

END OF 2016 USHERS IN SWEEPING NEW YORK STATE OVERTIME AND

The end of 2016 has ushered in changes, both expected and unexpected, to both the Federal overtime exemption and to New York State's minimum wage requirements and overtime exemption. While the Federal minimum salary requirement for certain "white collar" workers who work in executive, administrative or professional employment was set to be raised to \$913 per week under a recently enacted U.S. Department of Labor's ("DOL") regulation that was scheduled to take effect on December 1, 2016, an eleventh hour nationwide preliminary injunction issued by a federal district court judge in Texas, has possibly placed this requirement on hold. While the DOL's new regulations has been placed on hold, New York State's law passed in April 2015, increasing the State's minimum salary threshold for certain executive and administrators and raising the minimum wage rate for all hourly employees is still set to take effect on December 31, 2016. Here is a quick primer to help Long Island Gas Retailers' navigate this ever changing regulatory landscape. It is important to note that the wage and hour requirements are determined by a complex set of federal, state and local laws and regulations. While this article is prepared to provide members of the Long Island Gas Retailers Association with a general overview of some recent changes to federal and state law, this article is not meant to provide legal advice, and employers should consult with their counsel to review all applicable regulations to ensure that their pay and hour practices comply with all applicable laws.

Federal Overtime Regulations

It is a common misconception that any employees who are paid a salary are not entitled to receive overtime pay for all hours worked in excess of forty hours a week. Under regulations promulgated and administered by the DOL (and, as discussed below by the New York State Department of Labor), only certain employees who work as executives, supervisors, administrative professionals and professionals may be exempt from the overtime requirements of the federal Fair Labor Standards Act ("FLSA") if they meet three requirements under the white collar exemption. Prior to this month, to qualify for the white collar overtime exemption: (1) the employee must be paid a predetermined and fixed salary, (2) the employee's salary must exceed \$455.00 per week, or \$26,600.00 per year; and (3) the employee must perform "exempt duties" as defined by the DOL, such as, managing two or more full time employees or their equivalents; or perform administrative tasks with independent decision making abilities.

This year, the DOL passed a new regulation, scheduled to take effect on December 1, 2016, which raised the minimum salary requirement for the white collar exemption to \$913.00 per week (\$47,476.00 per year). A group of states, business groups and the U.S. Chamber of Commerce filed an action in the Eastern District

of Texas, challenging the DOL's new regulation on the grounds that the DOL exceeded its rule making authority by nearly doubling the salary basis test and by providing for automatic updates to the salary basis test every three years. On November 22, 2016, a federal judge in Texas imposed a nationwide preliminary injunction that halts the DOL's implementation and enforcement of this new rule.

The preliminary injunction leaves much uncertainty for employers in New York. The preliminary injunction is only temporary and is not a permanent halt to the new rule. On December 1, 2016, the DOL filed an appeal of the preliminary injunction to the Fifth Circuit Court of Appeals. In a statement posted on the DOL's website, the agency vehemently opposed the district court's order, and stood by its authority and actions taken to promulgate the new overtime rule.

It is also unknown if President Elect Donald J. Trump, set to take the oath of office on January 20, 2017, and his presumptive nominee as Secretary to the DOL, Andrew Puzder, intend to defend the DOL's new rule, or if the Republican majority Congress set to be sworn in on January 6, 2017 will pass legislation to repeal the rule. Either of these actions may render either the appeal to the Fifth Circuit or continued litigation moot.

While the future of the DOL's overtime rule remains uncertain, New York State employers have a number of important considerations to keep in mind before deciding to pause any efforts to come into compliance with the DOL's new overtime rule. Although the Texas Judge imposed a "nationwide injunction" the effect, if any, that this injunction would have on New York State employers remains uncertain. Particularly, New York State is not a party to the underlying litigation. Further, if the nationwide injunction is lifted by either the District Court Judge or the Appeals Court, employers who decide to defer compliance with the DOL's new overtime rule may still be found liable for unpaid overtime wages for those employees whose salaries no longer meet the salary basis test retroactively to December 1, 2016. This potential liability was illustrated this past year in *Kinkead v. Humana*, where a Connecticut District Court Judge held that an employer was liable to pay overtime under the FLSA during the period in which the DOL's overtime rule effecting home health care workers was vacated by the U.S. District Court judge in D.C. after the U.S. Circuit Court for the District of Columbia upheld the DOL's rule, and vacated the lower court's order. The Court's actions in *Kinkead*, illustrate that if the preliminary injunction is subsequently lifted, and the DOL's overtime rule takes effect, employers may be liable to pay overtime for any employees who no longer meet the salary basis test from December 1, 2016, despite the fact that a nationwide preliminary injunction was put in place.

¹ These are only examples, and not all of the requirements. Please contact us with any questions.

