Podcast

MYR 2024: DOL Final Rule Governing the White-Collar Exemptions to Overtime

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By almost any measure, 2024 is a memorable year for employment and labor law — and it's only halfway done. Our timely report, Mid-Year 2024: Now + Next, takes a closer look at the recent rules, regulations and rulings affecting employers today, the rest of the year and beyond.

Transcript

Welcome to Jackson Lewis's podcast, We get work™. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable, and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted?

No matter the month or year, employers can count on one thing, changes in workplace law. Having reached the midway point of the year, 2024 has proven to be no exception, with many significant changes and potential challenges ahead for employers. What follows is one of a collection of concise programs as We get work™; the podcast provides the accompanying voice of the Jackson Lewis 2024 Mid-Year Report, bringing you up-to-date legislative regulatory and litigation insights that are taking place now and what you can expect next in the second half of this year. We invite you and others at your organization to experience the report in full on JacksonLewis.com or listen to the podcast series on whichever streaming platform you turn to for compelling content. Thank you for joining.

Jeffrey W. Brecher
Principal and Wage + Hour Co-Leader

Hello, everyone. This is Jeff Brecher, and I wanted to speak to you today regarding the U .S. Department of Labor final rule governing the white-collar exemptions to overtime.

Today is July 16, and the first phase of the increase is effective. We're going to talk about what that increase is, the next phase, and also some legal challenges to the Department of Labor rule.

For some background, we're talking again about the executive, administrative and professional exemptions, sometimes referred to as the white-collar exemptions and

sometimes referred to as the EAP exemptions. They are exemptions from overtime and minimum wage. There are three requirements that have to be met in order to satisfy those:

- The first is that the individual must be paid a minimum salary level, which is what we're going to be talking about today.
- Second is that they have to be paid on a salary basis. And what that means is that they receive the same salary each week that's not reduced based on the quality or quantity of the work that the individual was employed. Of course, an exempt employee can receive additional wages, but they can't receive less wages than their salary based on the quality or quantity of the work they perform, except for certain enumerated exceptions. So that's the salary basis requirement.
- And then the third is the duties requirement, that they have to perform the duties that are applicable to each one of these exemptions. There are very specific requirements for the exemptions and the duties for each of them.

The final rule that the Department of Labor implemented does not affect the salary basis requirement [bullet 2 above] and it does not affect the duties requirement [bullet 3 above]. It only affects the salary level requirement — and under the 2024 rule, there are essentially three things that it does:

- The first is that it increases the salary level for the standard exemption, executive, administrative and professional exemptions, and it does that in two phases.
  - The first increase is July 1st, which has already occurred. The minimum salary level is going up to $844 per week or about $43,888.
  - Then there is a second phase increase, which would be effective January 1st of 2025. And the minimum salary level is going up to $1,128 per or $58,656 a year.
  - That's the first requirement or the first implementation for this rule.
- The second change the rule makes is with respect to the highly compensated exemption. That exemption is very similar to all of the white-collar exemptions, but it relaxes the duties requirement. So, they still have to be paid a salary basis. They still must perform duties that are covered by the exemption, but it's not as rigorous.
  - The salary level for that highly compensated exemption is also increasing, again, in two phases. The first phase, July 1st, which already passed, is going up from $107,432 to $132,964. And then the second increase is going on January 1st of 2025, and that's going to go up to $151,164.
  - So those are pretty big increases. The July 1st increase is more moderate, but the January 1st increases are significant. And the differences in how the Department of Labor calculates each one of those increases. One is based on the 20th percentile for the standard exemption — the 20th percentile of full-time salaried workers in the South. And then in January, they changed the methodology so that it's based on the 35th percentile. So that's what causes that big increase.
- The third change with the rule is automatic updates. For the first time, the Department of Labor regulation is requiring that every three years, so that'll begin in 2027, the salary levels will increase automatically.

- There are exceptions depending on how the economy is doing, but there won't be another regulation that has to be implemented. It will be automatic.

