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Labor and Employment Alert: Millions of Workers and Billions in Costs Herald a Brave New World Under the Department Of Labor's Overtime Rule

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Today, the U.S. Department of Labor published its final rule significantly expanding the overtime protections of the Fair Labor Standards Act (FLSA). The rule increases the salary an employee must receive before being considered overtime-exempt to $913 per week – $47,476 per year (or, $134,004 for highly compensated employees). This is more than double the existing $455 weekly ($23,660 annually) threshold. The rule takes effect on December 1, 2016. Thereafter, the salary thresholds will increase for inflation every three years.

Provision

Current Regulations Effective Until 11/30/2016

Final Rule Effective 12/1/2016

Salary Level

$455 weekly

$913 weekly

Salary Level for Highly Compensated Employees

$100,000

$134,004

Automatic Adjusting

None

Every 3 years

Bonuses

No provision to count nondiscretionary bonuses and commissions toward standard salary level.

Up to 10% of standard salary level can come from nondiscretionary bonuses, incentive payments, and commissions if paid on at least a quarterly basis.

The rule permits employers to consider nondiscretionary bonuses and incentive payments (including commissions) to account for 10% of the new $913 weekly salary level. To qualify, the bonus or payment must be made on a quarterly or more frequent basis. This means that an employee can receive a salary of $822/week and still be exempt if he or she receives at least $91 in nondiscretionary bonuses or incentive payments. The rule permits a "catch-up" payment at the end of the quarter if an employee has not earned enough in nondiscretionary bonuses and incentive payments to meet the salary level. The employer has one pay period to make up for the shortfall (up to 10% percent of the standard salary level for the preceding 13 week period). But for highly compensated employees who are paid at least $134,004 annually, employers must pay at least $913 per week on a salary or fee basis, while the remainder of the total annual compensation ($86,528) may include commissions, nondiscretionary bonuses, and other nondiscretionary compensation.

> Importantly, the DOL has left alone the current duties tests that employees must meet – in addition to the minimum salary level – in order to be considered exempt from overtime. “The Department believes that the increase to the standard salary level, coupled with automatic updating in the future, will address concerns that some workers who satisfy the standard duties test should be entitled to overtime pay because they are performing substantial amounts of overtime-eligible work (e.g., operating cash registers, stocking shelves, etc.).”

The enactment of the FLSA in 1938 ushered in an era of progressive legislation that required businesses to change their pay practices. Now, businesses must fundamentally adjust their operations in light of the DOL’s new salary threshold that will encompass 4.2 million newly overtime-eligible workers and cost employers $1.2 billion per year for the first ten years. The DOL estimates the rule will also “clarify” the overtime requirements of another 8.9 million currently salaried employees whose pay falls below the new threshold.

It remains to be seen whether the rule will be challenged in court or by Congress under the Congressional Review Act (under which Congress can disapprove the rule, but the disapproval can be vetoed by the president), and whether any such challenge will be successful. Regardless, employers must expect that the rule will become effective on December 1, 2016 and must take immediate action to audit their current workforce, pay practices, and job descriptions. The DOL suggests that employers can cope with this impact by raising salaries to maintain the exemption; paying current salaries with overtime after 40 hours; reorganizing workloads or spread work hours; and/or adjusting wages. Each will require careful consideration of business operations and the particular workforce.

Contact your Vorys lawyer for assistance with ensuring your company complies with the rule’s new requirements.