and meet a single salary threshold (in addition to the pay not being subject to deduction based on the quality or quantity of the employee’s work).

Although L&I states that the proposed regulations “make the act’s regulations consistent with the FLSA’s regulations with regard to duties,” there remain some differences. For example:

To qualify for executive exemption under the proposed regulations an employee must “customarily and regularly exercise discretionary powers,” whereas the FLSA’s regulations contain no such requirement.

To qualify for the professional exemption under the proposed regulations, an employee’s work must require “the consistent exercise of discretion and judgment in its performance.” The FLSA regulations contain no such requirement as to the professional exemption.

SALARY THRESHOLD INCREASE

The proposed regulations gradually increase the weekly salary thresholds for the EAP exemptions over three

years, starting upon publication of the final regulations. Presently, the salary thresholds are \$155 per week (long test) and \$250 per week (short test). The weekly thresholds would increase to \$610 per week (\$31,720 per year) upon publication of the final regulations (likely 2019), \$766 per week (\$39,832 per year) the second year (likely 2020), and \$921 per week (\$47,882 per year) the third year (likely 2021).

On the third anniversary of the publication of the final regulations (likely 2022) and every three years thereafter,

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ter, the thresholds would be subject to automatic updating tied to the 30th percentile of weekly earnings for full-time non-hourly workers in the Northeast Census region in the second quarter of the prior year, as published by the DOL, Bureau of Labor Statistics. As part of the calculation to qualify for an EAP exemption, up to 10 percent of the employee’s salary “may include payment of non-discretionary bonuses, incentives, and commissions that are paid quarterly or more frequently.”

WHAT’S NEXT?

On June 23, the proposed regulations were published in the Pennsylvania Bulletin for a 30-day public comment period. Those who are interested in

making comments should contact Bryan Smolock, director, Bureau of Labor Law Compliance, Department of Labor and Industry, 651 Boas Street, Room 1301, Harrisburg, PA 17121, (717) 787-0606, bsmolock@pa.gov by July 23.

A final version of the proposed regulations is expected to be published sometime in 2019. As they did in anticipation of the 2016 FLSA regulations, Pennsylvania employers should assess whether they have employees making less than the new proposed \$610 per week and determine whether the employees should be considered for reclassification, with an understanding that should the final regulations mirror the proposed regulations, the level will continue to increase and then automatically update. As the salary level continues to increase, employers seeking to limit the overtime worked by newly reclassified nonexempt employees may well want to consider hiring additional workers. Employers also should consider whether they would like to include nondiscretionary bonuses to count toward up to 10 percent of the salary threshold.

Should the final regulations be issued in substantially similar form, legal challenges to the regulations similar to those mounted against the 2016 FLSA regulations remain a possibility. As with the 2016 FLSA regulations, employers should stay tuned. •