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Understanding New Salary Thresholds for Overtime Exemptions: What Employers Need to Know

The first increase in the amount that must be paid to allow an employee, whose job meets one of the "duties" test, to be exempt from overtime goes into effect, barring any court stay, on July 1, 2024. The salary thresholds are as follows:

Salary Threshold	**Current**	**Phase One – Effective July 1, 2024**	**Phase Two – Effective January 1, 2025**
Duties Test Exempt	$684	$844 per week ($43,888 annually)	$1,128 per week ($58,656 annually)
Highly Compensated Employees	$107,432	$132,964	$151,164

Up to 10% of the required salary amounts may be satisfied by **nondiscretionary** bonuses, incentive payments and/or commissions, if these payments are made at least annually.

Each pay period an employer must pay the employee at least 90 percent of the minimum required salary.

The Department recognizes that some businesses pay significantly larger bonuses; where larger bonuses are paid, however, the amount attributable toward the standard salary level is limited to 10 percent of the required salary amount for the workweek. Note, that this does not mean bonuses are capped. It only means that the amount an employer may credit against the weekly required salary is limited to 10%.

Example: Employee A meets the duties test for an executive employee. Employee A receives a salary of $795.60 per week and two production bonuses; $1300 in June and $2500 in December. As a result, Employee A's total salary for the year is:

- $795.60 (salary) x 52 weeks = $41,371.20 amount paid in salary on a weekly basis.
- $41,371.20 (salary paid) + $3,800 (Bonuses earned) = $45,171.20 (salary plus nondiscretionary bonuses paid).

Employee A received $795.20 per week on a salary basis, which is 90% of the required salary level. Employee A's salary and nondiscretionary bonuses total $45,171.20, which exceeds the required salary level of $43,888 ($844 x 52 weeks) for that period. Because Employee A meets the duties test for an exempt executive and met the salary level requirements, Employee A is exempt from overtime pay for the year.

For a detailed exploration of these exemptions and how they intersect with state regulations, particularly in audits concerning misclassification of employees, see our previous post on the implications of New Jersey Department of Labor audits.

TAKEAWAY: In preparation for the upcoming changes in salary thresholds for overtime exemptions, employers should ensure compliance to avoid potential misclassification risks. If you have questions contact Tracy A. Armstrong or any member of the Wilentz Employment Law Team.

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Update On Severance Agreements: SpaceX Fights Back Against The National Labor Relations Board Declaration That Its Severance Agreements Are Invalid

Elon Musk's SpaceX is the latest in a line of businesses to fight back against complaints by the National Labor Relations Board ("NLRB") alleging unfair labor practices. Amazon recently challenged the NLRB's position that it engaged in alleged illegal retaliation against workers at its Staten Island warehouse by claiming that the NLRB's actions were unconstitutional. Now SpaceX has filed a lawsuit claiming that the NLRB's actions are unconstitutional after the Agency declared that SpaceX's severance agreements contain invalid confidentiality and non-disparagement clauses.

The National Labor Relations Act ("NLRA") provides that workers can engage in "concerted activity" in order to improve their working conditions, which includes sharing information about their working conditions. In a March 20, 2024 Complaint, the NLRB accused SpaceX of entering into severance agreements with terminated employees nationwide that contained unlawful confidentiality and non-disparagement clauses. SpaceX's confidentiality clause binds the employee not to publicize or disclose, except to attorneys, accountants, tax preparers, and financial advisors, the provisions of the settlement agreement. The non-disparagement clause binds the employee not to "disparage the Company, its officer, directors, employees, shareholders, and agents in any manner likely to be harmful to its or their business, business reputation, or personal reputation." The severance agreement excludes from its ban against disclosure of "information about unlawful acts in the workplace, such as harassment or discrimination." The third clause that the NLRB found unlawful limited the ability of the employee to provide assistance to any employee with "respect to any complaints, concerns, claims or litigation or any kind" against the company unless compelled by court order or subpoena. The NLRB's Complaint alleges that the above clauses, and others, constitute unfair labor practices against employees because they prevent employees from being able to engage in concerted activity.

On April 19, 2024, SpaceX fired back by filing a Complaint alleging that the NLRB's Complaint and requested relief, including subjecting SpaceX to an administrative proceeding was unlawful. The Complaint alleges that the NLRB does not have the legal authority to bring SpaceX before an administrative law judge for a hearing. SpaceX claims that doing so violates the United States Constitution by usurping authority that does not belong to it.

TAKEAWAY: Employers should continue to follow the legal battles between the NLRB and SpaceX over the legality of certain clauses in severance agreements in order to ensure that their severance agreements are up-to-date with the law. This area of the law is constantly changing, and if you need assistance in making sure your business's severance agreements are lawful, or with any other area of federal or New Jersey employment law, contact Stephanie Gironda or any member of the Wilentz Employment Law Team.

