

## **New Overtime Regulations Under FLSA**

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In my recent blog entitled “Common mistakes in classifying employees under the FLSA,” I discussed, among other things, many of the exemptions from overtime rules under the Fair Labor Standards Act, including for the executive, administrative, and professional exemptions. A requirement common to each of these exemptions (as well as for outside salespersons and computer employees) is a minimum weekly salary, which is currently \$455 per week, or \$23,660 per year.

On May 18, 2016, the Department of Labor published its new regulations on the overtime rules and has now set the minimum weekly wage at \$913, or \$47,476 per year. This now means that in order for employees to be treated as exempt under the above five categories of workers, they must earn at least \$913 per week. (The DOL’s goal was to set the standard salary level at the 40<sup>th</sup> percentile of earnings of full-time salaried workers in the lowest-wage Census Region, which is currently the South.) If they do not meet this threshold, they must be paid overtime for any hours they work over 40 in a work week. This new rule goes into effect on December 1, 2016.

There are several other changes of which employers need to be aware. First, the total annual compensation of a “Highly Compensated Employee” (HCE) will increase to \$134,004 (up from \$100,000). A HCE is one whose primary duty includes performing office or non-manual work and the regular performance of at least one of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee. The goal was to set the total annual compensation requirement for HCEs to the annual equivalent of the 90<sup>th</sup> percentile of full-time salaried workers nationally.

The new rule amends the “salary basis test” to allow employers to use non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level. These payments would need to be made on a quarterly or more frequent basis.

Further, the new rule establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles. The first increase of the standard salary level will be on January 1, 2020, and will then occur every three years thereafter.

With the new rule going into effect on December 1, 2016, employers must immediately begin to assess their workforce to determine their next steps. For companies with employees who are only slightly below the new minimum weekly wage, they will want to assess whether it will make more sense to simply increase salaries to meet the new minimum rather than pay overtime. Obviously, businesses will need to analyze the number of hours over 40 their currently-exempt employees have been working to make this determination. For situations in which the salary levels are currently much lower than the future minimum, or if it will be cost-prohibitive for the company to raise salary levels, companies will need to begin treating these employees as non-exempt and pay them overtime (or take active steps to prevent overtime work if the company cannot afford to pay overtime). Companies can calculate an appropriate hourly rate that takes into consideration

the expected number of overtime hours the employee will work. If these calculations are performed accurately, the overtime hours remain consistent, and limitations are enforced, the new rules do not have to cost companies more in the long run.

In addition, companies will need to make sure that they are keeping track of their newly non-exempt employees' hours the same way as they do for their currently non-exempt employees' hours (as is required under the FLSA). Moreover, companies need to be aware of the laws of the states in which they have employees, as some states (including Illinois, Wisconsin, and California, to name a few) require tracking of all employees' hours, regardless of exemption status.

This is also an excellent time for employers to not only look at their employees who may be affected by these changes, but to also look at all employees to ensure they are properly classified. We are available to help companies through the process of auditing their employee classifications and devising a plan to ensure compliance with these new rules.