Human Resources
BULLETIN

Human Resources Summer Compliance Updates

• **October 9, 2023** •

It was a busy compliance summer for employers, as several impactful pieces of legislation/rulemaking were either effectuated or proposed that could significantly impact employer's workplaces. The Pregnant Workers Fairness Act and material changes to the I-9 process were effectuated, and the Department of Labor proposed new rules regarding the white collar exemptions under the FLSA. This bulletin is intended to summarize these changes and provide employers with guidance on next steps to implement compliant policies and procedures within their organizations.

Pregnant Workers Fairness Act

The Pregnant Workers Fairness Act (PWFA) is currently in effect and impacts employer responsibilities related to workplace accommodations for pregnancy-related conditions. The Act's effective date was June 27, 2023.

The PWFA provides protection for employees who have known limitations related to pregnancy, childbirth and related medical conditions. The PWFA applies to covered employers in the private or public sector with at least 15 employees.

Important provisions of the PWFA for employers to understand include the following:

- Employers must not require an employee to accept an accommodation without a discussion between the employee and the employer related to the accommodation.
- Employers must not deny employment opportunities to a qualified employee or job applicant because of the person's need for a reasonable accommodation under the PWFA.
- Employers must not require an employee to take a leave if there is a reasonable accommodation that would allow the worker to remain working.

It is unlawful under the PWFA for employers to retaliate against a person who reports or

opposes prohibited discrimination under the PWFA or who participates in a PWFA proceeding or investigation. Any interference with an employee's righs under the PWFA is prohibited by the Act.

PWFA's ADA-Like Requirements

The PWFA has ADA-like requirements and borrows definitions and the requirement of engaging in an interactive process from the ADA. One important distinction between the ADA and the PWFA is that under the PWFA employers need to accommodate employees who are unable to perform an essential job function provided the inability is for a temporary period, the essential job function can be resumed in the near future, and the inability to perform the essential job function can be reasonably accommodated. Under the ADA, qualified employees must be able to perform the essential functions of the job with or without accommodation.

The PWFA is modeled after the ADA and reasonable accommodations under the PWFA may include changes to the work environment and general work processes. Under the PWFA employers are required to provide such reasonable accommodations unless they would create an "undue hardship" on the employer's business operations. The standard for establishing an undue hardship is whether the accomodation creates a significant difficulty or expense for the employer. As with the ADA, establishing that an accommodation creates an undue hardship can be difficult for employers and the determination takes into account the size and financial resources of the employer's operations.

With the PWFA in effect, employers should contemplate and understand various potential reasonable accommodations that may be appropriate for pregnant employees. These will vary based on the type of work the employee is performing and the employee's pregnancy-related limitations.

The U.S. Equal Opportunity Commission (EEOC) has provided some examples of possible accommodations that are instructive to employers. These accommodation examples include: allowing pregnant workers to have flexible work hours; providing parking closer to the employee's work location, providing additional break time to eat, rest and use the bathroom, taking leave or time off to recover from childbirth, and temporarily excusing work tasks that are strenuous or that require exposure to compounds unsafe for pregnancy.

The EEOC issued proposed regulations for the PWFA on August 11, 2023, and is currently soliciting feedback on these rules during an established 60-day comment period ending October 10, 2023. While they are not final, these proposed regulations can provide interim guidance for employers that are navigating current PWFA scenarios.

Employers should make sure that management and human resources employees understand the requirements of the PWFA. It is important that management employees are able to identify accommodation requests and are instructed to direct any accommodation requests to

the appropriate human resources personnel. Making sure human resources or other trained and knowledgable personnel are conducting the required interactive process serves to mitigate risk and protect the employee's privacy.

By supporting pregnant employees and interactively engaging with them through the accommodation process, employers can support their workers while meeting their legally required obligations.

The PWFA's Interaction with State or Local Laws

The PWFA does not replace any federal, state or local laws that offer more extensive protection to employees affected by pregnancy, childbirth or pregnancy-related medical conditions. Employers in states with more protective laws related to pregnancy and pregnancy-related conditions need to make sure they are providing the greatest applicable required protections to their employees while complying with their obligations under the PWFA.

Next Steps

Employers should make sure their HR and management staff are trained to recognize and comply with the PWFA. They should make sure these key organizational resources are knowledgeable on the Act's requirements and understand their responsibilities to engage with employees to determine appropriate accommodations (the interactive process).

Employers should also make sure the latest "Know Your Rights: Workplace Discrimination is Illegal" poster, which includes the PWFA, is posted at their worksites and on their company intranet site, if applicable.