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New Jersey Supreme Court Invalidates Non-Disparagement Clauses in Discrimination Settlements

The New Jersey Supreme Court has ruled that non-disparagement provisions in settlement agreements are unenforceable if they have the purpose or effect of preventing parties from revealing details relating to claims of discrimination, retaliation, or harassment.

The facts before the court relate that Christine Savage had filed suit against the Township of Neptune Police Department, alleging discrimination, retaliation, and sexual harassment. The matter was resolved when the parties entered into a settlement agreement, which contained a non-disparagement provision that prevented both sides from "mak[ing] any statements ... regarding the past behavior of the parties, which ... would tend to disparage or impugn the reputation of any party." Following the settlement, Savage went public in speaking with a television reporter, prompting the Township to file a motion to enforce the settlement agreement.

The question before the New Jersey Supreme Court was whether a non-disparagement provision in a settlement agreement can stop parties from revealing details relating to claims of discrimination, retaliation, and harassment, which is protected speech under the New Jersey Law Against Discrimination.

The unanimous decision from New Jersey's highest court clarifies the 2019 law that removed an employer's ability to demand a gag order of victims of discrimination in settlement agreements. That law states, "[a] provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment...shall be deemed against public policy..." N.J.S.A. 10:5-12.8(a).

The Court found that the non-disparagement clause the parties had agreed to, conflicted with the New Jersey Law Against Discrimination as it had the effect to bar speech that the law protects – speech that includes "details relating to a claim of discrimination, retaliation, or harassment." Id. In the future, non-disparagement provisions should be examined in the same manner as non-disclosure provisions – if they prevent a party from discussing the specifics of a discrimination, retaliation, or harassment claim, then such a provision goes against public policy and cannot be enforced.

TAKEAWAY: Employers and employees resolving claims of discrimination, retaliation and/or harassment cannot agree to restrict an employee's right to speak out about their underlying claims. To be clear, non-disparagement provisions can be enforceable, provided they do not have the purpose or effect of restricting an employee's ability to disclose the details of claims of discrimination, retaliation, or harassment.

If you have questions about the terms of your settlement agreement, a non-disparagement provision, a non-disclosure provision, or your rights, contact Meghan Chrisner-Keefe or any member of the Wilentz Employment Law Team.

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Employment Law Update: New York Passes First Prenatal Paid Leave

New York is the first state to pass a law requiring paid "prenatal personal leave."

The law, signed into law on April 22, 2024, goes into effect on January 1, 2025. It amends the New York Sick Law and requires New York employers to provide employees with 20 hours of paid prenatal leave during a 52 week period to enable employees to receive prenatal health care. New York Paid Personal Prenatal Leave passed on the heels of the federal Pregnant Workers Fairness Act, which was signed into law on June 27, 2023. It is anticipated that other states will follow New York's lead and pass legislation providing paid leave for prenatal health care.

The Basics of New York's Paid Personal Prenatal Leave

Paid prenatal leave applies to all New York employers and there is no minimum employee threshold. The leave is in addition to the leave provided by the New York Paid Sick Leave Law and New York Paid Family Leave. Paid personal prenatal leave is defined as "leave taken for the health care services received by an employee during their pregnancy or related to such pregnancy, including physical examinations, medical procedures, monitoring and testing, and discussions with a health care provider related to the pregnancy." The leave may be taken in hourly increments and is paid at the employee's regular hourly wage (or alternatively, the New York minimum wage, whichever is higher). Employers are not required to pay out employees for unused prenatal leave at the end of an employee's employment.

Relationship With New York Paid Sick Leave Law

The Paid Prenatal Personal Leave amendment is subject to some of the same requirements as the law it amends, the New York Paid Sick Leave Law. Thus, employers are barred from releasing confidential information about an employee's paid prenatal personal leave. The law also forbids retaliation against an employee who requests or takes paid prenatal personal leave.

There are some unanswered questions regarding the implementation of the Paid Prenatal Personal Leave amendment. These include specifics regarding employee notice and documentation requirements, and whether leave hours carry over from year to year. The New York Department of Labor is expected to publish FAQs or regulations to address these questions in the near future.

Takeaway: Employers with New York employees should ensure that they provide paid prenatal personal leave. In addition, employers with New York employees should review their handbooks and amend them to include paid prenatal personal leave. Finally, employers should be on the lookout for the FAQs/regulations that the New York Department of Labor will publish for clarifying information about the new law. If you have questions on New York Prenatal Personal Leave or any federal or New Jersey employment law, contact Stephanie Gironda or any member of the Wilentz Employment Law Team.

