Breakout Sessions – Series 1

WAGE AND HOUR POWER HOUR

OVERTIME AND OTHER HAPPENINGS

Steven F. Pockrass (Moderator) – Ogletree Deakins (Indianapolis)

Cynthia A. Bremer – Ogletree Deakins (Minneapolis)

Alfred B. Robinson, Jr. – Ogletree Deakins (Washington, D.C.)
I. Introduction

Despite still not having a Senate-confirmed administrator, the Wage and Hour Division (WHD) of the U.S. Department of Labor (Department or DOL) has been extremely active during the past 12 months. In addition to pursuing a number of major regulatory initiatives, the WHD has been issuing new opinion letters, actively engaging in enforcement activities, and promoting its Payroll Audit Independent Determination (PAID) program to encourage employers to voluntarily report and resolve FLSA minimum wage and overtime violations. The Department also has established an Office of Compliance Initiatives, which has rolled out new websites to assist employers and employees.

II. WHD Regulatory Activities

A. Part 541 Overtime Regulations

US DOL/WHD has several significant initiatives on its regulatory agenda. One item of great interest to almost all employers and many employees is a proposal to revise the regulations codified at 29 CFR Part 541 that define the executive, administrative, professional, outside sales, and computer employee exemptions in section 13(a)(1) of the Fair Labor Standards Act (FLSA).

1. New Proposed Salary Level and HCE Total Compensation Amount


A PDF of the NPRM can be accessed at: https://www.govinfo.gov/content/pkg/FR-2019-03-22/pdf/2019-04514.pdf, and a copy of that portion of the NPRM containing the proposed regulatory changes is attached as Exhibit A. In its NPRM, the Department has proposed to increase the standard minimum salary level for the executive, administrative, and professional exemptions (EAP) to $679 per week or $35,308 annually from the current $455 per week or $23,660 annually. In addition, US DOL/WHD is proposing to increase the total annual compensation threshold for a highly compensated employee (HCE) to $147,414 per year from the current $100,000 requirement. As with the current regulations, the NPRM keeps in place the requirement that a highly compensated employee receive at least the standard minimum salary level on a weekly, or less frequent basis; consequently, a highly compensated employee would have to be guaranteed a salary of at least $679 per week under the NPRM.

2. Additional Items in the NPRM

In addition to these increases in the standard salary level and total annual compensation amount, the NPRM also would:

- Rescind the 2016 final rule that was enjoined by a federal district court; and
• Allow non-discretionary bonus and incentive payments, including commissions, to meet up to 10% of the proposed standard salary level test of $679 per week or $35,308 per year.

Notably, the 2016 enjoined final rule also would have allowed for non-discretionary bonus and incentive payments to meet up to 10 percent of the proposed standard salary level, but the 2019 NPRM proposes a more generous timeframe of annually or more frequently in which an employer must make these non-discretionary payments.

The NPRM also would:

• Establish a standard salary level test of $455 per week for the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands, and $380 per week for American Samoa; and

• Provide an exclusion from the standard salary level proposal for employees in the motion picture producing industry who make at least $1,036 per week.

3. What the NPRM Does Not Propose To Do

Not only is the NPRM significant for what it proposes to do; it is also significant for what it does not propose to do, including:

• The NPRM does not propose to change the standard duties tests for the executive, administrative, professional, outside sales, or computer employee exemptions.

• It does not include a provision which automatically would increase the standard salary level test or total annual compensation for a HCE on some regular or periodic basis as did the enjoined 2016 final rule.

• It does not allow non-discretionary bonus or incentive payments, including commissions, to meet the minimum guaranteed salary component of the total annual compensation for a HCE.

4. Periodic Updates

In its NPRM, US DOL/WHD expresses its intent to update the standard salary level test and total annual compensation thresholds every four years through the notice-and-comment process. This goal is intended to discharge its statutory charge to define and delimit these exemptions from time to time. The Department concluded its consideration of this point by stating:

…the Department is committing to evaluate more frequently the part 541 earnings thresholds going forward. Specifically, the Department believes that the standard salary level and the HCE total annual compensation threshold should be proposed to be updated on a quadrennial basis (i.e., once every four years) through an NPRM published in the Federal Register, followed by notice-and-comment rulemaking. The Department intends to propose such updates using the same methodology as the most recent final rule, meaning, in the first instance, the methodology employed by the final rule for which this NPRM is
providing notice and opportunity to comment. In these future rulemakings, the Department also intends to seek comment on whether to update the special salary levels that apply to the U.S. territories. Proposed quadrennial updates would ensure public input on how earning thresholds could continue to be up-to-date, while giving businesses sufficient time to adjust to these more frequent (and thus smaller) increases. The Secretary, however, may foretell proposing updates if economic or other factors so indicate. Accordingly, the Department proposes to delete the current (though not enforced) Sec. 541.607, while affirming its intention to propose increasing the earnings thresholds every four years. The Department seeks comment from the public regarding this proposal.