² A copy of the DOL's new regulation is available at: <https://www.federalregister.gov/documents/2016/05/23/2016-11754/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and>

³ *Nevada v. United States Department of Labor, et. al.*, 4:16-cv-00731.

CHANGES TO FEDERAL AND MINIMUM WAGE REQUIREMENTS

Additionally, regardless of the salary basis test that is in effect, employers may still be liable for unpaid overtime if any employees who do not meet the duties test are misclassified and improperly paid a salary and not paid overtime wages at 1.5 times their normal hourly rate. It is for this reason, that all employers should periodically conduct an audit to ensure that all employees, both hourly and salaried are properly classified.

New York State Minimum Wage and Overtime Exemptions

Regardless of the status of the DOL's new overtime rule, New York State's minimum wage rate and overtime exemption are set to increase on December 31, 2016. Not only is New York State's minimum wage increasing, but, for the first time, the amount of the increase will vary depending on the county, and in New York City's five boroughs, the minimum wage rate will vary depending on the employer's size. Additionally, the minimum wage is set to increase annually between now and 2021. These scheduled increases are summarized below:

General Minimum Wage Rate Schedule

| Location | 12/31/16 | 12/31/17 | 12/31/18 | 12/31/19 | 12/31/20 | 2021* |
|---------------------------------------|----------|----------|----------|----------|----------|---------|
| NYC - Large Employers (of 11 or more) | \$11.00 | \$13.00 | \$15.00 | | | |
| NYC - Small Employers (10 or less) | \$10.50 | \$12.00 | \$13.50 | \$15.00 | | |
| Long Island & Westchester | \$10.00 | \$11.00 | \$12.00 | \$13.00 | \$14.00 | \$15.00 |
| Remainder of New York State | \$9.70 | \$10.40 | \$11.10 | \$11.80 | \$12.50* | |

Source: <https://labor.ny.gov/workerprotection/laborstandards/workprot/minwage.shtm>

An important consideration for Long Island area employers is how to handle employees who may perform work a portion of time in Nassau, Suffolk and Westchester, where there is a uniform minimum wage rate, and a portion of time in either New York City or in the remainder of the State where different minimum wage rates are in effect. At this time the NYDOL has not published any additional guidance on how they intend to enforce the new minimum wage requirements, particularly as to employers with locations that have difference minimum wage requirements.

In addition to changes in the minimum wage rate, New York State has increased the minimum salary threshold for executives and administrative employees who may be exempt from the overtime requirements under New York's Labor Law. Under the Minimum Wage Order for Miscellaneous Industries, which took effect on December 31, 2013, which is promulgated by the NYDOL, a salaried employee working in a *bona fide* executive or administrative capacity is exempt from receiving overtime when: (a) the employee performs certain duties, and (b) the weekly salary earned by the employee is at least 75 times the weekly minimum wage. Accordingly, with the new annual increase in the minimum wage, the salary basis test in New York State for executives and administrators will be increasing annually over the next five years. The new weekly minimums are summarized below:

| Location | 12/31/16 | 12/31/17 | 12/31/18 | 12/31/19 | 12/31/20 | 12/31/2021 |
|---------------------------------------|----------|----------|------------|------------|------------|------------|
| NYC - Large Employers (of 11 or more) | \$825.00 | \$975.00 | \$1,125.00 | | | |
| NYC - Small Employers (10 or less) | \$787.50 | \$900.00 | \$1,012.50 | \$1,125.00 | | |
| Long Island & Westchester | \$750.00 | \$825.00 | \$900.00 | \$975.00 | \$1,050.00 | \$1,125.00 |
| Remainder of New York State | \$727.50 | \$780.00 | \$832.00 | \$885.00 | \$937.00 | |

As discussed above, payment of a salary of at least the minimum salary threshold is just one of the factors that must be satisfied for an employee to qualify for the executive or administrative employee exemption from the overtime requirements under the New York Labor Law. Even if an employee does meet the minimum salary requirements, the employee may still be entitled to receive overtime if the employee's duties do not fall within the NYDOL's requirements.

With all of these changes to both the state and federal regulations, it is recommended that all employers take the time to review their pay policies and conduct an audit of any employees classified as salaried and exempt from overtime requirements heading into the New Year. By Gregory S. Lisi, Esq., Partner and Head of Labor and Employment Practice Group at Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP and Lisa M. Casa, Esq.

If employers have questions regarding either the federal minimum wage requirements, the DOL's new overtime rule, or changes to New York's minimum wage requirements, the attorneys in Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP Labor and Employment Practice Group are available to take your questions.

⁴<https://www.dol.gov/featured/overtime> ⁵Id. ⁶Kinkad v. Humana, Inc., No. 3:15-CV-01637(JAM), 2016 WL 3950737, at *1 (D. Conn. July 19, 2016)
⁷12 NYCRR §142, et. seq. ⁸<https://labor.ny.gov/formsdocs/wp/CR142.pdf>