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New York City Employers Must Provide Employees with Recently-Issued "Workers' Bill of Rights" by July 1, 2024

On March 1, 2024, the Department of Consumer and Worker Protection ("DCWP") issued the "Workers' Bill of Rights," which serves as a comprehensive guide to employee rights in New York City. New York City employers should familiarize themselves with the Workers' Bill of Rights and prepare to comply with the notice requirements that accompany it.

Workers' Bill of Rights

The DCWP created the Workers' Bill of Rights as an overview of important New York City, New York State, and federal laws in the workplace. For example, the Workers' Bill of Rights includes information about rights enforced by the DCWP, including, but not limited to, paid safe and sick leave, temporary schedule changes, and fast food worker rights. The Workers' Bill of Rights also outlines the rights enforced by other New York State and federal agencies, such as minimum wage and hour rights, family and medical leave, and discrimination-free workplace.

Notice Requirements

Employers in New York City must provide their employees with the multilingual "Know Your Rights at Work" poster, which refers them to the Workers' Bill of Rights webpage. Specifically, employers in New York City are required to:

1. Post the "Your Rights at Work" poster where employees can easily see it by July 1, 2024. Employers must also post the "Your Rights at Work" poster to their intranet or mobile app if they offer one to employees;
2. Provide a copy of the "Your Rights at Work" poster to each current employee by July 1, 2024; and
3. Provide a copy of the "Your Rights at Work" poster on or before an employee's first day of work starting after July 1, 2024.

Penalties for Noncompliance and Enforcement

Employers who fail to post or distribute the "Your Rights at Work" poster could face a civil penalty of $500 for each violation. However, for a first violation, the Commissioner of the DCWP will issue a warning and request that the employer correct the violation within 30 days.

Enforcement of the "Workers' Bill of Rights" will be complaint-based. Beginning July 1, 2024, employees can file a complaint online if their employer does not make the "Your Rights at Work" poster available.

Takeaway: If you are a New York City employer seeking additional guidance on complying with these obligations, contact Nicholas Rollo or any member of the Wilentz Employment Law Team.

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Employers beware! You are not Exempt from New DOL Thresholds regarding Overtime Eligibility

The FLSA has long utilized a three-part test to determine if an employee is exempt from receiving overtime. The test is as follows:

1. The employee must be paid a salary which does not vary;
2. The salary has to equal or exceed a set minimum amount; and
3. The employee's duties must consist of executive, administrative, or professional duties or the employee must work in a specialized area, such as computer professionals or commissioned sales employees [Salaried Employees May be Entitled to Overtime Pay].

On April 23, 2024, the US DOL released its final rule regarding raising the salary thresholds (#2

above). The current threshold is $684 a week/$35,568 a year.

The new rule raises the income threshold. As of July 1, 2024, the threshold will be $844 per week/$43,888 per year. Then, on January 1, 2025, the threshold will rise to $1,128 per week/$58,656 per year.

Additionally, highly compensated employees, who do not meet all of the elements of the third prong of the overtime exemption test,[1] may still be exempt from overtime if they earn at least $107,432 per year under the current rule. **Also, under the new rule effective on July 1, 2024, to be classified as a "highly compensated employee", an employee will have to earn at least $132,964 per year. This threshold will rise again on January 1, 2025, to $151,164.**

Lastly, automatic updates will take place every three years based on the latest earnings data.

TAKEAWAY: If an employer improperly classifies an employee as exempt (because they do not meet all three elements above, including paying the proper threshold) and, therefore, does not keep track of their time, the court will rely on the veracity of the employee's testimony in determining if overtime is owed. As a result, it's imperative that employers ensure employees are correctly classified and if you are unsure, contact Tracy Armstrong or another member of the Wilentz Employment Law Team.

Resources:

[1] FLSA regulations note that because a high level of pay is a "strong indicator" of exempt status, it eliminates the need for a "detailed analysis" of job duties. Thus, the regulations currently state, an employee earning a salary of $107,432 or more a year will qualify for exemption if the worker's primary duty is performing office/non-manual labor and the worker "customarily and regularly performs any one or more of the exempt duties" of an executive, administrative or professional employee.

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Employment Law Update: Are There Limits To Accommodation?

New Jersey employers should be aware that they must comply with the New Jersey Law Against Discrimination ("NJLAD"), which requires that it is an employer's duty to engage in an interactive process with an employee who needs accommodations because of a disability. Employers must provide accommodations for an employee who can perform the essential functions of a job with accommodations, unless there is no reasonable accommodation that will allow the employee to perform the essential functions of the job (or it is an "undue hardship" on the employer).

