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Client Alert

EMPLOYMENT LAW UPDATE

Department of Labor Increases Salary Level for Exempt Employees

As has been long expected, on May 18, 2016, the US Department of Labor (DOL) Wage and Hour Division issued new regulations dramatically raising the minimum salary threshold for exempt executive, administrative, and professional employees under the FLSA (commonly known as the "white collar" regulations). The new salary rules takes effect <u>December 1, 2016</u>.

<u>Summary of Major Changes in Final Rule</u>

What exactly did the DOL change?

Under current FLSA regulations, an employee is exempt from the minimum wage and overtime requirements if the employee's primary duty involves executive, administrative, or professional duties as defined by the regulations (called the "Duties Test") *and* if the employee is paid on a salary basis of not less than $455 per week ($23,660 annually) (called the "Salary Basis Test").

The new rules increase the required salary level for these exemptions to $913 per week (<u>$47,476 annually</u>) effective December 1, 2016.

This required salary level was set at the 40th percentile of earnings for full-time salaried workers in the lowest-wage Census Region. The new rules require this salary level be updated every three years (beginning January 1, 2020) to maintain the salary level at the same percentile (40th) of full-time salaried employees in the workforce in the lowest-wage Census Region.

What about the Highly Compensated Employee Exemption?

Under current FLSA regulations, a "highly compensated employee" is exempt from the minimum wage and overtime requirements if the employee is paid on a salary basis, earns at least $100,000 in total annual compensation, and customarily and regularly performs one or more of the exempt duties of an executive, administrative, or professional employee.

The new rules increase the required annual compensation amount for highly compensated employees to <u>$134,004 annually</u> effective December 1, 2016.

This annual compensation level was set at the 90th percentile for full-time salaried workers nationwide based on 2015 BLS data. The new rules require this salary level be updated every three years (beginning January 1, 2020) to maintain the annual compensation level at the same percentile (90th) of full-time salaried employees in the workforce nationwide.

How has the Duties Test changed?

The new rules make no changes to the duties requirements for the executive, administrative, and professional exemptions.

Can Nondiscretionary Bonuses, Commissions, or Incentive Payments be counted towards the new salary level?

Under the current FLSA regulations, the Salary Basis Test may only be satisfied by payment of a predetermined minimum guaranteed *salary*. The new rules revise the regulations to permit employers to count nondiscretionary bonuses, incentive payments, and commissions toward no more than 10% of the new required salary level, as long as these amounts are paid out on a quarterly (or more frequent) basis. The new rules allow quarterly catch-up payments for employers to ensure compliance with the Salary Basis Test if an exempt employee has not earned sufficient salary plus nondiscretionary bonus, incentive, and commission payouts in the quarter.

Next Steps for Employers

- In the next few months, employers should review the classifications and salaries of their white collar employees and identify exempt employees who earn less than $47,476 annually.
- With regard to the affected employees, employers must either:

  (1) maintain the FLSA exemption by raising employee pay to the new salary level; *or*

  (2) reclassify employees as non-exempt and begin paying overtime December 1, 2016. For many affected employees, this will entail new time-reporting obligations and possibly the need for employers to manage employee hours so that these reclassified employees do not work more than 40 hours in a workweek.
- In reclassifying an employee from salaried exempt to non-exempt, an employer may reduce the employee's regular wages either in the form of a lower salary (plus overtime) or a new hourly rate (plus overtime) such that going forward the employee's regular wages and new overtime pay are largely the same as the employee's prior base salary.
- Employers should be mindful, in communicating these changes, that many employees may be unhappy as they may view this change as a step backward in their career since they once again will be reporting their hours worked.

Our attorneys are available to consult with the employer community with respect to questions that may arise regarding implementation of these new salary rules. Please contact any of our attorneys or call the office and ask to speak to the contact attorneys named below:

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