The Department utilizes the same methodology used in the 2004 rulemaking to determine the proposed standard salary level of $679 per week or $35,308 per year. It uses the most current dataset of the pooled 2015-2017 Current Population Survey (CPS) Merged Outgoing Rotation Group (MORG) to identify the standard salary level which it then adjusts forward to January, 2020. US DOL/WHD briefly described its methodology as follows:

Now, to restore the value of the standard salary level as a line of demarcation between those workers for whom Congress clearly intended to provide minimum wage and overtime protections and other workers who maybe bona fide EAPs, and to maintain the salary level's continued validity, the Department proposes to update standard salary level using the 2004 methodology with current CPS data. Using pooled 2017 CPS MORG data, a salary level of $641 ($33,332 annually) corresponds to the 20\textsuperscript{th} percentile of earnings for full-time salaried workers in the South Census region and/or in the retail industry. To account for expected changes between 2017 and January 2020, and to make it so that the salary level will accurately reflect compensation at the approximate effective date, the salary level was inflated using the compound annual growth rate that increased the standard salary level from $455 to $641 over 15 years (2.31 percent = (($641/$455)^{1/15} - 1). Applying this growth rate for an additional 2.5 years (assuming 2017 data represents mid-2017 on average) results in a January 2020 salary level of $679 ($641 \times 1.0231^{2.5})). Similarly, to update the HCE total compensation requirement, the Department used CPS MORG data to ascertain the 90\textsuperscript{th} percentile of all full-time salaried workers in 2017 ($139,464), calculated the compound annual growth rate from 2002 to 2017 (2.24 percent), then applied that rate over 2.5 years to inflate the 2017 level to $147,414 for January 2020.

(footnotes omitted)


5. Comment Period

The NPRM has a 60-day comment period which expires on May 21, 2019. Thus, for interested employers and employees, there is still time within which to submit comments on this important rulemaking. A worksheet that can assist in preparing comments is attached as Exhibit B.

The preamble to the NPRM relates that the Department’s goal is to have a final rule in effect by January, 2020. While it is anticipated that there will be requests to extend the comment
period, it will be necessary for US DOL/WHD to decline such requests if it hopes to be able to meet this ambitious time schedule. One justification for not extending the comment period is that employers, employees, and employee advocates had approximately two weeks advance notice of the contents of the NPRM since it was released on March 7, 2019, but it was not published until March 22, 2019.

B. Other Rulemakings

US DOL/WHD has several other notable rulemakings in progress. A proposal for two of these pending rulemakings has been sent to the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) for review prior to publication in the Federal Register.

1. Regular and Basic Rates Under the FLSA

One of these is an initiative to address the regular and basic rates under the FLSA. At the time this paper went to press, it is not known exactly what US DOL/WHD plans to propose on this topic, even though it is designated as not economically significant. OIRA, however, did conclude its review of this proposal on March 21, 2019, so further details about this proposed rule should be available at Workplace Strategies.

2. Joint Employment

The other initiative at the proposed rule stage is a revision to the joint employment regulation in Part 791 of Title 29 of the Code of Federal Regulations. Again, it is not known exactly what US DOL/WHD plans to propose, and OIRA had not completed its review of the proposed rulemaking at the time this paper went to press. However, the current administration withdrew Administrator’s Interpretation 2016-1 (AI 2016-1) issued on January 20, 2016, titled “Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Workers Protection Act”. Presumably, this withdrawal suggests that the current administration does not agree with the joint employer test described in AI 2016-1, so the expectation is that this proposal would be to update the Part 791 regulations that describe the circumstances in which a joint employment relationship might exist. Depending on how long it takes OIRA to complete its review, details about this proposed rule also may be available at Workplace Strategies.

3. Tip Regulations

Another regulatory initiative is of particular interest to those in the hospitality industry. Specifically, it is an effort to revise the tip regulations in Part 531 of Title 29. While this initiative is also at the proposed rule stage, no proposed rule has been submitted to OIRA for review as of the date this paper went to press. Nonetheless, this is another important rulemaking because Congress amended section 3(m) of the FLSA in March, 2018, in an attempt to help clarify permissible tip practices involving tip pools and tip credits. Thus, US DOL/WHD acknowledges that this regulatory initiative is necessary to update and clarify the tip regulations in light of the amendments to the FLSA that Congress enacted in 2018.

III. WHD Opinion Letters

In 2018, US DOL/WHD resurrected the issuance of opinion letters after a 9-year hiatus that began during the Obama administration which opted to issue administrator’s interpretations instead. On January 5, 2018, US DOL/WHD reissued 17 previously withdrawn opinion letters
addressing a wide range of topics under the FLSA. During the remainder of 2018, US DOL/WHD issued another 11 FLSA opinion letters and 2 opinion letters interpreting the Family and Medical Leave Act (FMLA).

