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INFORMATION MEMO
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USDOL Issues Final Regulations Revising the FLSA White Collar Exemptions

The U.S. Department of Labor recently issued its final regulations revising the white collar exemptions under the Fair Labor Standards Act. Although the final regulations significantly raise the salary threshold for the administrative, professional, executive, and computer employee exemptions, employers can take some solace in the fact that the increase is actually lower than the one proposed by the USDOL last summer. In addition, employers who still have extensive work to do in order to prepare for the implementation of the final regulations will have more time to do so than expected. The final regulations will not become effective until December 1, 2016, which gives employers more than six months to make decisions regarding whether to increase salaries to retain the exemptions or reclassify formerly exempt employees as non-exempt.

The USDOL's proposed regulations issued last summer set the minimum salary to qualify for the white collar exemptions at the salary level equal to the 40th percentile of earnings for full-time salaried workers in the United States. The final regulations set the minimum salary to qualify for the white collar exemptions at the salary level equal to the 40th percentile of earnings for full-time salaried workers in the lowest-wage Census Region of the United States. So, instead of the salary threshold increasing to approximately $970.00 per week as anticipated, the salary threshold for the administrative, professional, executive, and computer employee exemptions will increase to $913.00 per week (which amounts to $47,476 per year) effective December 1, 2016. Although this salary increase is slightly more palatable to employers than the proposed salary increase, it is still a significant increase from the current federal minimum salary level of $455.00 per week to qualify for the white collar exemptions and the current New York minimum salary level of $675.00 per week to qualify for the administrative and executive exemptions. Teachers, lawyers, and doctors will continue to not be subject to this minimum salary requirement.

The USDOL's proposed regulations set the minimum salary to qualify for the highly compensated employee exemption at the salary level equal to the 90th percentile of earnings for full-time salaried workers in the United States. This did not change in the final regulations. Effective December 1, 2016, the minimum salary to qualify for the highly compensated employee exemption will be increased from $100,000 per year to $134,004 per year.

The USDOL's proposed regulations included a provision that would have automatically raised the minimum salary levels to qualify for the white collar exemptions from year to year without further rulemaking. The USDOL's final regulations still provide for automatic increases, but instead of occurring every year, these automatic increases will occur every three years beginning on January 1, 2020. The automatic increases will continue to be based on the 40th percentile of earnings for full-time salaried workers in the lowest-wage Census Region of the United States to qualify for the executive, administrative, professional, and computer employee exemptions, and the 90th percentile of earnings for full-time salaried workers in the entire United States to qualify for the highly compensated employee exemption. Although this will still force employers to evaluate their exempt workforces on a periodic basis to determine whether to reclassify employees as non-exempt, going through this process every three years instead of every single year will ease this burden slightly.

Currently, employers are not permitted to count commissions, bonuses, and other forms of incentive compensation toward the minimum weekly salary for an employee to qualify for the executive, administrative, professional, and computer employee exemptions. However, the USDOL's final regulations allow employers to satisfy up to 10% of the new salary threshold by the payment of non-discretionary bonuses, incentives, and commissions that are paid quarterly or more frequently. Employers should take this into consideration when deciding how to restructure the compensation of exempt employees in order to retain the white collar exemptions.

The final rule does not include any revisions to the outside sales exemption, so employees who are engaged in the primary duty of making sales outside the workplace will continue to not be subject to a minimum salary requirement to qualify for the exemption. In addition, although the USDOL solicited comments about whether revisions should be made to the duties tests for the white collar exemptions, the final rule leaves the duties requirements untouched.

Employers should keep in mind that they have many options when evaluating compliance with the new white collar exemption regulations. One of those options is to convert salaried exempt employees to hourly non-exempt employees and do so at an hourly rate that will not raise the total personnel expense for their business. Of course, that means that the hourly rate will need to be set low enough to account for straight time pay for the first 40 hours per work week and overtime pay for hours worked in excess of 40 hours per work week, without raising an employee's total average weekly earnings above the current salary. In other words, many of the 4.2 million employees who will potentially now be eligible for overtime pay may find that they will not earn any more than they did when they were exempt employees who were ineligible for overtime pay.

If you have any questions about this *Information Memo*, please contact Subhash Viswanathan, any of the attorneys in our Labor and Employment Law Practice, or the attorney in the firm with whom you are regularly in contact.

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