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Labor and Employment Update

The Department of Labor Includes Puerto Rico Under its New Overtime Exemption Rules, but "Promesa" Promises to Leave it Out

In 2014 President Barack Obama directed the Department of Labor (DOL) to update the overtime exemptions to the Fair Labor Standards Act (FLSA). On May 17, 2016, the DOL issued its final rule "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees". Under the FLSA, an employee who meets one of these definitions is exempted from overtime if: (1) the employee is paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed; (2) said salary meets a minimum specified amount; and (3) the employee's job duties primarily involve executive, administrative, or professional duties.

Until now, the minimum weekly salary that met prong two of the test was \$455 (or \$23,660 annually). The new rule raises this minimum weekly guarantee to **\$913 (or \$47,476 annually)**. Although the DOL was urged to exempt Puerto Rico from this standard, the final rules apply to the island for the sake of uniformity.

The changes are effective **December 1, 2016**, unless PROMESA (House Bill 5278) delivers its promise to create an exemption. Sec. 404 of HB 5278 would exempt Puerto Rico from these rules, at least until the U.S. Comptroller completes an assessment that concludes that their application would not have a negative impact on the economy of the island. The assessment must consider regional, metropolitan, and non-metropolitan cost-of-living differences. By way of comparison, roughly a third of the island's workers are employed at the minimum wage, more than double the proportion in the mainland, and managers earn approximately 63% of their stateside counterparts. Local unemployment is twice that of the mainland.

PROMESA would also allow the Governor, with the approval of the PROMESA Oversight Board, to apply FLSA's sub-minimum youth rate to certain employees who would not otherwise be covered by it. Under FLSA, the sub-minimum youth rate applies for the first ninety days of work, to employees under 20 years of age. PROMESA would allow the Governor to apply it to employees until they reach the age of 25. It is worth noting that, on May 19, Puerto Rico's Legislative Assembly almost unanimously passed Concurrent Senate Resolution 58, officially rejecting this part of then H.R. 4900 (predecessor of PROMESA). It remains to be seen whether the Puerto Rico Legislature can undercut by legislation a power granted to the Governor under federal law.

PROMESA is yet being marked up and debated in the U.S. House of Representatives. It is therefore uncertain whether these special labor provisions will make it into the final version of the law.



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Other changes of significance in the final FLSA overtime exemption rules include raising the total annual compensation to qualify as an exempt “highly compensated employee” from \$100,000 to \$134,004. Also, the rules now allow the use of nondiscretionary bonuses and incentive payments to satisfy up to 10% of the new standard salary level. Finally, the rules creates a mechanism to automatically update the salary and compensation levels every three years.

Our attorneys at Reichard & Escalera are available to assist you in understanding and implementing these developments. For more information regarding the new DOL rules you may also access <https://www.dol.gov/WHD/overtime/final2016/overtime-factsheet.htm>.

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