DOL's Final Rule Expands Overtime Eligibility for Millions of Workers

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Executive Summary: Today, the U.S. Department of Labor (DOL) will publish its long-awaited Final Rule amending the "white collar" exemption tests for executive, administrative, and professional employees (located in 29 CFR Part 541) under the Fair Labor Standards Act (FLSA). These new regulations increase the threshold minimum salary to $913 per week ($47,476 annually), doubling the annual salary previously required for an employee to be considered exempt from overtime under the FLSA's white collar exemptions. The regulations also increase the minimum salary threshold under the "highly-compensated" exemption to $134,004 annually. Although the Final Rule does not change the current duties test, it contains a mechanism to automatically adjust the minimum salary thresholds every three years. The regulations are to become effective by December 1, 2016.

What Changes Did the Regulation Make?

Salary Basis Test. Since 2004, for employees to fall within the white collar exemptions, they must have been paid a salary of at least $455 per week ($23,660 annually), and must have performed delineated exempt duties. The new regulations increase this salary threshold to $913 per week ($47,476 annually), by tying the required salary level to the 40th percentile of earnings for full-time salaried workers in the lowest-wage census region, which currently is the South region. Although the Final Rule does not set the threshold as high as the DOL had proposed in June 2015, this is still a significant increase that will affect millions of workers nationwide.

Inclusion of Non-discretionary Bonuses and Incentive Payments. For the first time, employers will be able to use non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the salary basis requirement. Such payments may include non-discretionary incentive bonuses tied to productivity and profitability. However, such payments must be paid on a quarterly or more frequent basis in order to be applied to satisfy up to 10 percent of the now required $913 per week ($47,476 annually) threshold.

Highly Compensated Exemption. The DOL's regulations contain a special rule for "highly compensated" workers, which previously provided that such employees are exempt if they earn a salary of at least $455 per week, are compensated more than $100,000 annually (which can include commissions and non-discretionary bonuses earned during the year), primarily perform office or non-manual work, and customarily and regularly perform at least one of the exempt duties of an exempt executive, administrative or professional employee. The Final Rule increases the salary threshold to $134,004 annually, based upon the 90th percentile of full-time salaried workers nationally. Highly compensated employees must still receive at least the minimum salary per pay period (now $913 per week), exclusive of non-discretionary bonuses and incentive payments. However, as under prior regulations, non-discretionary bonuses and incentive payments may be used to count towards the total annual compensation requirement.

Effective Date. The Final Rule will become effective December 1, 2016.

Automatic Updating Every Three Years. Although in June 2015 the DOL proposed annual updates to the salary basis test, the Final Rule provides automatic updates every three years, beginning on January 1, 2020. This is still unprecedented and a huge administrative burden for employers. The updated salary basis threshold will be based upon the 40th percentile of weekly earnings for full-time salaried workers in the lowest-wage census region. The DOL will publish the updated rates in the Federal Register at least 150 days before their effective date. Based on current estimates and wage growth projections, the minimum salary threshold could rise to $51,000 by 2020.

Duties Test. The Final Rule has made no changes to the existing duties test.

Impact on Employers. The immediate impact will be that employers in every state will be required to review the exempt status of their employees. For some employers, the new regulations could mean that many, if not most, of their employees will immediately become non-exempt upon the effective date of the regulation. For obvious reasons the regulations may have a disproportionate impact on certain regions and industries. In addition, employers should anticipate that states will increase their state law salary basis thresholds in the future. The DOL's new regulations have increased the FLSA's salary basis test to an amount greater than even California, which is currently the nation's highest at $41,600 annually. It is possible that certain states, including California, may attempt to provide even broader and greater protections than those afforded by the DOL's new regulations.

What Should Employers Do? Employers should conduct an immediate audit of their workforce, including all those employees affected by the increase in the salary basis test. Employers will have to make tough decisions including: whether to reclassify employees as non-exempt and how to calculate and determine the appropriate hourly pay for such workers; whether to increase salaries in order to maintain the exemption; how to expand or modify their timekeeping and other procedures to appropriately track time worked; and/or consider other compensation methods and alternatives to ensure compliance while keeping costs in check. Employers should consult an attorney so that they can effectively audit their workforce, discuss confidentiality and privilege issues, and come into compliance with the new regulations prior to their effective date, and do so in a manner that reduces the negative effects upon the company's business and budget.

If you have any questions about the DOL's new regulations, recommended steps for your company to take in response, would be interested in an audit proposal free of charge, or have any other wage and hour issues, please feel free to contact Salvador Simao, ssimao@fordharrison.com, head of FordHarrison's Wage and Hour Practice Group, or David Kim, dkim@fordharrison.com, who is also a member of the Wage and Hour Practice Group. You may also contact the FordHarrison attorney with whom you usually work.