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The Department of Labor Announces Final Rule for Overtime Pay Exemptions Under the FLSA

On May 18, 2016, the Department of Labor (the “DOL”) announced a final rule that revises overtime exemption regulations for certain executive, administrative, and professional employees (“white-collar employees”) and highly compensated employees under the Federal Labor Standards Act (the “FLSA”). The revised regulations contain four major changes:

- 1) raising the minimum salary level that full-time white-collar employees must earn to be exempt from overtime pay to \$913 per week or \$47,476 per year;
- 2) allowing nondiscretionary bonuses and incentive payments to satisfy up to 10 percent of the minimum salary level for white-collar employees;
- 3) raising the minimum annual compensation that highly compensated employees must earn to be exempt from overtime pay to \$134,004; and
- 4) providing a mechanism to automatically adjust the minimum salary and compensation requirements every three years.

The new regulations take effect on December 1, 2016.

Background

The FLSA requires most employees to be paid overtime pay at time and one-half the regular rate of pay for all hours worked in a work week in excess of 40 hours.

However, Section 13(a) of the FLSA has long provided an exemption from overtime pay for certain executive, administrative, and professional employees—the “white-collar” exemption. To qualify for the white-collar exemption, employees generally must meet three tests. First, they must primarily perform executive, administrative, or professional duties, as defined by the regulations—the “duties test.” Second, they generally must be salaried employees, meaning that they are paid on a predetermined and fixed basis that does not change based on the quality or quantity of their work—the “salary basis test.” Third, they must be paid a minimum salary set forth in the DOL’s regulations—the “salary level test.”

Section 13(a) also exempts so called “highly compensated employees”—employees who regularly perform executive, administrative, or professional duties; whose primary duties include office or non-manual

work; who earn at least the minimum weekly salary level provided in the white-collar exemption; and who earn a minimum annual compensation, which is set forth in the DOL's regulations and includes salary, bonuses, and incentive payments.

The Changes in the New Regulations

The DOL's revised overtime rule only affects the salary and compensation requirements. No changes were made to the duties tests.

Specifically:

- The new overtime rule sets the minimum salary level for the white-collar exemption at the 40th percentile of earnings of full-time salaried workers in the lowest wage Census Region. That number is currently \$913 per week or \$47,476 annually.
- The new rule also amends the white-collar exemption salary basis test to allow nondiscretionary bonuses and incentive payments to meet up to 10 percent of the new minimum salary level test, provided that those payments are made on a quarterly or more frequent basis. In other words, beginning on December 1, 2016, up to \$4,747.60 in bonuses or commissions can be used to satisfy the \$47,476 white-collar exemption minimum salary level.
- The DOL also revised the minimum salary level for highly compensated employees to the annual equivalent of the 90th percentile of earnings for full-time salaried workers nationally, which is currently \$134,004. The other existing requirements for the highly compensated employees exemption remain in place.
- In addition, the new rule provides that salary level and compensation minimums will automatically adjust every three years, beginning on January 1, 2020, to maintain the earnings percentiles mentioned above. For future automatic adjustments, the DOL will publish all updated minimum salary and compensations levels 150 days prior to when they will become effective.

Guidance for Employers

The new rule will affect all industries across the country, and many positions that were previously clearly exempt under the white-collar exemption will become non-exempt. Indeed, the DOL estimates that the new rule will change the exemption statuses of over 4.2 million workers.

Currently, white-collar employees making more than \$23,660 are exempt from overtime pay. Under the new rule, the threshold salary for qualifying for the exemption more than doubles to \$47,476. This means that any employees making between \$23,660 and \$47,476 who previously qualified for the exemption are

no longer exempt under the new rule, irrespective of their job duties and responsibilities. Similarly, highly compensated employees who previously were exempt and made between \$100,000 and \$134,004 no longer qualify for an exemption.

To prepare for and ensure compliance with the new overtime exemption rule, employers should consider taking the following actions:

- Audit payrolls to determine which employees and positions that are currently classified as overtime exempt are affected.
- Determine whether impacted employees should be reclassified as non-exempt or have their salaries raised above the new minimum salary levels.
- Update payroll and time-tracking systems to take into account impacted employees.
- Train new non-exempt employees on tracking and recording their time to account for overtime hours.
- Create a plan to clearly communicate and discuss the overtime rule changes with employees.

Finally, because minimum salary and compensation requirements will be automatically updated in the future, employers should also consider the following actions to ensure long-term compliance with the new overtime rule:

- Analyze whether a restructuring of the organization is necessary to better accommodate anticipated increases in payroll costs such as consolidating roles or reallocating duties.
- Modify compensation and payroll structures to incorporate the capacity to track and comply with automatic minimum salary level and compensation adjustments.

The final overtime rule can be found [here](#).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Allan J. Arffa

212-373-3203

aarffa@paulweiss.com

Robert A. Atkins

212-373-3183

ratkins@paulweiss.com

Jay Cohen

212-373-3163

jaycohen@paulweiss.com

Eric A. Stone

212-373-3326

estone@paulweiss.com

Daniel J. Toal

212-373-3869

dtoal@paulweiss.com

Liza Velazquez

212-373-3096

lvelazquez@paulweiss.com

Maria H. Keane

212-373-3202

mkeane@paulweiss.com

Associate Lin Ting Li contributed to this client alert.