

### Tick-Tock: The Overtime Clock Starts Running For Millions More Workers

On May 18, 2016, the U.S. Department of Labor's Wage and Hour Division ("DOL") issued a final rule modifying overtime eligibility under the Fair Labor Standards Act ("FLSA"). The final rule, which goes into effect on December 1, 2016, increases the salary threshold for overtime eligibility for exempt executive, administrative, and professional employees to \$47,476 per year. It also increases the salary requirement for the "highly compensated" exemption to \$134,004 per year. The DOL calculates that this will extend overtime pay eligibility to 4.2 million workers currently classified as exempt.

#### Background

The FLSA guarantees minimum wage and overtime pay at a rate of one and one-half times the employee's regular rate for all hours worked over 40 in a workweek. Individuals employed in a "bona fide executive, administrative, or professional capacity" and certain other employees are exempt from this requirement. 29 U.S.C. § 213(a)(1), (17). This means that those individuals may be required to work more than 40 hours per week without receiving additional overtime pay.

Currently, exempt executive, administrative, and professional employees (often called "white collar" employees) must meet three requirements to be exempt: (1) the employee must be paid on a salary basis (meaning he or she receives a set amount of compensation for each week in which he or she performs any work); (2) that salary level must be at least \$455 per week (or \$23,660 per year); and (3) the employee must meet duties tests that vary among the different exemptions. To satisfy the duties test, an exempt executive's primary duty must involve managing the enterprise, he or she must regularly supervise at least two full-time employees, and he or she must have hiring and firing authority (or his or her suggestions regarding hiring and firing must be given particular weight). An exempt administrator's primary duty must be the performance of office work directly related to the employer's management or operations, and that duty must include the exercise of discretion and independent judgment with respect to matters of significance. An exempt professional employee is generally a member of one of the traditional "learned" professions, such as doctors, dentists, accountants, teachers, engineers, lawyers, and architects.

There is a separate federal exemption for highly compensated employees. It imposes a minimal duties test but requires that an employee receive a high level of total annual compensation.

#### The Final Rule

The final rule differs slightly from the [rule proposed by the DOL in June 2015](#). The DOL raised the salary threshold for exempt white-collar employees from \$23,660 to \$47,476 per year (or from \$455 to \$913 per week). Employers can satisfy up to 10 percent of this salary requirement with nondiscretionary bonuses, incentive payments, and commissions, so long as these forms of compensation are paid at least quarterly.

The final rule also raised the total annual compensation requirement for exempt highly compensated employees from \$100,000 to \$134,004. (Employers should note that a number of state wage and hour laws (including New York's) do not recognize the highly compensated exemption.)

The final rule further provides that these salary thresholds will be automatically updated every three years, beginning on January 1, 2020. The salary level for exempt executive, administrative, and professional employees will be set at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage census region in the U.S. The compensation requirement for highly compensated employees will equal the annualized weekly earnings of the 90th percentile of full-time salaried workers nationally.

Though the proposed rule suggested that the DOL might modify the duties tests described above, the final rule did not make any changes to the duties tests for any exemption.

### **Take-Aways for Employers**

With the new rule going into effect before the end of the year, now is the time for employers to assess their employees' overtime eligibility. Employers should determine how many exempt executive, administrative, or professional employees make less than \$47,476 per year. Those employees will be non-exempt in December and thus entitled to overtime pay for all hours worked over 40. Employers have a few options to become compliant with the new rule:

- Employers can raise the affected employees' salaries to at least \$47,476 per year. So long as the employees continue to satisfy the applicable duties test, they will continue to be exempt under the FLSA.
- Employers can reclassify affected employees as non-exempt, tracking their hours and paying overtime for all hours worked over 40 in a workweek.
- Employers can ensure that their newly non-exempt employees do not work more than 40 hours per week, and (if necessary) may hire new employees to cover the additional time those employees had been working. Keep in mind that even if non-exempt employees do not work any overtime, employers still must track their hours (and pay for any overtime the non-exempt employees ultimately work).

Along with reviewing salary levels, this is also the time for employers to review overtime exemptions generally. Employers should ensure that all job descriptions properly reflect the employees' exempt duties and the reality of their day-to-day work.

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