On March 14, 2019, WHD issued its first two FLSA opinion letters of 2019. In Opinion Letter FLSA2019-1, WHD found that live-in residential janitors in New York were not exempt from the FLSA, even though New York state law excludes such individuals from similar state minimum wage and overtime laws. Acting WHD Administrator Keith E. Sonderling also stated in this Opinion Letter that “WHD does not believe that relying on a state law exemption from state law minimum wage and overtime requirements is a good faith defense to noncompliance with the FLSA, but a court retains the discretion to make that determination on a case-by-case basis. See 29 U.S.C. § 260.”

In Opinion Letter FLSA2019-2, an employer offered employees the opportunity to participate in a voluntary community service program. The employer compensated employees for the time they spent on volunteer activities during working hours or when they were required to be on the employer’s premises. In reviewing this employer’s program, the WHD found that the time spent in the volunteer program did not constitute “hours worked” under the FLSA so long as the employer did not unduly pressure the employees to participate. This finding was based on the fact that the employer:

- did not require participation in the program;
- did not control or direct the volunteer work;
- did not create any adverse consequences for failing to participate; and
- did not guarantee bonuses to participating employees but rather disbursed bonuses on a discretionary basis to the most successful community service team.

In addition to these 2019 letters interpreting the FLSA, WHD also issued an FMLA opinion letter on March 14, 2019. In FMLA2019-1-A, the acting administrator clarified that “an employer is prohibited from delaying the designation of FMLA-qualifying leave as FMLA leave” and must notify the employee of the FMLA status of the employee’s leave within five days of the employer obtaining enough information to make the determination. This opinion letter explicitly notes the agency’s disagreement with a Ninth Circuit Court of Appeals decision, which held that employees may decline FMLA leave to preserve it for future use and instead use vacation time before using FMLA leave. The opinion letter also states that an employer is prohibited from designating more than 12 weeks of leave (or 26 weeks of leave for military caregiver leave) in a year as FMLA leave.

WHD also has redesigned its website to allow easy access to FLSA Opinion Letters issued since 2001 and to FMLA Opinion Letters issued since 2002, as well as to guide employers and employees as to how to request an Opinion Letter. To access and search the DOL’s online index of FLSA opinion letters, go to https://www.dol.gov/whd/opinion/search/index.htm?FLSA. To access and search the DOL’s online index of FMLA opinion letters, go to https://www.dol.gov/whd/opinion/search/index.htm?FMLA.
IV. WHD Enforcement and Sub-Regulatory Activities

A. Record Back Pay Recovery in FY 2018

US DOL/WHD announced last year the results of its enforcement activities for Fiscal Year (FY) 2018 which ended September 30, 2018. It recovered a record $304.9 million in back wages for workers. In comparison, the Department recovered $270.4 million in back wages in FY 2017. The prior record high was $280.7 million in back wages collected in FY 2012.

In analyzing this record recovery, the back wage amounts attributable to both overtime pay and minimum wages collected under the FLSA were up in FY 2018 over the results in FY 2017. Specifically, overtime pay recovered in FY 2018 was $194.2 million versus $157.6 million in FY 2017. Similarly, minimum wage collections in FY 2018 totaled $32.4 million as opposed to $31.2 million in FY 2017.

The enforcement results in the 15 identified low-wage, high violation industries also is interesting. The industry with the greatest amount of back wages recovered in FY 2018 was food services, which yielded a recovery of $42.9 million in back wages for 41,103 employees based upon 5,751 cases. The results for FY 2017 was $42.9 million for 44,363 employees in 5,446 cases.

The low wage industry with the second highest back wage recovery was construction which had $38.8 million in back wages for 25,679 employees in 3,018 cases versus $49.3 million for 26,514 employees in 2,959 cases for FY 2017. Additional enforcement statistics can be found at: https://www.dol.gov./whd/data/index.htm.

B. Record Number of Compliance Assistance Events

Perhaps equally significant to the amount of back wages recovered, US DOL/WHD provided a record number of 3,643 compliance assistance events. These compliance assistance events consisted of varying outreach activities, including training, presentations and other education activities designed to help employers comply with and employees understand their rights under the various laws US DOL/WHD enforces.

