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At Long Last: The Department of Labor Issues Final Salary Threshold Rule Effective December 1, 2016

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After almost a year of speculation and concern, the U.S. Department of Labor ("DOL") today, May 18, 2016, issued its long-awaited Final Rule on overtime exemptions, making a major change to the minimum salary that an employee must earn for the employer to avoid liability for premium overtime pay for hours worked in excess of 40 in a work week.

Background

The federal Fair Labor Standards Act ("FLSA") generally requires employers to pay each employee at least the federal minimum wage and premium overtime pay at the rate of one and one-half times the employee's "regular hourly rate" for all hours worked over 40 in a work week.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay requirements for employees in certain "white collar" positions. To be properly classified as "exempt," an employee generally must meet all of the following criteria:

- Be paid on a salary basis, or in some cases, a fee basis;
- Be paid a minimum of $455 per week; and,
- Fit the requirements of the "duties test" for the applicable exemption.

In response to a directive from President Obama, the DOL, in June, 2015, proposed regulations that would significantly increase the minimum weekly salary threshold for exempt employees. Although new duties tests were not included in the proposed regulations, many speculated that the DOL would also revise the duties tests in its final rule.

The Final Rule

Today, the DOL announced the Final Rule, including a new salary threshold, but leaving the current duties tests intact. The Final Rule becomes effective December 1, 2016, giving employers more than six months to prepare for the impact of the changes regarding overtime pay eligibility.

Increased Salary Threshold

The Final Rule increases the weekly salary threshold to a rate in the 40th percentile of weekly earnings of full-time salaried workers in the lowest income Census region (currently the South) in the United States. This means that the projected minimum salary will increase to $913 per week, more than twice the current $455 weekly threshold. The Final Rule also provides that this threshold will be updated every three years, using the same standard (i.e. the 40th percentile of the lowest region).

The Final Rule also increases the total annual compensation requirement for "Highly Compensated Executives" ("HCE") to the annual equivalent of the 90th percentile of full-time salaried workers nationally, or from the current $100,000 to $134,004 a year.

Inclusion of Bonus, Incentive, and Commission Pay

The Final Rule includes a provision allowing employers for the first time to use non-discretionary bonuses, incentive pay, or commissions to satisfy up to 10 percent of the salary threshold for non-HCE employees, provided that such payments are made on at least a quarterly basis. The DOL, in its press release announcing the publication of the Final Rule, stated that this new provision recognizes the importance these forms of pay have in many companies’ compensation arrangements, and that this new policy responds to comments received from the business community.

Congressional Consideration of the Final Rule

With the combination of a Final Rule published at the direction of a Democratic administration and a Republican dominated Congress, it is widely expected that the current Congress may attempt to pass legislation to invalidate all or some of the provisions in the Final Rule. However, it is also anticipated that if such legislation is passed, the President will exercise his veto power, thereby averting any change in the Final Rule. In that event, next year a new Congress or the new President may or may not attempt to take action to change the Final Rule, depending on the outcome of the upcoming elections. However, it is unlikely that there will be any change to the December 1, 2016 effective date.

Employers' Options

What can employers do to avoid the economic impact of having to pay premium overtime pay to employees who are now exempt, but will no longer be when the Final Rule becomes effective on December 1, 2016? Each employer, during the next six months, should carefully analyze salaries, job descriptions, and historic and projected overtime workforce demands. To avoid or minimize the increased costs of overtime pay, employers may:

- Redistribute job duties;
- Increase staff;
- Institute written policies limiting each employee to 40 hours of work per work week (but pay at the overtime rate for any time worked over 40 hours per work week); and/or,
- Raise the salary of any employee who may work more than 40 hours per week to at least $913 per week.

Conclusion

Employers should plan for the provisions of the Final Rule to become effective on December 1, 2016. The new salary threshold for the overtime exemptions contained in the DOL's Final Rule will significantly affect many employers. Careful consideration of the effect of this new economic requirement is essential to avoid employee claims for back pay and DOL audits. Ward and Smith's Labor and Employment attorneys are prepared to assist if you have questions about the effect of the DOL's new regulation on your workforce.

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 For further information regarding the issues described above, please contact Grant B. Osborne.