ADDITIONAL RESOURCES

"What You Should Know About the Pregnant Workers Fairness Act" FAQs

Proposed Regulations to Implement the PWFA

Department of Labor Proposed Overtime Rule

On August 30, 2023, the U.S. Department of Labor (DOL) released a proposed rule to raise the salary threshold for exempt employees from $684 per week ($35,568 annually) to $1,059 per week, which equates to employees needing to earn $55,068 or more per year to be exempt from overtime pay. The proposed rule also would increase the total annual compensation requirement for highly compensated employees to $143,988 per year and outlined an automatic update provision for setting future overtime thresholds. Should this rule be finalized, it will be far-reaching, as the DOL estimates that it could impact an estimated 3.6 million American workers. The proposed rule is open for public comment for 60 days (until October 29, 2023), so employers should begin the process of assessing potential impact on their payroll and organization to develop a strategy if the rule is ultimately implemented.

Background

Under current rules in effect since January 1, 2020, employees must meet three requirements to be classified as exempt from overtime under the FLSA executive, administrative, or professional exemptions:

- Meet a "duties test" (perform certain duties in the position)
- Be paid on a salary or fee basis; and
- Be paid at least $684 per week, which is roughly $35,568 a year.

There are some exceptions to the above requirements. For example, employees earning at least $107,432 a year may also be exempt under the "highly compensated employee" exemption if they satisfy a shortcut version of the duties test. There are also certain types of employees such as doctors, lawyers, and teachers, that don't need to meet the above tests to be classified as exempt.

Proposed Changes

The DOL is proposing three main changes to the current rules:

- Raise the exempt salary threshold from $684 per week to $1,059 which the DOL characterizes as the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (Southeast), meaning employees would need to earn $55,068 or more per year to be exempt from overtime pay;
- Raise the total annual compensation requirement for highly compensated employees to $143,998 per year which the DOL characterizes as the 85th percentile of full-time salaried employees nationally;

- Automatically update the compensation thresholds every three years based on then-current wage data; and
- Adjust compensation thresholds for exempt status to Puerto Rico, Guam, U.S. Virgin Islands, Commonwealth of the Northern Mariana Islands, American Samoa and the motion picture industry.

The DOL is not proposing any changes to the duties test currently, which is likely a positive for employers. The DOL noted that if the rule is finalized as proposed, the salary threshold will likely be higher than currently calculated as it will be tied to the then-current wage information from the Bureau of Labor Statistics. Based on that thinking, if the rule is finalized by the end of 2023, the salary level could be as high as $59,285 per year. If the rule is finalized in early 2024, the salary level could be as high as $60,209.

Potential Hurdles

As noted above, the notice and comment period will be open through October 29, 2023, but could potentially be extended depending on the number of comments received. This process can be time-consuming, so although it could be fast-tracked, it is likely that the rule would be effective in early to mid-2024.

During this period, it is possible that the rule will be challenged in court, as it successfully was in 2016 during the Obama administration, when a Texas federal court blocked the rule from taking effect at the last moment. Regardless of the history, employers should prepare for the likelihood of the rule being finalized and effectuated when assessing its potential impact within their organization.

Next Steps

- Assess current pay practices and become familiar with the exemptions currently utilized to claim exempt status for salaried exempt employees within the organization;
- Since the duties test is not changing, employers should target employees in the range of the proposed salary level and highly compensated employee increases to determine which employees could potentially be reclassified as non-exempt due to increases in those areas;
- Analyze those employees affected by the changes and determine whether leaving them as non-exempt and eligible for overtime is acceptable within the organization or whether to implement strategies for those employees to maintain their exempt status:
- Assess the potential negative impact on morale for those employees changed from salaried exempt to hourly non-exempt;

• Prepare a communication plan if employee pay changes will occur so that discussion of the changes will be a smooth transition and not a stressful experience for the employees and the employer; and

• Be prepared to train both managers and newly non-exempt employees on the differences that exist between being exempt and non-exempt which could include not only different pay practices but potentially different benefits.

Employers should plan for these proposed changes to occur in order to properly assess organizational impact and develop a proactive plan to address the changes. As noted, there are still hurdles that could derail the effectuation of this proposal, but it is unlikely. It is more likely that the rule will be effectuated with some changes due to comments collected during the notice period, so employers should be prepared to pivot should the requirements change upon finalization.

