G|K EMPLOYMENT & LABOR ADVISORY

MAY 2016

Department of Labor Released Final Changes to Overtime Regulations, Some of Which Carry a Few Surprises

In July 2015, Gallagher & Kennedy alerted employers to the U.S. Department of Labor's ("DOL") proposed amendments to the FLSA's overtime regulations. The long anticipated final changes to the overtime regulation have been released and will take effect December 1, 2016.

The most significant change to the regulations is the increase in the salary level required for exemption from overtime to an annual salary of $47,476 (up from the current salary threshold of $23,660). This translates to a weekly salary if $913 (up from $455 per week). This figure was revised downward from the proposed regulations and is set at the 40th percentile of fulltime salaries in the lowest-wage Census Region, which is currently in the South.

This means that employees who currently earn more than $455 per week, but less than $913 per week, need to be (1) reclassified as nonexempt and will be entitled to overtime for any hours worked over 40 in a week or (2) increased to the $913 per week threshold, for those employees not far off from the new threshold.

No changes to duties test. The DOL has posted a fact sheet which explains the final rules focus on updating salary and compensation level for white collar exempt employees. In addition to the salary threshold, workers must meet the "duties tests" to determine exempt status. The DOL did not alter the duties test for exemption in the final regulations, so employers should continue to follow the familiar duties tests from 2004.

White collar exemption tests. To be exempt from overtime, "white collar" employees must (1) be compensated on a salary basis exclusive of board, lodging, or other facilities rather than on an hourly basis, (2) meet the salary threshold of at least $913 per week (as of December 1, 2016), and (3) meet the duties tests by having the employee's primary job involve the kind of work associated with exempt executive, administrative, or professional employees.

The overtime exemption applies to any computer employee who is compensated on a salary or fee basis at a rate of $913 per week or more, or on an hourly basis at a rate of at least $27.63 an hour, and meets the duties tests.

Three year adjustments. The DOL will automatically update the standard salary and compensation levels every 3 years going forward. This will be easier on employers than the originally proposed annual updates. Based on projections of wage growth, the DOL anticipates that this threshold will rise to over $51,000 by January 1, 2020, which will be the date of the first increase.

FOR FURTHER INFORMATION, PLEASE CONTACT:

Jodi R. Bohr	(602) 530-8035	jodi.bohr@gknet.com
Don P. Johnsen	(602) 530-8437	dpj@gknet.com

Gallagher&Kennedy

2575 East Camelback Road | Phoenix, Arizona 85016-9225
Phone (602) 530-8000 | Fax (602) 530-8500

G|K

Highly Compensated Employees. The final rule also set the total annual compensation level for highly compensated employees (HCEs) at $134,004 per year, up from the proposed threshold of $122,148. This compensation level is equal to the 90th percentile of earnings of full-time salaried workers nationally and is set to adjust automatically every three years on this basis.

According to the DOL, to be exempt as an HCE, an employee must also receive at least the new standard salary amount of $913 per week on a salary or fee basis and pass a minimal duties test. An HCE must customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee and have the primary duty of performing office or nonmanual work.

Bonuses and incentives. The final rule allows employers to count nondiscretionary bonuses, incentive payments, and commissions toward as much as 10 percent of the salary threshold. In order to count, these payments must be paid on a quarterly or more frequent basis. The new rules also permit the employer to make a catch-up payment.

An HCE's annual compensation may continue to include commissions, nondiscretionary bonuses, and other nondiscretionary compensation earned, as it has in the past. An HCE must also receive at least the new standard salary amount of $913 per week on a salary or fee basis.

There are a few options available to employers to assist in controlling overall costs:

a. Increase the salaries of a group of employees to place them in the exempt category in order to avoid paying overtime.

b. Drop the hourly rates of newly nonexempt employees, so the total cost when paying overtime will be comparable to the salary they were paid when they were exempt (although this option may not go over well with employees).

c. Reclassify the affected employees as nonexempt, but limit their overtime hours.

d. Hire part time workers or temporary employees to offset the reduced workload of employees who are no longer working more than 40 hours per week.

e. Reduce fringe benefits such as health insurance contributions, 401(k) match, vacation, sick days, etc. to offset the increased overtime costs.

f. Train newly nonexempt employees to use proper timekeeping methods and to prevent them from working unauthorized overtime.

Prior to making any changes, employers should explain to employees why the change is taking place, i.e., to comply with standards set by changes to the federal law, not a discretionary change by the company. Reclassifying an employee from exempt to nonexempt offers overtime options, but may appear to be a loss of status to the newly nonexempt. While some employees will welcome the chance to receive overtime pay, others may see the need to track actual hours worked as a demotion. Therefore, reiterate that the changes are not a reflection of how the company views the employee. These measures will likely ease the transition.

Since our previous advisory, we've already seen an uptick in DOL audits of companies in which the focus has been on the classification of exempt versus non-exempt employees. These final regulations promise a continued uptick on the focus on the proper classification of employees by the DOL. This is an excellent opportunity to review your company's compensation plans and job descriptions which are essential when properly classifying employees as exempt or non-exempt based on white collar exemptions under the FLSA.

FOR FURTHER INFORMATION, PLEASE CONTACT:

Jodi R. Bohr (602) 530-8035 jodi.bohr@gknet.com
Don P. Johnsen (602) 530-8437 dpj@gknet.com

Gallagher&Kennedy

2575 East Camelback Road | Phoenix, Arizona 85016-9225
Phone (602) 530-8000 | Fax (602) 530-8500