

Overtime Pay for Millions

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Millions of American workers will now be eligible for overtime pay after the Department of Labor (“DOL”) released its long-awaited Final Rule updating the overtime regulations under the Fair Labor Standards Act (“FLSA”). The Final Rule raises the minimum annual salary requirement to qualify for “white collar” executive, administrative and professional exemptions from \$23,660 to \$47,476 per year. The Final Rule will take effect on December 1, 2016. This will give employers nearly 200 days to prepare to comply with this 100% increase to the minimum salary necessary to exempt a salaried employee from overtime pay requirements under the FLSA.

The Department of Labor estimates that the Final Rule will extend overtime pay protections to over 4 million workers within the first year of implementation and boost wages for workers by \$12 billion over the next 10 years. The Final Rule is summarized below:

Minimum Salary Threshold Increases By More Than 100%

The minimum salary to qualify for a “white collar” exemption will increase from \$23,660 to \$47,476 annually or from \$455 per week to \$913 per week. The new salary requirement is more than double the current salary, but lower than the salary originally proposed by the DOL in June 2015. The new minimum salary threshold is set at the 40th percentile for full-time salaried workers in the lowest income Census region (currently the South) based on statistical data from the Bureau of Labor Statistics. The last time the DOL increased the minimum salary requirement for the “white collar” exemptions in 2004, it set the salary level at the 20th percentile.

Salary Requirement for Highly Compensated Employee Exemption Also Increased

The FLSA contains a special exemption from overtime pay requirements for highly-compensated workers who are currently paid a total annual compensation of \$100,000 or more, which includes a salary of at least \$455 per week and may consist of commissions and other non-discretionary bonuses and compensation earned. To qualify for the highly compensated employee (“HCE”) exemption, an employee must perform office or non-manual work as their primary duty and perform at least one of the exempt duties of a “white collar” executive, administrative or professional employee. Thus, an employee who earns than \$100,000 annually may qualify for an exemption even if they don’t meet all of the requirements of any single “white collar” exemption. Under the Final Rule, the salary requirement for HCEs will increase to \$134,004 per year and a minimum weekly salary of \$913, equivalent to the 90th percentile of earnings for full-time salaried workers nationally.

Automatic Increases to Minimum Salary Requirement

For the first time, the DOL has built in an automatic escalator to increase the exemptions’ minimum salary threshold every three years in order to keep pace with inflation. Starting January 1, 2020, increases will be set at the 40th

percentile of salaries for full-time workers in the lowest wage census region for the “white collar” executive, administrative and professional exemptions and at the 90th percentile of salaries for full-time salaried workers nationally for the HCE exemption. The DOL will publish the new salary rates 150 days before the effective date. It is estimated that the minimum salary threshold for the “white collar” exemptions will increase to \$51,168 at the time of the first adjustment in 2020.

Notably, the proposed rule had called for automatic annual increases to the minimum salary threshold, but the final rule abandoned this thereby giving employers more preparation time between increases.

Bonuses, Commissions, and Incentive Pay may Satisfy a Portion of the New Minimum Salary Requirement

Currently under the FLSA, employers are not permitted to use nondiscretionary bonuses, incentive payments or commissions to satisfy the minimum salary requirement to qualify for an overtime exemption. Exempt employees must be paid a minimum salary exclusive of such compensation. Under the Final Rule, the DOL permits employers to use nondiscretionary bonuses, commissions and incentive payments tied to productivity and profitability to satisfy up to 10% the new minimum salary requirement for the “white collar” exemptions. In addition, the Final Rule requires such compensation to be paid on a quarterly or more frequent basis in order to be counted toward the minimum salary requirement. Employers are also permitted to make a “catch-up” payment and make up the difference if the employee has not earned sufficient commissions to satisfy the minimum salary on a quarterly basis. While nondiscretionary bonuses and incentive payments (including commissions) will continue to count toward the annual total compensation requirement for HCEs, such payments may not be used to satisfy any portion of the minimum weekly salary amount for the HCE exemption.

No Changes to Duties Tests

The new rule contains no changes to the duties tests for any of the “white collar” exemptions or the HCE exemption. This comes as a relief to many in the business community who feared a stricter duties test to more narrowly define the white collar exemptions.

No Changes to any other FLSA Exemptions

The Final Rule imposes no changes to the outside sales or computer professional exemptions or any other statutory exemptions.

Potential Challenges to Final Rule

Congress now has 60 days to review the Final Rule and could potentially issue a resolution of disapproval. Should Congress disapprove the final rule, there is little doubt President Obama will veto any such vote. In March 2016, lawmakers in the House and Senate introduced the “*Protecting Workplace Advancement and Opportunity Act*” that would nullify the Final Rule and prevent the DOL from issuing any future rules with automatic increases to the minimum salary requirement without separate rulemaking. The outcome of this legislation will likely depend on the results of the November election.

How Can Employers Prepare?

The time has never been better for employers to conduct an audit of their workforce to ensure that employees are currently properly classified under the FLSA and will remain so after December 1, 2016. In auditing the workforce, employers should focus on job duties performed not duties listed on a job description or an employment agreement to meet the duties test of an exemption. Consider updating outdated job descriptions to reflect the actual duties performed by employees. At minimum, employers should identify all salaried exempt employees with a current annual base salary less than the new minimum threshold of \$47,476. Employers should recognize that discussions, notes and documents used in self-audits might be subject to discovery in the event of litigation. Involving outside counsel in the audit process may bring much of the audit process within the protection of the attorney client and work product privileges.

Should you have any questions related to this matter, please contact any of the following members of the Labor & Employment Practice Group of Benesch, Friedlander:

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