

Pennsylvania DLI proposal would more than double exempt threshold

What the Obama administration attempted to do at the federal level, the Wolf administration will now try at the state level. The Pennsylvania Department of Labor and Industry has submitted a proposed rule to amend the regulations that exempt executive, administrative and professional salaried workers from overtime requirements under Pennsylvania's Minimum Wage Act of 1968.

The effect would be to make many more workers eligible for overtime pay under state law—even those who aren't eligible under federal law.

Raising the salary threshold

Pennsylvania has not updated its overtime regulations since 1977. As a result, the DLI says, "Pennsylvania's EAP salary thresholds have failed to keep pace with economic growth and the rising nominal salaries of exempt salaried workers." The current threshold of \$250 per week would be raised under the proposed rule to:

- \$610 per week (\$31,720 annually) effective on the date the final rule is published in the Pennsylvania Bulletin
- \$766 per week (\$39,832 annually) one year later
- \$921 per week (\$47,892 annually) a year after that.

The proposal would index the threshold to inflation with adjustments every three years. On Jan. 1 of the year beginning three years after the rule's publication, the salary threshold would be adjusted to "the 30th percentile of weekly earnings of full-time non-hourly workers in the Northeast Census region in the second quarter of the prior year as published by the United States Department of Labor, Bureau of Labor Statistics." The same adjustment would be made every three years after that.

Under the proposed regulations, up to 10% of the EAP salary amount could be paid with "non-discretionary bonuses, incentives or commissions" that are paid, at a minimum, on a quarterly basis.

Changes to the duties test

In addition to meeting the salary threshold, EAP employees must also meet a duties test to be eligible for overtime pay.

The new duties test moves the state's regulations closer to U.S. Department of Labor regulations implementing the Fair Labor Standards Act. For example, the proposed regulations eliminate the current requirement that exempt EAP employees must not devote more than 20% of their hours in a workweek to activities that are "not directly and closely related to" or "an essential part of or necessarily incident to" the duties listed in the duties test.

The proposal adapts federal language for administrative exempt employees when it states that the employee

meets the duties test only if he or she “customarily and regularly exercises discretion and independent judgment with respect to matters of significance.”

DLI’s proposal requires executive employees to “customarily and regularly exercise discretionary powers” in order to qualify for exemption. This language is not in the federal regulations.

Challenges on the horizon

The new DLI proposal will likely face challenges like those the Obama administration faced when it tried to raise the federal threshold. Business groups, such as the Chamber of Commerce, will likely challenge the hike to \$31,720. In 2016, a Texas federal court struck down the DOL’s proposal, claiming the proposed federal threshold of \$47,476 “was so high it rendered the duties test for the EAP exemptions irrelevant.”

Clearly, the Wolf administration is trying to thread the needle with this proposal, choosing a threshold that is high enough to spur wage growth, but low enough not to succumb to the federal court’s duties-test objection.

What employers need to do

Once the proposed regulations are published in the Pennsylvania Bulletin, the public will have 30 days to submit written comments about the proposed amendments. Concerned employers should voice their concerns and contact industry groups to coordinate a response.

If the proposed rule goes into effect, exempt employees currently earning less than the new proposed threshold of \$31,720 would suddenly be eligible for overtime pay.

Employers should plan budgets based on the hours those employees currently work. Then run another scenario in which employees whose duties qualify them for the exemption were given raises to put them above the threshold. This exercise will provide the basis for a cost comparison.

Should the proposal go through, it is not clear how long the transition period will be. Employers are better off being prepared for the change than waiting to see what happens.

Because the issues are complex, it’s essential to confer with an attorney who has extensive wage-and-hour law experience. Competent counsel can analyze job duties to ensure jobs are classified properly and may suggest changes to job duties that may lower overall costs. Your attorney can also weigh in on the effect of bonuses, incentives and commission structures.

Clearly, if it occurs, the transition will be complex. Pennsylvania employers should begin planning now for the change.