ADDITIONAL RESOURCES

DOL News Release

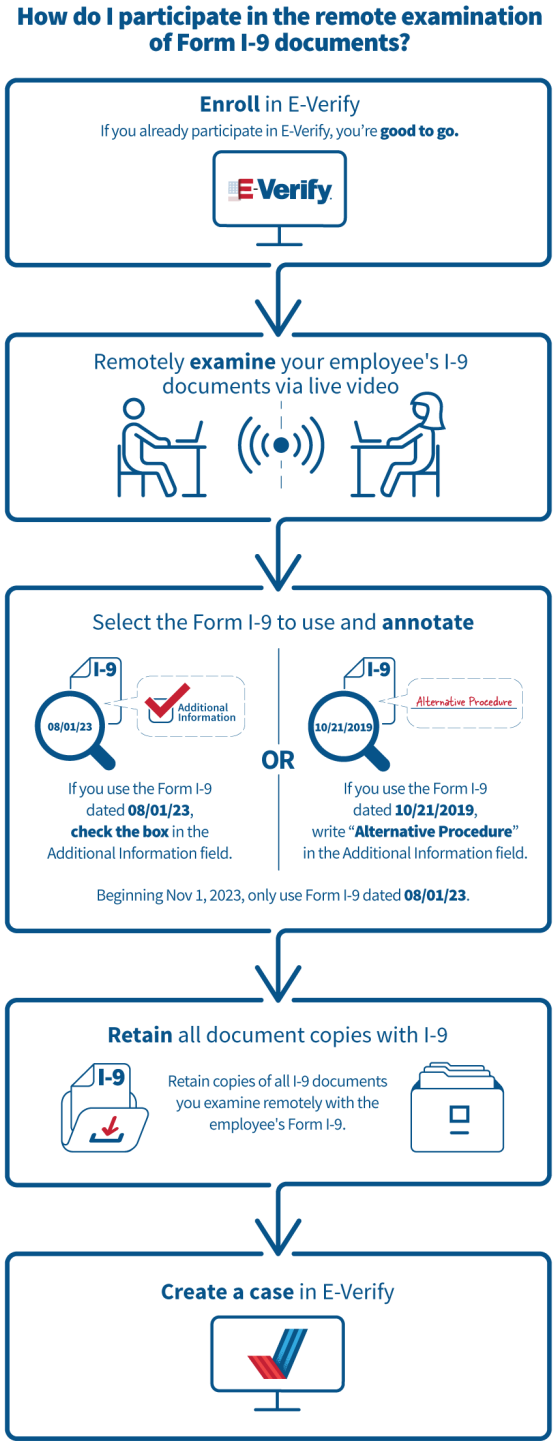
Proposed Overtime Rule

New Form I-9 Alternative Procedure to Remotely Examine Employee Documents

The United States Department of Homeland Security (DHS) recently announced changes regarding Form I-9, Employment Eligibility Verification. Effective August 1, 2023, the new I-9 form allows qualified E-Verify employers to use an alternative document inspection procedure when completing Sections 2 or 3. Under this alternative procedure, E-Verify employers may complete document verification remotely instead of physically examining the original document(s) during an in-person meeting with the new hire (or existing employee during reverification).

DHS is allowing employers three months to transition to the new version of Form I-9. Thus, employers may lawfully continue to use the existing version of Form I-9 (issuance date of October 21, 2019) through the end of business on October 31, 2023. By November 1, 2023, all employers must use the new version of Form I-9 for new hires and reverifications. There are several steps employers must take to meet the new requirements.

1) Employers that wish to use remote document verification must be enrolled in the E-Verify program and be in "good standing" at the time that they rely on the new procedure.
2) The employer must examine copies (front and back, if the document is two-sided) of Form I-9 documents or an acceptable receipt to ensure that the documentation presented reasonably appears to be genuine and relates to the employee and must then conduct a live video interaction with the individual



presenting the document(s) to ensure that the documentation reasonably appears to be genuine and relates to the individual.

3) On the Form I-9 dated 08/01/2023, the employer must check the box to indicate that they used an alternative procedure in the Additional Information field in Section 2. On the Form I-9 dated 10/21/2019, the employer must notate "Alternative Procedure" in the Additional Information field in Section 2.
4) Employers must retain a clear copy (front and back, if two-sided) of all documents examined in a paper or electronic format, or in an acceptable combination, for as long as the employee works for the employer, plus the specified period after their employment has ended. In the event of a Form I-9 audit by a federal government inspector, the employer must make available copies of the identity and U.S. work authorization documentation the employee presented for remote document examination.

DHS provided the flow chart on the previous page to help properly guide employers through the new I-9 process. Keep in mind that E-Verify employers are not required to use the I-9 remote document verification procedure. If E-Verify employers choose to use this new procedure, they may do so for all employees or for only those Forms I-9 associated with employees who are working remotely. Employers must apply I-9 procedures fairly and consistently. Therefore, employers should not require certain remote employees to appear in-person at the company's offices to complete the I-9 process while allowing other remote employees to complete the I-9 process using the new standards.

ADDITIONAL RESOURCES

Summary of Changes to I-9 Form

USCIS Remote Examination Alternative Procedure Summary

E-Verify Enrollment