**<u>U.S. DEPARTMENT OF LABOR ISSUES FINAL OVERTIME RULE UPDATING WHITE COLLAR EXEMPTIONS</u>**

*By: Jeffrey B. Halbert*

After months of anticipation, on May 17th the DOL announced its final rule modifying the requirements for employees to satisfy the white collar exemptions under the Fair Labor Standards Act ("FLSA"). The final rule will be published on May 18th and is scheduled to take effect on December 1, 2016.

Under the FLSA, employees are entitled to wages at or above the federal minimum wage (i.e., $7.25 pr/hr) and must be paid time and one-half for work over forty (40) in any work week. However, certain employees are exempted from this requirement if they are classified as executive, administrative, or professional and are paid on a salary basis. All other employees, subject to limited exceptions, are non-exempt and must be paid at least minimum wage and overtime for hours worked over forty (40) in a week. Generally, employers have the burden to demonstrate that an employee is exempt from overtime by satisfying both the salary basis test (i.e., predetermined salary not subject to adjustment based on hours worked) and the specific duties tests, as defined by DOL regulations. In addition, an employer is required to compensate exempt employees at or above a minimum amount. Currently, this amount is $455 per week or $23,660 annually. The DOL's May 17th announcement addresses only the minimum salary threshold to qualify for these exemptions.

On March 13, 2014, President Obama issued a directive to the DOL to "modernize and streamline the existing overtime regulations" in an effort to simplify overtime rules to make them easier to understand and apply. After significant delay, on June 30, 2015, the DOL proposed sweeping new regulations designed to expand overtime protections for millions of workers. The proposed rules sought to raise the salary threshold for exempt employees to a weekly minimum of the 40th percentile of weekly earnings for full-time salaried workers which was projected to be $50,440 annually or $970 per week in 2016. It also would have modified the requisite salary threshold for highly compensated employees (i.e., those who earn at least $100,000 annually and perform any one or more exempt duties) to be based on the 90th percentile of weekly earnings for full time salaried workers or $122,148 annually. In addition, the proposed rule also would implement a mechanism to automatically update the minimum salary levels to adjust for inflation and preclude the need to regularly change the levels through future regulatory action by indexing salary and compensation levels to Bureau of Labor Statistics (BLS) data annually.

The DOL's final rule sets the new salary threshold at $47,476 annually or $913 per week which is a reflection of the concerns expressed during the public comment period that ended on September 4, 2015. However, the new threshold doubles the current salary level required to satisfy the executive, administrative and professional exemptions. The amount will be updated every three (3) years with the first scheduled update set for January 1, 2020. During this three (3) year period, the salary level is projected to rise to more than $51,000 based on wage growth. In addition, the final rule sets the total annual compensation requirement for highly compensated employees at $134,004 annually or $913 per week and will require only a "minimal showing" to demonstrate an employee is not eligible for overtime. Although a topic of discussion since the proposed rule was issued last year, the new rule leaves the current duties tests unchanged.

Importantly, for the first time, employers will be able to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the standard salary level. These payments include nondiscretionary incentive bonuses tied to productivity and profitability. The final rule requires employers to make such payments on a quarterly or more frequent basis and allows for a "catch-up" payment in order to credit nondiscretionary bonuses and incentive payments toward a portion of the required salary level. However, the final rule retains the requirement that highly compensated employees must receive at least the full standard salary each pay period without regard to the payment of nondiscretionary bonuses and incentive payments and continues to permit nondiscretionary bonuses and incentive payments (including commissions) to count toward the total annual compensation requirement.

The DOL estimates that the new rules will result in an increase in employee wages of approximately $12 billion over the next 10 years with an average annual increase of $1.2 billion. Also, under the new rules will extend the right to overtime compensation to an estimated 4.2 million workers who are currently classified as exempt.

Despite the December 1, 2016 effective date, employers must take immediate steps to comply with the new rule which include:

- Consideration of potential costs to absorb and manage overtime.
- Review the salary ranges of positions within your organization that are currently considered exempt under the executive, administrative and professional exemptions.
- Identify positions earning less than the $47,476 threshold and determine for which positions an increase in salary is necessary.
- Reclassify employees to non-exempt and consider alternative compensation incentives to counter loss of exempt status.
- Evaluate positions to determine particular tasks the employee performs on a weekly basis and the number of hours required in order to assess potential overtime impact.
- Determine if certain job duties can be redistributed or eliminated or if a function can be outsourced.
- Consider whether nondiscretionary bonuses or incentive payments (including commissions) will be sufficient to satisfy the new salary threshold for exemption. Keep in mind that the new rule allows employers to credit these payments in an amount up to 10% of the salary threshold.
- Review possible alternative compensation plans rather than simply moving to hourly status (i.e., salaried-nonexempt or fixed salary for fluctuating hours).
- Consider restricting hours and schedule adjustment to limit potential overtime.
- Implement policies restricting after-hours use of electronic communication devices.
- Evaluate hours tracking methods and reporting and develop a plan to begin tracking hours worked. Employers are required to keep accurate records of hours worked on a weekly basis for non-exempt workers. It may be helpful to begin tracking those hours now in order to plan for the conversion to overtime status.

While the new rules are not the end of the world, they may change the way employers do business. Stay tuned for additional guidance as employers continue to digest the new rules.

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