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The U.S. Department of Labor Issues New Overtime Regulations Affecting Millions of U.S. White Collar Workers

By Philip R. Voluck, Esq., Keith Gutstein, Esq. and Meg Theranger, Esq.

On May 18, 2016, the U.S. Department of Labor (DOL) issued its Final Rule drastically modifying the regulations used to determine whether white collar employees qualify for exemptions from overtime pay under the Fair Labor Standard Act ("FLSA"). The new rule could potentially affect as many as 4.2 million white collar workers currently classified as exempt from receiving overtime based upon the current federal thresholds.

In order for an employee to qualify for an FLSA white collar exemption, the employee must satisfy: (a) the "salary basis test", which requires the employee to be paid a fixed weekly salary; (b) the "salary level test", which sets a minimum mandatory salary threshold; and (c) the "duties test", which requires that the employee primarily perform executive, administrative, or professional duties as defined by the FLSA. Under the existing rule, the required annual salary level is $23,660.

The new rule significantly changes the salary level test by increasing it from $23,660.00 to $47,476.00 annually. As a result, wages for white collar workers, whether through overtime compensation or higher salaries, could increase by an estimated 12 billion dollars over the next ten years. The new rule additionally provides for automatic updates to the salary level test every 3 years to prevent it from becoming outdated and ineffective as it had in the past.

There are also some new "protections" for employers. For the first time, employers may also use incentive payments to satisfy up to 10% of the required salary level for the overtime exemption (if they are provided to employees on at least a quarterly basis). This allows employers to play "catch up" at the end of each financial quarter. Significantly, the DOL did not alter the "duties test" as it considered concerns from employers during the comment period that changes to the duties test would be too disruptive.

In response to these significant changes, which go into effect on December 1, 2016, employers must consider their options, which include: increasing salaries for exempt employees that already meet the duties test, reclassifying employees as non-exempt and paying overtime premiums when employees work in excess of forty (40) hours in a week, or reducing or eliminating hours worked by employees to prevent overtime hours. Employers should use the time before the new rule goes into effect to consult employment counsel and analyze the best options available.

While the national attention focused on the increasing salary threshold will undoubtedly convince some employers to simply raise the salary of employees they deem to be exempt, employers must not lose sight of the fact that in order for an exemption to apply, the employee must also satisfy the duties test. Accordingly, employers are cautioned that the decision to increase an employee's salary, but avoid a thorough analysis of the duties test, may not only potentially nullify the exemption, but the increased pay to employees already misclassified as exempt may also lead to an increase in potential damages against the employer.