

CLIENT ALERT

DOL Issues Final Overtime Regulations

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The Department of Labor (DOL) today released its long-awaited changes to the Fair Labor Standards Act's overtime regulations. Subject to the outcome of various expected legal challenges, these regulations are expected to take effect on December 1, 2016.

What's New

The DOL has set the new exemption salary threshold at \$47,476 per year (\$913 per week). This means that any employee earning a salary below this figure will be automatically entitled to overtime. This threshold is set to rise every three years to a level equivalent to the 40th percentile of weekly earnings for full-time, salaried workers in the nation's lowest income region. (The first modification is scheduled for January 1, 2020, and DOL expects the threshold to reach \$51,168 per year.) And for the first time, employers will be allowed to count bonuses, incentives and commissions toward the required threshold, up to a maximum of 10 percent of that figure, so long as these payments are made at least on a quarterly (or more frequent) basis.

The DOL also raised the "highly compensated employee" (HCE) threshold to \$134,004 per year (from \$100,000), which is based on the 90th percentile of all salaried, full-time workers. This figure will also be adjusted every three years to maintain the 90th percentile position, and DOL expects this threshold to reach \$147,524 per year for the January 2020 adjustment. Employers may continue to count non-discretionary bonuses, incentive payments and commissions in determining whether employees have satisfied the HCE threshold.

No changes to the job duties tests: The DOL, which last June invited comments about the "job duties" tests under the FLSA, opted to leave these tests unchanged. Employers should nonetheless expect that legal challenges to employee classifications will continue, especially by employees who spend a significant portion of their time performing non-exempt tasks (*e.g.*, retail assistant managers, etc.). This is because the DOL had previously expressed concern that such employees would not satisfy the job duties test of the FLSA.

What Happens Next

As indicated above, the DOL intends to make these regulations effective in 197 days, or December 1, 2016. This is longer than the implementation time period provided in 2004, the last time the regulations were changed. While there may be legal challenges to the length of the implementation period, employers should not count on a reprieve and should prepare as if the new regulations will indeed become effective in December.

To the extent preparations are not yet underway for these regulations, employers should promptly identify the positions that could be affected by the new regulations. For each position, employers should decide whether to raise the employee's compensation up to the threshold – with the knowledge that this threshold becomes a moving target – or reclassify the employees as non-exempt (*i.e.*, overtime eligible). This analysis inevitably requires an analysis of financial implications, including

possible budget offsets for increased overtime costs and likely upward pressure on wages as lower earners move up to meet the exemption threshold.

For employees who are reclassified as non-exempt, employers must manage compliance with the full range of the FLSA's recordkeeping and overtime payment rules. This effort should include necessary training to ensure that formerly exempt employees understand what it means to be a non-exempt employee. This includes learning what constitutes "work time" under the FLSA and how to record it, learning about meal and rest breaks, and generally understanding the new expectations that come with overtime eligibility. Similarly, these employees' supervisors must be trained on the new expectations on their non-exempt subordinates, from the tracking of work time to the pre-authorization of overtime work to the prevention of off-the-clock work. Compliance will also likely require making changes to relevant policies and practices, including timekeeping systems.

Challenges to the Regulations

We expect there will be a number of challenges to these regulations. Congress has already been working on a bill entitled "Protecting Workplace Advancement and Opportunity Act." This bill, which might be enacted by Congress but would certainly be vetoed by President Obama, would require DOL to abandon the new rule and to "fully and accurately" consider the economic impact of any new regulation on small business, nonprofits, and others that would be affected. Court challenges seem likely as well, including challenges to the "notice and comment" process itself and to the proposed triannual indexing of the salary level test. Nonetheless, employers should prepare for full implementation of these regulations by December 1, 2016.

These new regulations will be the subject of our monthly [Third Thursday program](#) tomorrow, May 19, 2016, noon Eastern Time.

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