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EMPLOYER ALERT FALL 2016

CHANGES TO FLSA “WHITE COLLAR” OVERTIME EXEMPTIONS

Earlier this year, the United States Department of Labor (“USDOL”) announced rules that will increase the minimum salary level for classifying a “white collar” employee as exempt from the overtime rules under the Fair Labor Standards Act (“FLSA”). The new rules go into effect on December 1, 2016.¹ An explanation of the new rules can be found at <http://federalregister.gov/a/2016-11754> and <https://www.dol.gov/whd/overtime/regulations.pdf>.

Below is a summary of what employers need to know:

1. The most significant change is the increase in the salary level of an employee who is exempt from the payment of overtime. (The new standard salary level for exempt executive, administrative, and professional (“EAP”) employees is set at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region.) The new regulation raises the annual salary threshold from \$23,600 to \$47,476 for the executive, administrative, and professional white collar employee. That is an increase from \$455 to \$913 per week. This means that if you have employees who earn less than \$913 per week, they will be classified as “nonexempt” and entitled to receive overtime wages for hours worked above 40 in a work week.

2. The USDOL will update the new salary threshold every three years beginning January 1, 2020. This will ensure that the threshold is maintained at the 40th percentile of weekly earnings of full-time salaried workers in the lowest income region of the country – currently the South. It is expected that the threshold will be more than \$51,000 by January 1, 2020.

3. The “highly compensated employee” (“HCE”) exemption salary level was also increased from \$100,000 to \$134,004 annually. (This is equal to the 90th percentile of earnings of full-time salaried workers nationwide and will also be updated every three years.)

4. No changes were made to the “duties test” under the white collar exemptions that has been in effect since 2004.

5. Bonuses, incentive payments, and commissions can now count up to 10 percent of the new salary threshold as long as they are paid on at least a quarterly basis.

¹ On September 20, 2016, a group of 21 states filed a lawsuit against the Obama Administration to attempt to stop the law from going into effect. If that lawsuit is successful we will let you know. Otherwise, prudent employers should assume that the new rules will apply on December 1, 2016.

STEPS EMPLOYERS SHOULD TAKE NOW

1. Decide whether it is appropriate to raise the employee's salary to meet the new exemption rules or to allow the employee to work overtime and be paid accordingly. Between now and December 1, 2016, it may be helpful for the employer to start tracking the current number of hours worked weekly by their exempt employees so an informed decision² can be made about the appropriate hourly wage to pay the affected employees.

2. Prepare or update written job descriptions that focus on the current duties and responsibilities of each position. Accurate job descriptions are important for many reasons, including helping you correctly classify employees and/or defend an exemption if challenged in a lawsuit or audit conducted by the USDOL.

Consider developing written employment agreements for salaried exempt employees. Among other things, the agreement should define job duties, specify compensation terms, and acknowledge that the employee is considered to work in an exempt position. Such agreements are excellent vehicles for ensuring that employees are bound by certain restrictions after their employment terminates (*e.g.*, unfair competition, non-solicitation of clients, non-disclosure of confidential information, etc.).

3. Talk to your employees who will be reclassified from exempt to nonexempt employees by the new overtime rule. Explain the new law and let them know that these changes were set by the federal government, not by the employer, and that they are objective standards, not subjective. Some employees may welcome the extra overtime hours, but others may feel demoted. Let them know that these changes are not a reflection of their performance.

4. Train nonexempt employees to use accurate timekeeping methods. Consider adopting policies that require employees obtain approval to work overtime hours. Limit overtime hours and make sure that all overtime hours worked are authorized.

5. Review HR forms that will need to be revised when the regulations go into effect (*e.g.*, offer letters, handbooks, training materials, job descriptions, etc.).

Finally, wage-hour issues can be complex. Thus, we recommend that employers conduct internal wage-and-hour compliance audits with an experienced employment law attorney, who can help ensure that the audit results are confidential and protected by the attorney-client privilege. If you would like to be proactive about these expected changes, please contact Mr. Clark at (480) 844-0039 or etc@clarkfirm.com.

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² Some questions an employer should ask are: Will the exemption(s) be lost when the salary threshold changes? If so, does it make business sense to increase the salary level for those positions? Or, would it be better to pay employees in those positions on an hourly rate basis – with the understanding that overtime pay will be due if/when overtime is worked? Also, do the employees in question meet the “job duties” tests of the white collar exemptions? Do any other minimum wage or overtime exemptions apply?