C. Payroll Audit Independent Determination (PAID)

In 2018, US DOL/WHD announced an initiative called Payroll Audit Independent Determination, or PAID, to resolve FLSA minimum wage and overtime violations. Initially launched as a 6-month program, US DOL/WHD made it a permanent initiative in the fall of 2018. The PAID initiative is designed to enable employers to resolve FLSA violations pursuant to US DOL/WHD’s authority to supervise back wage settlements in cases where employers voluntarily disclose minimum wage or overtime violations. In such cases, the employer would agree to submit to the agency’s authority, and the cases must meet certain minimum criteria for participation. To participate in PAID, an employer first must identify the violations, the impacted employees, and the time periods of the violations. The employer must also compute the back wages due each impacted employee. Then the employer can request to participate in the program and have the DOL/WHD supervise the payment of the back wages due. The FLSA expressly authorizes the Secretary of Labor to supervise the payment of unpaid minimum

---

1 These industry sectors are: agriculture; amusement; apparel manufacturing; auto repair; child care services; construction; food services; guard services; hair, nail and skin care services; health care; hotels and motels; janitorial services; landscaping services; retail; and temporary help.
wages on unpaid overtime compensation due employees under sections 6 or 7 of the FLSA, respectively, in addition to providing for a private right of action to remedy FLSA violations. The statute further provides that the acceptance by any employee of this DOL/WHD supervised settlement amount acts as a waiver by that employee of his or her right to file an FLSA action to recover any alleged unpaid wages, liquidated damages, and attorneys’ fees. A link to the PAID portal is: https://www.dol.gov/whd/paid/index.htm.

D. Office of Compliance Initiatives

In another important development, the Department announced the creation of an Office of Compliance Initiatives (OCI) in August 2018. OCI is a multiple enforcement agency effort that is coordinated by the Department’s Office of the Assistant Secretary for Policy. The goal of the OCI is to advance “the expansion and development of innovative approaches to compliance assistance and enforcement.” It is concentrating its initial efforts on:

- Instilling within DOL a renewed commitment and culture that promotes compliance assistance activities;
- Providing employees and employers with access to high-quality, up-to-date information about their rights and obligations, respectively, under federal labor laws and regulations enforced by DOL;
- Assisting enforcement agencies with the development of new strategies that use data in designing compliance and enforcement activities that have greater impact; and
- Enhancing outreach to the various stakeholders of enforcement agencies within DOL.

OCI initially rolled out two new websites that are designed to assist workers and employers that have compliance questions. For employees and employee advocates, Worker.gov “provides a centralized base of information focused on worker protections” under various federal laws. Employer.gov provides employers with information about their responsibilities under such laws, and it includes a resource section specifically designed for small business owners.

A recent compliance assistance tool announced by OCI is an enhanced electronic version of the Hardy Reference Guide to The Fair Labor Standards Act. The new online version of this publication is designed to provide employees and employers with an easy-to-use, simple resource on wage and hour requirements and links to other resources as well.
Part II

Department of Labor

Wage and Hour Division

29 CFR Part 541

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule
unintentionally misclassifying workers as exempt; but an unskilled high standard salary level increases labor costs to employers precluded from claiming the exemption for employees performing bona fide EAP duties. Thus, the ultimate cost of the regulation is increased if the standard salary level is set either too low or too high. The Department determined that setting the standard salary level using the level equivalent to the earnings of the 90th percentile of full-time salaried workers in the South and/or in the retail sector, projected forward to January 2020, balances the risks and costs of misclassification of exempt status.

IX. Executive Order 13132, Federalism

The Department has (1) reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The proposed rule would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

X. Executive Order 13175, Indian Tribal Governments

This proposed rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects in 29 CFR Part 541

Labor, Minimum wages, Overtime pay, Salaries, Teachers, Wages.

Signed at Washington, DC this 7th day of March, 2019.

Keith E. Sonderling,
Acting Administrator, Wage and Hour Division.

For the reasons set out in the preamble, the Department of Labor proposes to amend title 29 of the Code of Federal Regulations part 541 as follows:

PART 541—DEFINING AND DELIMITING THE EXEMPTIONS FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER AND OUTSIDE SALES EMPLOYEES

1. The authority citation for part 541 continues to read as follows:


2. Revise paragraph (a)(1) of §541.100 to read as follows:

§541.100 General rule for executive employees.

(a) * * *
(1) Compensated on a salary basis pursuant to §541.600 at a rate of not less than $679 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or $380 per week if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities; and

3. Amend §541.400 by removing the first two sentences of paragraph (b) and adding one sentence in their place to read as follows:

§541.400 General rule for computer employees.

(b) The section 13(a)(1) exemption applies to any computer employee who is compensated on a salary or fee basis at a rate of not less than $679 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or $380 per week if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging, or other facilities.

7. Amend §541.600 by:

(a) To qualify as an exempt executive, administrative or professional employee under section 13(a)(1) of the Act, an employee must be compensated on a salary basis at a rate of not less than $679 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal Government, or $380 per week if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging, or other facilities.

