DOL Releases Long Awaited Overtime Regulation

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Since 2014 when President Obama directed the Department of Labor (DOL) to revise the regulations for exempting employees from overtime, employers have been anxious to see the final rule. The wait is over and employers have until Dec. 1, 2016 to become compliant.

Previously, employees could be exempt from earning overtime pay if they received at least $455/week and met the “duties” test for an exemption. *The duties tests for each of the exemptions have remained unchanged under the new regulations.* However, an employee must now earn $913/week (or $47,476 annually) to qualify as exempt under the new standard salary level test.

There remains the Highly Compensated Employee (HCE) exemption (with the minimal duties test), but the minimum compensation required to qualify has increased from $100,000 to $134,004 a year (or $1,397/week).

Employers should not get too comfortable with these thresholds because, beginning Jan. 1, 2020, the regulations provide for automatic updating to the earnings tests every three years. The automatic adjustments will ensure that the minimum compensation remains at the “40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region” (currently the south) for the standard salary level test and the 90th percentile *nationally* for the HCE exemption. The DOL will publish the new standard salary levels and HCE total compensation requirements at least 150 days in advance of each automatic adjustment.

One nice change for employers is that they will now be able to include non-discretionary bonuses and other incentive pay such as commissions to satisfy up to 10 percent of the required minimum compensation required for the standard salary level test. The DOL views a non-discretionary bonus as one that is announced in advance to induce employees to work harder or to remain with the company. However, such payments must be made on a quarterly or more frequent basis.

An employer has one pay period following the close of a quarter to make a “catch up” payment if, during the prior quarter, an employee did not earn sufficient bonus payments. If the employer fails to pay a sufficient amount, the employee would be entitled to overtime compensation for that prior quarter.

For the HCE exemption, the employee may receive non-discretionary bonuses and other incentive pay to satisfy the $1,397/week, provided the base salary (excluding the non-discretionary incentive pay) is not less than $913/week.

The DOL suggests the following options for employers as they implement the final regulations:

• Adjust an employee's salary upward to meet the new thresholds to maintain exempt status [this will result in the employee earning more per week];

• Continue to pay an employee on a "salaried" basis, but also compensate the employee for all hours actually worked over 40 in a work week at time and a half the regular rate of pay [this may result in the employee earning more each week, but perhaps less than the $47,476 a year year];

• Convert an employee's wages to an hourly rate (not below the applicable minimum wage rate) that will result in the same total weekly compensation as the employee continues to work the same number of hours but now earns the overtime premium of time and a half [implemented correctly, this should result in the employee earning the same wages and working the same number of hours as before]; or

• Convert an employee's current wage rate to the comparable hourly rate, but now limit the employee's ability to work overtime [this may result in the employee earning more per hour while working fewer hours].

Employers need to keep in mind that, while the Fair Labor Standards Act does not require an employee to record what time they start and finish work, they need to accurately record how many hours are worked each day. Employers should note, however, that if an employee simply records "8 hours" each and every day, all year, every year, the DOL may question the accuracy of the records.

If there is a silver lining in the new regulations it is that employers have an opportunity to correct the status of misclassified workers perhaps without tipping them off that they should have been receiving overtime all along by simply blaming it on the change in the law.

Implementing the new salary requirements correctly should be fairly straight forward for employers. However, the duties tests remain complicated and are often misapplied. If you need assistance in reviewing job classifications, you should always consult an experienced employment attorney.