

---

**New Federal Overtime Regulations to Take Effect December 2016**

In response to public concern that wages at the low end of the pay scale were slow to rise, in 2014 President Obama directed the United States Department of Labor (the “DOL”) to update the regulations defining which white collar workers are protected by the minimum wage and overtime requirements of the Fair Labor Standards Act (the “FLSA”). Consistent with the President’s goal of ensuring that workers receive a fair day’s pay for a fair day’s work -- by increasing wages and increasing overtime pay -- the Memorandum instructed the DOL to find ways to modernize and simplify the FLSA regulations while ensuring that the FLSA’s intended overtime protections are fully implemented.

The DOL issued proposed regulations in July 2015, and invited public comment. After considering the comments, on May 18, 2016, the DOL released the final regulations, which make substantial changes to the test governing which employees are entitled to overtime. The new regulations will go into effect on December 1, 2016, giving employers 6 months to bring their pay practices into compliance.

Given the far-reaching nature of the amendments -- the DOL estimates that more than 4 million employees will be affected nationwide -- it is imperative that employers immediately develop a plan to bring pay practices into compliance by either increasing certain employees’ salaries to maintain the exemption, or preparing to pay overtime to employees who will now be non-exempt. Employers that cannot afford to increase labor costs should consider reclassifying affected employees as non-exempt while simultaneously developing a workable strategy to cap these employees’ hours at 40 hours per week. Likewise, employers should begin planning

---

appropriate budgets, and implementing any necessary training. Moreover, as long as employers are re-classifying some employees to comply with the new regulations, this would be an ideal opportunity to examine and, if necessary, change the exempt status of all currently misclassified employees, even those employees not directly affected by the new regulations.

### Raising the Salary Threshold

The most sweeping change is the increase in the minimum salary threshold required to be classified as a white collar employee who is “exempt,” in FLSA parlance, from Federal overtime law requirements. Currently, employees whose duties satisfy the test for “executive,” “administrative,” “professional,” or “computer” employees are considered exempt as long as they receive a minimum salary of \$455 per week (\$23,660 per year). This is the so-called “salary basis test.” Under current rules, employees whose salaries are less than this amount, or who are not paid on a salary basis, are not considered exempt, no matter what their duties are.

The current salary threshold was set in 2004 and has not changed since. The new regulations raise the threshold from \$455 per week to \$913, which equals \$47,476 per year.<sup>1</sup> Thus, an employee who does not receive a salary of at least \$913 per week will not be considered exempt. For example, a project manager who earns \$850 per week (and whose duties satisfy one of the white collar exemptions) may be currently considered exempt, and thus not entitled to overtime. But under the new regulations, that project manager would no longer be exempt, and the employer would be required to pay her one and a half times her regular rate for all hours worked over 40 in any given workweek. If the manager’s employer does not want to

---

<sup>1</sup> The minimum salary threshold will increase every three years based on a formula set forth in the regulations.

---

pay overtime, it would have to raise her salary above the threshold, for example to \$925 per week.

The final regulations depart from the proposed regulations (and current regulations) in their treatment of nondiscretionary bonuses, incentive payments and commissions. Currently such payments do not count toward the minimum salary amount, but beginning in December 2016, employers may use such payments, so long as they are paid quarterly or more frequently, to satisfy 10% of the minimum salary requirement. At the end of each quarter (13 weeks), if the employer determines that the employee's salary plus bonus, incentive and/or commission payments did not bring the employee's weekly compensation to \$913, it may make a one-time payment to make up the difference. Thus, for example, an employee who earns a salary of \$825 per week, plus commissions in an amount equal to at least \$88 per week, will meet the minimum salary requirement. If, at the end of the quarter, it turns out that she earned only \$50 per week in commissions, the employer must make a payment of \$494 (13 weeks times the \$38 weekly shortfall) in order to keep the employee exempt.

#### Highly Compensated Employees

An employee can also be considered exempt if she is a "highly compensated employee." Currently, this exemption requires that the employee receive total annual compensation of at least \$100,000 and regularly perform any one or more (but not necessarily all) of the exempt duties or responsibilities of an executive, administrative or professional employee. Total annual compensation for the highly compensated employee exemption may include commissions, non-discretionary bonuses, and other non-discretionary compensation. When the changes go into effect, the threshold for highly compensated employees will increase to \$134,004 per year (to be

---

revised every three years). The employee will still have to earn at least \$913 on a weekly basis, with the rest being made up of commissions and other non-discretionary compensation. To the extent such non-discretionary compensation does not bring the employee up to the \$134,004 threshold, the employer can make a year-end payment of the shortfall in order to retain the exemption.

#### Conclusion

In order to comply with the sweeping changes to the salary threshold, employers should review the compensation levels of their currently exempt white collar and computer employees, as well as their highly compensated employees. Employers should also examine their personnel budgets and train their staff, and consider whether these changes present an opportunity to re-classify any currently misclassified employees. HNRK stands ready to assist you in these efforts.