(b) The required amount of compensation per week may be translated into equivalent amounts for periods longer than one week. For example, the $679-per-week requirement will be met if the employee is compensated biweekly on a salary basis of not less than $1,358, semimonthly on a salary basis of not less than $1,471, or monthly on a salary basis of not less than $2,942. However, the shortest period of payment that will
meet this compensation requirement is one week.

* * * * *

§ 541.601 Highly compensated employees.

(a) An employee with total annual compensation of at least $147,414 is deemed exempt under section 13(a)(1) of the Act if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee as identified in subparts B, C or D of this part.

(b) (1) "Total annual compensation" must include at least $679 per week paid on a salary or fee basis as set forth in §§ 541.602 and 541.605, except that § 541.602(a)(3) shall not apply to highly compensated employees. Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period. Total annual compensation does not include board, lodging and other facilities as defined in § 541.606, and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans and the cost of other fringe benefits.

(2) If an employee’s total annual compensation does not total at least $147,414 by the last pay period of the 52-week period, the employer may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required level. For example, an employee may earn $125,600 in base salary, and the employer may anticipate based upon past sales that the employee also will earn $22,414 in commissions. However, due to poor sales in the final quarter of the year, the employee actually only earns $10,000 in commissions. In this situation, the employer may within one month after the end of the year make a payment of at least $12,414 to the employee. Any such final payment made after the end of the 52-week period may count only toward the prior year’s total annual compensation and not toward the total annual compensation in the year it was paid. If the employer fails to make such a payment, the employee does not qualify as a highly compensated employee, but may still qualify as exempt under subparts B, C, or D of this part.

* * * * *

§ 541.602 Salary basis.

* 9. Revise paragraph (a)(3) of § 541.602 to read as follows:

(a) * * *

(3) Up to ten percent of the salary amount required by § 541.600(a) may be satisfied by the payment of nondiscretionary bonuses, incentives and commissions, that are paid annually or more frequently. The employer may utilize any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire. If the employer does not identify some other year period in advance, the calendar year will always be the last pay period of the 52-week period the sum of the employee’s weekly salary plus nondiscretionary bonus, incentive, and commission payments received does not equal 52 times the weekly salary amount required by § 541.600(a), the employer may make one final payment sufficient to achieve the required level no later than the next pay period after the end of the year. Any such final payment made after the end of the 52-week period may count only toward the prior year’s salary amount and not toward the salary amount in the year it was paid. This provision does not apply to highly compensated employees under § 541.601.

* * * * *

10. Revise § 541.604 to read as follows:

§ 541.604 Minimum guarantee plus extras.

(a) An exempt employee who has additional compensation without losing the exemption or violating the salary basis requirement. If the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. Thus, for example, an exempt employee guaranteed at least $679 each week paid on a salary basis may also receive additional compensation of a one percent Commission. An exempt employee also may receive a percentage of the sales or profits of the employer if the employment arrangement also includes a guarantee of at least $679 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least $679 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (e.g., flat rate, bonuses, payments, straight-time hourly amount, and time and one-half amount, and any other basis) and may include paid time off.

(b) An exempt employee’s earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days, or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned. The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee’s usual earnings at the assigned hourly, daily or shift rate for the employee’s normal scheduled workweek. Thus, for example, an exempt employee guaranteed compensation of at least $700 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid $210 per shift without violating the $679-per-week salary basis requirement. The reasonable relationship requirement applies only if the employee’s pay is computed on an hourly, daily or shift basis. It does not apply, for example, to an exempt account manager paid a guaranteed salary per week that exceeds the current salary level who also receives a commission of one-half percent of all sales in the store or five percent of the store’s profits, which in some weeks may total as much as, or even more than, the guaranteed salary.

11. Revise paragraph (b) of § 541.605 to read as follows:

§ 541.605 Fee basis.

* * * * *

(b) To determine whether the fee payment meets the minimum amount of salary required for exemption under these regulations, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least the minimum salary per week, as required by §§ 541.600(a) and 541.602(a), if the employee worked 40 hours. Thus, an artist paid $350 for a picture that took 20 hours to complete meets the $679 minimum salary requirement for exemption since earnings at this rate would yield the artist $700 if 40 hours were worked.

12. Amend § 541.709 by revising the first sentence to read as follows:

§ 541.709 Motion picture producing industry.

The requirement that the employee be paid "on a salary basis" does not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least $1,036 per week (exclusive of board, lodging, or other facilities).

