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DOL Publishes New Salary Test for White Collar Exemptions

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Practice Area: Labor and Employment

More than two years after President Obama directed the Department of Labor (DOL) to update and modernize the regulations governing the exemption of executive, administrative and professional employees from the minimum wage and overtime exemptions under the Fair Labor Standards Act, on May 18, 2016, DOL announced that it published the new regulations. The final adoption of the new regulations follows a notice of proposed rulemaking on July 6, 2015, which elicited more than 270,000 comments.

The new rules, which become effective December 1, 2016, raise the salary test for exempt executive, professional and administrative employees, the so-called "white collar" exemptions, from the current minimum salary requirement of $455 per week to $913 per week, or $47,476 annually. This is actually about $3,000 below the $970 per week figure which DOL had previously proposed to set as the salary threshold.

DOL estimates that the new salary test may affect as many as 4.2 million workers who are currently exempt but fall below the new salary threshold.

The new weekly salary, which is tied to the 40th percentile of all full-time salaried workers in the lowest-wage census region (currently the South), will be automatically adjusted each three (3) years.

For the first time, DOL will allow employers to count non-discretionary bonuses, incentive payments and commissions for up to ten percent (10%) of the minimum salary requirement. A non-discretionary bonus, incentive payment or commission is generally one which is promised to the employee and tied to the employee meeting certain individual or group goals or standards.

In order to claim the credit, the bonus, commission or other incentive payment must be paid at least quarterly. If the employee fails to earn enough to satisfy the salary test in a given quarter, the employer may still claim the exemption by making a catch-up payment in the next payroll following the end of the quarter.

In response to the doubling of the salary requirement, the DOL has stated that employers may respond in one of several ways:

- Increase the salary of an employee who meets the duties test to at least the new salary level to retain his or her exempt status;
- Pay an overtime premium of one and a half times the employee's regular rate of pay for any overtime hours worked;
- Reduce or eliminate overtime hours;
- Reduce the amount of pay allocated to base salary (provided that the employee still earns at least the applicable hourly minimum wage) and add pay to account for overtime for hours worked over 40 in the workweek, to hold total weekly pay constant; or
- Use some combination of these responses.

Another option, not addressed by DOL's guidance memo, is to convert employees to salaried, non-exempt status, which, if the employee works a fluctuating workweek, allows an employer to only have to pay an overtime premium equal to "one-half of the regular rate" for hours worked in excess of forty (40) in the workweek.

In deciding which of these approaches to take, employers will be presented with more challenges than just deciding how much additional payroll, if any, they can absorb. Maintaining historical distinctions in pay grades or ranges, ensuring you remain competitive in the marketplace, balancing the new level of pay with expectations for performance, as well as understanding the employee's perspective of what it means to be salaried versus hourly are all important considerations in your payroll and personnel practices. In addition, to what extent, if any, should an increase in salary be offset by a less generous benefit package? These same considerations will come into play as the salary figure is adjusted each three years down the road.

With the new rules will likely come increased scrutiny not just for those employees whose salary falls below the new standard, but for even those salaried employees who are already above the new threshold, as DOL continues to aggressively seek compensation for workers it deems have been misclassified or where the employer's salary practices do not fully adhere to the existing regulations dealing with deductions from salary or the existing duties test.

The new regulations also reflect changes in the salary requirements for highly compensated employees where the threshold has been increased from $100,000 to $134,004.

As under the former regulations, certain occupations which meet the definition of being a professional, such as teachers, doctors and lawyers, have no minimum salary requirement.

Between DOL's current initiative to address the issues of "worker misclassification" and "joint employer status," we anticipate seeing a great deal of DOL enforcement activity in the future.