So those are the changes that are going into effect. As I said, the first one, the first phase was effective July 1st and the second is January 1st of 2025.

But there have been several legal challenges that have been brought to invalidate the rule. Most significantly, we did have a decision on June 28,[2024] which was right before the effective date of the first increase in a case called *State of Texas v. the Department of Labor*. In that case, the State of Texas sued the USDOL in the Texas District Court and sought a preliminary injunction against the rule, arguing that the rule was invalid because, among other things, the FLSA does not require a salary level for the exemption to apply.

And it's kind of an interesting point in the sense that the FLSA does not specify a particular salary requirement at all. It is a requirement that the Department of Labor imposed early on when the FLSA was passed in 1938. But the statute itself says that an individual is exempt if they're employed in a bona fide capacity as an executive, administrative or professional employee. It doesn't say anything specifically about any salary requirement or salary level requirement.

And the district court judge there agreed and held that it was likely that the rule was and is invalid and issued a preliminary injunction blocking the rule. The injunction was limited only to the state of Texas — so only Texas employees that were employed by the state of Texas. The court did not issue a nationwide injunction. But the underlying reasoning of the judge would apply to any employer. It's just the plaintiff in that case was only the state of Texas, so that's why the case was limited to that.

But it does preview perhaps that other courts may issue a broader injunction relating to the salary level rule, but we'll have to see how that progresses. That case is progressing. It's now going to move to summary judgment and the parties are going to brief that and then the judge will make a final decision.

Meanwhile, there is another case pending also addressing the same issue, but under the prior increase. This would have been the increase that occurred under the Trump administration. That case is called *Mayfield v. the Department of Labor.* And in that case, the plaintiff similarly argued that the department has no authority to impose any salary level requirement because that is inconsistent with the statute. Again, the FLSA doesn't say anything about salary. The argument is that the department has no authority to impose that requirement.

That case has progressed because the district court denied the plaintiff's motion for summary judgment and said the DOL does have that authority. But that case is on appeal now at the Fifth Circuit, and oral argument is scheduled in that case for August 7, 2024. That is a very important decision because it is a circuit court and it is addressing the threshold issue about whether you can have any salary requirement under the FLSA. So, stay tuned for that one.

I should also say that it is likely to be influenced by a very recent U.S. Supreme

Court case called *Loper Bright*, which overruled an earlier Supreme Court case called *Chevron* and essentially held that federal judges do not have to defer to agency interpretation of statutes when the court believes that interpretation is wrong.

Previously under *Chevron* a district court judge was required to defer, even if they disagreed, with an agency interpretation of a statute, as long as it was reasonable. But the Supreme Court overruled that. And that may play into the viability of the current Department of Labor regulation and the Fifth Circuit's consideration of that.

The Fifth Circuit actually asked for supplemental briefing relating to the Supreme Court's recent decision, and I'm sure that that will be discussed at the oral argument on August 7 [2024]. So, stay tuned to see what happens then. It's possible that the Fifth Circuit might invalidate any salary level requirement, and if so, that could jeopardize the rule for all employers, all employees, depending on how you look at it nationwide.

But as it stands now, the rule is effective and employers should be preparing for a possible increase in January. So, you have several options, but one thing that you should do is make a list of all employees who do not satisfy the anticipated salary level under the FLSA beginning in January. Once you've identified those individuals, you'll have some choices to make:

- One, you may reclassify them as non-exempt and eligible for overtime.
- Two, you might increase their salary so they satisfy the salary level.
- Or three, you might reduce their hours so that they're not triggering any overtime payments.

There are all sorts of considerations that you need to consider in making that third choice. One of them always is wage compression. If you raise the salary of those individuals, does that result perhaps in an individual who is being supervised, making very close to their supervisor now, and so you're going to have to do further increases for everybody up the line. How will it affect morale? How will it be communicated? There's a lot of issues in making that determination.

But again, stay tuned. We'll see how this plays out in the courts. It's an exciting time for wage and hour attorneys. Please check our website and sign up for our alerts so that we can get the latest breaking news to you when it occurs. Thanks everyone.

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