* * * * *
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Worksheet for Comments in Response to 2019 NPRM Regarding 29 CFR Part 541 Published on March 22, 2019

RIN 1235-AA20
Comments must be received by DOL/WHD No Later Than May 21, 2019

<table>
<thead>
<tr>
<th>Employer Name:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employer Contact:</td>
</tr>
<tr>
<td>Industry:</td>
</tr>
<tr>
<td>For-Profit/Non-Profit:</td>
</tr>
<tr>
<td>Particular Areas of Concern to be Emphasized throughout Comments:</td>
</tr>
</tbody>
</table>

### Topics on Which Comments Will be Prepared

<table>
<thead>
<tr>
<th>Topic#</th>
<th>Yes/No</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>The 2019 Proposed Rule would set the minimum standard salary level for the executive, administrative and professional (EAP) exemptions at $679 per week (with an anticipated effective date of January 2020). Is this an appropriate level? If not, what do you recommend to be an appropriate level, and what is the basis for your recommendation? (See also Topics 2 and 3 below)</td>
<td></td>
</tr>
<tr>
<td>Topic#</td>
<td>Yes/No</td>
<td>Notes</td>
</tr>
<tr>
<td>-------</td>
<td>--------</td>
<td>-------</td>
</tr>
<tr>
<td>2.</td>
<td></td>
<td>The minimum salary level of $679 contained in the 2019 Proposed Rule is based on the same methodology used by the DOL in 2004, with an adjustment based on anticipated wage growth from 2017 to January 2020. This methodology excludes from the exemption roughly the bottom 20 percent of salaried employees in the lowest-wage Census region (the South) and/or in the retail sector nationwide. Is applying the 2004 methodology to current salary data (South and/or retail industry nationwide) still an appropriate basis for setting the minimum salary level? If not, what would be a more appropriate methodology, and what do you recommend as an appropriate minimum salary level based on that methodology?</td>
</tr>
<tr>
<td>3.</td>
<td></td>
<td>Consistent with the current regulations, the 2019 Proposed Rule does not propose having alternative minimum salary levels based on region, industry, employer size, or for-profit/non-profit status. Do you agree with this aspect of the Proposed Rule, and if not, what do you recommend and why?</td>
</tr>
<tr>
<td>Topic#</td>
<td>Yes/No</td>
<td>Notes</td>
</tr>
<tr>
<td>-------</td>
<td>--------</td>
<td>-------</td>
</tr>
<tr>
<td>4.</td>
<td></td>
<td>The 2019 Proposed Rule would permit non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the minimum salary level for the EAP exemptions, but not for the highly compensated Employee (HCE) exemption, provided such bonuses are paid annually or more frequently. Do you agree that these types of payments should be allowed to count toward the minimum salary level, and if so, is 10 percent an appropriate cap? If not, what should an appropriate cap be, and what is the basis for your recommendation? Do you agree with the Proposed Rule’s annual or more frequent basis for making these payments, and if you disagree, what do you recommend and why? Do you agree with the Proposed Rule’s applying this provision only to the salary level for the EAP exemptions, and not to the HCE exemption, and if not, what do you recommend? Are there any other issues with respect to this aspect of the 2019 Proposed Rule that you believe the DOL needs to address an/or clarify in its Final Rule, and if so, what are your recommendations? (See also Topic 5 below)</td>
</tr>
<tr>
<td>5.</td>
<td></td>
<td>As part of its proposal to allow up to 10 percent of the minimum salary level to be paid in the form of non-discretionary bonuses and incentive payments (including commissions), the 2019 Proposed Rule would permit employers to make a final “catch-up” payment within one pay period after the end of each 52-week period (the 52-week period must be identified in advance by the employer; otherwise, a calendar year will apply). Under the proposal, employers would have one pay period to make up for the shortfall (up to 10 percent of the standard level, $3,530.80), and any such catch-up payment would “count only toward the prior year’s salary amount and not toward the salary amount in which it was paid.” Is this proposal appropriate? If not, how would you modify such a proposal?</td>
</tr>
<tr>
<td>Topic#</td>
<td>Yes/No</td>
<td>Notes</td>
</tr>
<tr>
<td>-------</td>
<td>--------</td>
<td>-------</td>
</tr>
<tr>
<td>6.</td>
<td></td>
<td>The 2019 Proposed Rule proposes that the total minimum compensation level for the HCE exemption should be set at the 90th percentile of all full-time salaried workers nationally using 2017 CPS data, and then inflated to January 2020. Using this methodology, the 2019 Proposed Rule sets the minimum total annual compensation threshold for the HCE exemption at $147,414 (with an anticipated effective date of January 2020), as compared to the current threshold of $100,000. Is this methodology appropriate, and is this minimum total compensation threshold appropriate? If you disagree with the methodology and/or the minimum threshold, what do you propose, and what is the basis for your recommendation?</td>
</tr>
<tr>
<td>7.</td>
<td></td>
<td>The DOL’s anticipated effective date for a Final Rule is January 2020. Will this provide sufficient time for employers to make any changes required by a Final Rule and to provide affected employees with sufficient notice of the changes? Is there anything you want to emphasize to the DOL with respect to an effective date (e.g., the minimum amount of time for an effective date after a Final Rule is published in the Federal Register; using the January 2020 figures but making the effective date later in 2020; allowing an employer to implement changes at a later date based on its fiscal year; providing a different effective date based on employer size, industry, or for-profit/non-profit status, etc.)?</td>
</tr>
<tr>
<td>Topic#</td>
<td>Question</td>
<td>Yes/No</td>
</tr>
<tr>
<td>-------</td>
<td>--------------------------------------------------------------------------</td>
<td>--------</td>
</tr>
<tr>
<td>8.</td>
<td>The 2019 Proposed Rule suggests an NPRM followed by notice-and-comment rulemaking to update the EAP minimum salary and HCE total compensation thresholds every four years to prevent the levels from becoming outdated. Do you agree with this proposed approach, and if not, what do you recommend, and what is the basis for your recommendation?</td>
<td></td>
</tr>
<tr>
<td>9.</td>
<td>The 2019 Proposed Rule notes that US territories face their own economic challenges and that an increase in the salary level would affect them differently than the states. Accordingly, the DOL proposes setting the minimum salary level at $455 per week for EAP employees in Puerto Rico, the Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands. The DOL also proposes setting the minimum salary level at $380 per week for employees in American Samoa. Are these special salary levels appropriate, or should the DOL set the standard minimum salary level at $679 per week (or some other amount) to these U.S. territories?</td>
<td></td>
</tr>
<tr>
<td>10.</td>
<td>Are there any other topics or issues you would like to address in your comments to the DOL?</td>
<td></td>
</tr>
</tbody>
</table>
Wage and Hour Power Hour: Overtime and Other Happenings