A New Jersey Case

A recent New Jersey case has raised questions regarding the duty of an employer to accommodate an employee whose disability makes it difficult for the employee to interact with the public, when interacting with the public is an essential function of the employee's job. Plaintiff John Casalnova filed suit against WaWa in the New Jersey Superior Court alleging that his employer failed to accommodate his Tourette syndrome ("TS"). TS is a condition of the nervous system that often results in an individual having motor or vocal tics, and making involuntary sounds or movements. Casalnova worked as a WaWa store manager with a six figure salary before he was diagnosed with TS. After he was diagnosed, he requested that WaWa accommodate any outburst resulting from his TS because it would be involuntary and caused by his disability, not an intentional violation of WaWa's policies and procedures. WaWa denied this request.

Casalnova alleges he then requested to be accommodated by a transfer to a non-customer facing position. After denying all accommodation requests without engaging in the interactive process required by law, Casalnova alleges, WaWa then retaliated against him for making these requests, resulting in two demotions.

A Federal Court Decision

Cameron Cooper, a delivery merchandiser for Coca-Cola Consolidated, Inc. ("CCC") who was diagnosed with TS, sued CCC for failure to accommodate him. A delivery merchandiser for CCC is responsible for merchandising, delivering, and the maintenance of "company standards" at company locations.

Cooper had a form of TS that caused him to involuntarily use inappropriate language, such racial slurs and profanity. The company received complaints from its customers and employees regarding Cooper's language. Cooper proposed that CCC provide him with a non-customer facing route, and the company stated it did not have such a position. CCC proposed that Cooper take an available non-customer facing warehouse position. Cooper took the warehouse position, but sued the company under the Americans with Disabilities Act ("ADA") alleging failure to accommodate his disability.

The Sixth Circuit Court of Appeals, which decided this case, examined whether "excellent customer service" was an essential function of the job of delivery merchandiser. The Court held that it was, relying on the words of the employer's job description and Cooper's admission. The Court then determined whether Cooper could provide excellent customer service with an accommodation. The Court ruled that he could not, because of his involuntary use of racist and profane words. The Sixth Circuit then dismissed Cooper's claims ruling that he could not identify a reasonable accommodation to allow him to perform the essential job function of "excellent customer service."

The Complaint in Caselnova does not mention that the employee had any episodes of outbursts involving curse words or racial slurs, which makes the New Jersey case different from the Sixth Circuit case. Employers will have to wait for the Court's decision to determine whether that fact makes any difference regarding the duty to accommodate.

TAKEAWAY: Employers should ensure that they engage in an interactive dialogue with their employees who request accommodations for disabilities, and that their job descriptions specifically identify the essential functions of positions in case those functions are challenged. If you have questions on the employer duty to accommodate, or any federal or New Jersey employment law, contact Stephanie Gironda or any member of the Wilentz Employment Law Team.

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The NLRB's New Target: Electronic Surveillance in the Workplace

Many employers use video cameras to prevent theft, have a record of workplace incidents, and for general security purposes. Although seemingly reasonable, such electronic surveillance in the workplace has drawn increased scrutiny from regulators, especially the National Labor Relations Board ("NLRB").

On October 31, 2022, NLRB General Counsel Jennifer Abruzzo issued Memorandum 23-02 regarding employers' electronic surveillance and automated management practices in the workplace. The memo indicates plans to urge the NLRB to protect employees using the National Labor Relations Act ("NLRA"). "Intrusive or abusive" technologies, include, but are not limited to:

- security cameras
- GPS tracking devices
- keyloggers
- audio recording devices

Abruzzo believes such technologies and practices have a tendency to interfere with employees' NLRA Section 7 rights, which generally protect union and non-union workers' ability to engage in concerted organizing activities.

The NLRB has made decisions on employer's use of electronic surveillance in the workplace. The following cases have been found as a violation of Section 7 of the NLRA:

- Stern Produce Company, Inc.: While there are legitimate business reasons for using camera systems to prevent or investigate accidents, an employer's use of cameras facing the inside of the cab and the driver had created an unlawful impression of surveillance under the NLRA.
- Cemex Construction Materials Pacific, LLC: Employer created an impression of surveillance among its plant foremen/batchmen by lingering for an unusually long time at the entrance of the plant and waiving to drivers entering and exiting the plant while organizers standing near the same gate were displaying a poster and answering questions about comparative wages and benefits.

Employers should be aware of the NLRB's recent focus on electronic surveillance in the workplace before adopting any such practice to ensure they do not violate the NLRA.

Takeaway: If you are an employer that currently uses, or are considering to use, electronic surveillance in the workplace and need additional guidance on whether such technologies or practices would be lawful, contact Nicholas Rollo or any member of the Wilentz Employment Law Team.