

## **DRAMATIC CHANGES TO OVERTIME RULES ARE HERE TO STAY**

Mr. Richard Fader of Ft. Lee, New Jersey asks: "Is it true that we will see new rules to calculate overtime compensation and who will now be subject to those new rules?" Well Mr. Fader, after two years of wait, debate and overall angst for employers across the country, the new overtime rules by the U.S. Department of Labor ("DOL") have arrived and are a dramatic departure from the past.

On May 17, 2016, the DOL announced the final rule updating the requirements for employees to qualify for exemptions from the overtime requirements under the Fair Labor Standards Act ("FLSA"). The final rule, which takes effect on December 1, 2016, represents a dramatic change from the existing rule. As a result of these changes, millions of workers will lose their current FLSA-exempt status on December 1, 2016.

Under the existing rule, which has been in effect since 2004, employees must be paid a minimum salary of \$455 per week (\$23,600 annually) to qualify for the executive, administrative, professional ("EAP") exemptions from the FLSA's overtime requirements. Under the new final rule, the salary level will increase to \$913 per week (\$47,476 annually). Beginning January 1, 2020, the salary level will update automatically every three years to the 40th percentile of full-time salaried workers in the lowest-wage U.S. Census region. The DOL estimates that this figure will be \$51,168 in 2020. However, the final rule allows up to 10% of the salary level threshold to be met through the payment of non-discretionary bonuses, incentive pay, or commissions. In order for these payments to count towards the salary level, they must be made on at least a quarterly basis.

As a concession to the business community, the final rule reduced the proposed salary level from \$50,440 to \$47,476, lengthened the implementation period from 60 days to six months. However, there is no avoiding the fact that by the end of this year, employees must be paid a salary of more than double the current salary level test in order to qualify for the EAP exemptions. Employers will have to raise the salaries of exempt employees to meet the new salary level, or re-classify exempt salaried employees to non-exempt hourly and manage the overtime they work.

The final rule, however, made no changes to the "duties" test for employees to qualify for the EAP exemptions. The DOL has stated that the updated salary level, coupled with the automatic updates to the new salary level, will serve as the most effective way of determining which employees should be considered exempt.

The final rule also updates the total annual compensation level above which Highly Compensated Employees ("HCE") are ineligible for overtime. The new level is \$134,004 per year, which is up from the current \$100,000 per year. The HCE threshold will automatically increase every three years to the 90th percentile of full-time salaried workers nationally, which the DOL estimates will be \$147,524 in 2020.

Given these dramatic changes to the FLSA, employers should consider a number of legal and practical strategies in implementing the new regulation, which include the following:

- Raise salaries of exempt employees to at least the new threshold to keep an employee exempt from being entitled to overtime compensation. This assumes the employee also meets the applicable "duties tests" for the exemption. This may also be an opportunity for employers to ensure that their employees currently classified as exempt from receiving overtime compensation continue to meet the "duties tests" for their overtime exemption. These "duties tests" have not been changed under the new rule.
- Instead of raising salaries, re-classify a currently exempt employee as non-exempt, and pay them time-and-a-half of their weekly regular rate of pay for overtime work. Weekly regular rate of pay is determined based under the existing DOL rules.
- Leave the employee at their current salary, and pay the employee time-and-a-half of the employee's weekly regular rate of pay whenever the employee works in excess of 40 hours in any work week.
- Limit employees to 40 hours of work each work week.
- Evaluate and realign hours and employee workload, including when necessary, hiring additional workers, in an attempt to make overtime work unnecessary.
- Review and revise overtime policies. Revising handbook policies to restrict hours and overtime work may minimize negative financial impact resulting from the final rule.
- Train employees on the procedures and importance of accurate recordkeeping. After December 1, 2016, businesses will likely have large numbers of employees who either have never tracked their hours or have not done so in a number of years because of their FLSA exempt status.

The contents of this column are not intended to be a complete summary of the legal issues discussed in this column. Rather, this column is intended to alert you to the broad impact of changes in the law. Because of the complexity of the law, it is recommended that all employers consult with experienced labor and employment counsel to ensure that all policies and practices are in compliance with the applicable California and federal law. Please feel free to reach out to the author with any questions or comments.