Presenters
Cynthia A. Bremer (Minneapolis)
Alfred B. Robinson Jr. (Washington, D.C.)

Moderator
Steven F. Pockrass (Indianapolis)

Today’s Agenda

- Overview of US DOL/WHD Regulatory Agenda
  - Proposed overtime rule
  - Status of regular and basic rate proposal
  - Status of independent contractor rulemaking

- Enforcement and Education Efforts
  - Enforcement efforts
  - Opinion letters

- “Lucky 7” Compliance Tips
Notice of Proposed Rulemaking (NPRM)

- Published in Federal Register on March 22
- To access NPRM and to submit comments electronically: https://www.federalregister.gov/documents/2019/03/22/2019-04514/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and

NPRM (cont’d.)

- 60-day comment period ends on May 21
- Rescinds enjoined 2016 Final Rule
- US DOL/WHD intends to issue Final Rule effective January, 2020 (an aggressive timeframe)
NPRM: Proposed Minimum Salary Level

- $679 weekly

For payroll purposes, this equates to:

- $1,358 biweekly
- $1,471 semi-monthly
- $2,942 monthly
- $35,308 annually

NPRM Salary Level Methodology

- Follows methodology of 2004 Final Rule
- Adjusts results to account for anticipated wage growth from 2017 until 2020
NPRM: Proposed Highly Compensated Employee (HCE) Compensation

- Total annual compensation level equal to 90\textsuperscript{th} percentile of earnings of full-time salaried workers nationally
- $147,414 minimum total annual compensation
- Based on 2017 CPS MORG data inflated to January, 2020

NPRM: Proposed HCE Compensation (cont’d.)

- Includes provision for annual “catch up” payment at the end of the year or within one month of year’s end to meet $147,414 minimum total compensation requirement
- Minimum salary must be at least $679 per week
NPRM: Nondiscretionary Payment to Meet Standard Salary Level

- 10% of minimum salary level may be nondiscretionary bonus, incentive, and/or commission payments
- Nondiscretionary payments must be paid annually or more frequently
- “Catch up” payment to meet 10% must be made by next pay period after end of the year

NPRM Proposed Salary Levels Outside the Continental United States

- Salary level of $455 per week for:
  - Commonwealth of the Northern Mariana Islands
  - Guam
  - Puerto Rico
  - U.S. Virgin Islands
- $380 per week for American Samoa
NPRM: Periodic Review

- Commits to periodic review to update salary and total annual compensation levels
- Proposes updates on quadrennial basis or once every 4 years
  - Would use notice-and-comment procedure
  - Subject to delay for economic or other reasons

The NPRM Does Not:

- Change any duties tests
- Include a provision that would automatically increase the salary level on a periodic basis as contained in the enjoined 2016 Final Rule
- Require payment of the nondiscretionary incentive that can be used toward 10% of the salary threshold to be paid on a quarterly or more frequent basis as contained in the enjoined 2016 Final Rule
The NPRM Does Not:

- Include different or multiple salary levels based on:
  - Region
  - Industry
  - Employer size
  - Exemption
- Allow nondiscretionary bonus or incentive payments to meet minimum salary level for HCE

Actions to Take Now

- Evaluate jobs likely to be impacted
  - Consider whether exempt positions below $35,308+ will receive a salary increase or will be reclassified
  - Consider pay and rate for jobs to be reclassified
  - Ensure exempt employees satisfy relevant duties tests
Actions to Take Now (cont’d.)

