May 18, 2016

The U.S. Department of Labor Wage and Hour Division today announced its long-anticipated regulations changing overtime pay rules and exemptions. The final rules dramatically change implementation of the Fair Labor Standards Act (FLSA), and will impact virtually all employers. The new rules are set to take effect on December 1, 2016.

Key provisions of the new rules include the following:

- **Increases the salary threshold from $23,660 to $47,476 a year, or from $455 to $913 a week. That is, for an employee to qualify for one of the “white collar” exemptions to the FLSA’s overtime requirements, the employee must be paid a salary of at least $47,476 annually.** This doubles the current salary threshold, and will have a huge impact on many industries. The retail and hospitality industries, in particular, are likely to be among those most affected by this change. Special rules for certain non-profits and employee groups such as teachers will continue to apply.

- **Adjusts the salary threshold every three years.** Past changes to the salary threshold have been specific amounts which remained in effect until further action was taken by the Labor Department, or Congress. The new regulations provide for adjustments to the salary threshold every three years, which are intended to prevent reduction in the “real dollar” value of the salary threshold. Rather than tying the threshold to inflation or measures such as the Consumer Price Index, the threshold will be adjusted so it remains equal to “the 40th percentile of full-time salaried workers in the lowest income region of the country.” The Division anticipates that the threshold will rise to more than $51,000 on January 1, 2020.

- **Increases the “highly compensated employee” threshold—from $100,000 to $134,004.** Current regulations include special rules that make it much easier for employers to consider salaried employees who are paid at least $100,000 annually as exempt from overtime pay requirements. The new rules maintain the “highly compensated” category, but substantially increases the threshold figure. The highly compensated employee threshold will be adjusted to a level equal to the 90th percentile of annual earnings of full-time salaried employees nationally.

- **Retains current “duties tests” used to determine whether salaried employees are properly treated as exempt from**
overtime requirements. In addition to being paid on a salary basis. Employers were concerned that the new regulations would make the “duties test” used to determine whether employees are properly considered exempt from the FLSA’s overtime requirements. Fortunately, the new rules do not change the duties requirements. So, for example, the current test used to determine whether a salaried employee is an overtime-exempt “Executive” employee will remain the same.

- New rules for treatment of bonuses, incentive payments and commissions paid to salaried employees. The new regulations allow employers to count certain non-discretionary bonuses, incentives, or commission payments to determine whether an employee’s salary meets the minimum salary threshold. But there are conditions. For example, a bonus or incentive tied to productivity or profitability must be “non-discretionary,” and must be paid on a quarterly or more frequent basis. Only a portion of the bonus or incentive payment equal to 10 percent of the required salary amount can be included to determine whether the salary threshold is met. The regulations also allow “catch-up” payments. So, if the employee does not qualify for a bonus or incentive, the employer can pay a “catch-up” payment at the end of a quarter to bring the employee’s salary up to the minimum salary threshold and maintain the overtime exemption. Bonuses and incentive payments cannot be counted to determine whether the “highly compensated employee” threshold is met.

As this brief summary suggests, the new regulations are complicated and there are many exceptions, conditions, and qualifications not covered here. If you have any questions about the new regulations, please contact Joseph W. Bryan at jbryan@taylorench.com or 678.336.7192.