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The U.S. DOL Unveils Final Overtime Rule

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On September 24, 2019, the United States Department of Labor ("DOL") announced a Final Rule amending the overtime pay exemption requirements under the Fair Labor Standards Act ("FLSA"). The new Final Rule updates the salary level required for exemption from overtime pay of time-and-a-half for all hours worked over 40 in a workweek to $684 per week or $35,568 annually. Under the previous rule, set out in 2004, the salary threshold was set at $455 per week or $23,660 annually. The Final Rule is effective on **January 1, 2020.**

What is new?

- The salary threshold in the Final Rule is within a few dollars of the salary threshold proposed by the DOL in March 2019.
- The Final Rule increases the total annual compensation for highly compensated employees ("HCEs") from $100,000 to $107,432, provided HCEs are paid at least the standard salary level of $684 on a weekly basis.
- The Final Rule revises the special salary levels for workers in the U.S. territories and in the motion picture industry. Specifically:
  - Special salary level for workers in Puerto Rico, U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands is $455 per week.
  - Special salary level for workers in American Samoa is $380 per week.
  - "Base rate" threshold for employees in the motion picture industry is $1,043 per week.
- The Final Rule allows employers to make a "catch up" payment within one pay period after the end of the 52 week pay period if an employee does not earn enough in nondiscretionary bonuses and incentive payments (including commissions) in a given 52-week period to retain his or her exempt status. If the employer chooses not to make the catch-up payment, the employee would be entitled to overtime pay for any overtime hours worked during the previous 52-week period.
- The Final Rule allows employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the standard salary level.
- The Final Rule does not include automatic adjustments over time to the salary threshold.
- The Final Rule does not update the "duties test."
- According to the DOL, the salary threshold increase expands overtime eligibility to 1.3 million additional U.S. workers.

<u>What Should You Do to Comply?</u>

- Increase salary level for exempt employees:
  - Through straight pay by increasing salaries to a minimum of $455 per week or $35,568 annually
  - With non-discretionary bonus (only up to 10% of the standard salary level or $3,556.80 for employees not classified in special salary levels)
- Determine if nonexempt salaried employees should be converted to an hourly pay basis.
  - Pros: tracking and paying overtime will be easily facilitated.
  - Cons: may be viewed by the affected employees as a demotion.
- Adopt protocols to ensure that nonexempt salaried employees are paid overtime at the proper rate.
  - Revise Employee Handbooks and policies relating to overtime and time keeping.
  - Implement time clock system.
  - Travel time incurred by newly reclassified employees should be analyzed to assess whether and to what extent that time should be considered compensable time and if adjustments to travel schedules should be implemented.
- Evaluate telecommuting and other alternative work arrangements to determine whether compensable time can be realistically managed and tracked from remote locations.
- Remind employees about when they are permitted and not permitted to engage in work-related activities outside of scheduled work hours.
  - i.e. employees checking and responding to work-related emails and texts outside of their normal work hours.
- Analyze whether the fluctuating workweek approach is beneficial, which can result in a substantial reduction in overtime pay costs.
- Analyze whether the size of payroll should be reduced.
- Analyze whether the compensation of employees should be reduced.

Please contact the employment law attorneys at Holifield Janich & Ferrera, PLLC for further guidance on this issue.