- File comments with DOL on or before May 21, 2019
- Evaluate challenges/concerns created by compression if you increase salaries to meet new threshold
- Consider alternatives to raising salary level
- Determine whether reclassification will impact benefit programs

Actions to Take Now (cont’d.)

- If you are making changes:
  - Devise communication plan for affected employees
  - Train affected employees (and supervisors and managers) on timekeeping and other policies
Other DOL/WHD Regulatory Initiatives

- Regular and Basic Rates Proposed Rulemaking
  - OIRA concluded review on March 21, 2019
  - Status of proposal

- Joint Employment Proposed Rule
  - Submitted to OIRA for review February 28, 2019
  - Status of proposal

- Tip Regulations Initiative in Light of:
  - Congressional amendment to section 3(m) of FLSA

DOL/WHD Enforcement and Education Efforts

- “New” DOL more focused on educating employers and proactively encouraging compliance than prior administration, but no less aggressive in investigations
- [https://www.dol.gov/whd/data/](https://www.dol.gov/whd/data/)
- Payroll Audit Independent Determination (PAID) Initiative
- DOL Office of Compliance Initiatives
Increased US DOL/WHD Enforcement

- Record Back Wages Collected by WHD for FY 2018
  - $304.9 million
  - Increase from $270.4 million in FY 2017 and $266.8 million in FY 2016

- WHD Enforcement Results FY 2018
  - FLSA recovery of overtime totaled $194.2 million in 11,018 cases
  - FLSA recovery of minimum wage totaled $32.4 million in 10,071 cases
  - FMLA recovery totaled $1.8 million
  - Food services top low wage industry: $42.9 million

Recent DOL/WHD Opinion Letters

- Two letters released March 14, 2019
  - Wage and recordkeeping requirements for residential janitors and “good faith” defense
  - Compensability of time spent participating in an employer-sponsored community service program

- Other opinion letters released in 2018/2019
- WHD opinion letter webpage offers a search function allowing users to search by keyword, year, topic, and a variety of other filters
Enforcement Efforts: OD Experience

- Most schedule on-site interviews within 7-10 days of initial visit/letter (and adjourn with call)
- Sometimes disclose reason for investigation – random vs. report
- Often focus on other issues beyond initial scope – uniform deductions, expense reimbursement, travel time, meal/rest periods
- Similar length and aggressiveness level
- Findings typically not confirmed in writing
- Often willing to forego liquidated damages

“Lucky 7” Compliance Tips

1. Audit pay and timekeeping practices *before* an investigator shows up
   - Consider working with counsel in an effort to preserve privilege
   - Identify and mitigate potential risks that employees are performing off-the-clock work
   - Be especially diligent if you have acquired employees from another entity through a merger or acquisition
“Lucky 7” Compliance Tips (cont’d.)

2. Carefully consider the law before classifying an employee as exempt or an individual as an independent contractor
   – Audit periodically as conditions change
   – Consider working with counsel in an effort to preserve privilege

“Lucky 7” Compliance Tips (cont’d.)

3. If employees are not being paid for their meal breaks, ensure that they are taking full, uninterrupted meal breaks of at least 30 minutes
   – Be especially careful if employees are consistently recording unpaid meal breaks of exactly 30 minutes
   – Be especially careful if you auto-deduct for meal breaks
“Lucky 7” Compliance Tips (cont’d.)

4. Include commissions, bonuses, and other forms of non-discretionary incentive pay in regular rate calculations, and be sure you are calculating the regular rate correctly
   - DOL investigators always will ask about these topics
   - Commissions, bonuses, and other forms of incentive pay based on performance over more than one workweek often trip up employers
   - Shift premiums, on-call time, travel time, and training time also are topics that tend to trip up employers

“Lucky 7” Compliance Tips (cont’d.)

5. Assign internal point person to handle document collection (which may be more challenging with electronic databases)
   - Can that person also interpret the documents, or do you need to identify someone else for that?
   - Will that person communicate with the investigator directly, or do you want all communications regarding interpretation of documents to be handled by outside counsel?
“Lucky 7” Compliance Tips (cont’d.)

6. Question the investigator and understand the scope before providing documents or other information, and before the investigator conducts any interviews

7. Know/learn the law or involve someone who does, and make your case to the investigator through regulations and opinion letters
Wage and Hour Power Hour: Overtime and Other Happenings

Presenters
Cynthia A. Bremer (Minneapolis)
Alfred B. Robinson Jr. (Washington, D.C.)

Moderator
Steven F. Pockrass (Indianapolis)