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SPECIAL UPDATE

PUBLIC AND PRIVATE EMPLOYERS

May 19, 2016

United States Department of Labor Issues Final Rule Updating Overtime Regulations

Yesterday, President Obama announced the publication of the Department of Labor's final rule updating the overtime regulations. The new rule focuses primarily on updating the salary and compensation levels needed for Executive, Administrative and Professional workers to be exempt and provides for the following:

1. Sets the minimum standard salary level at \$913 per week/\$47,476 per year to qualify for any exemptions;¹
2. Sets the total annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test to \$134,004;² and
3. Establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the referenced percentiles.

The Final Rule also amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level.

Exemptions and Options for State and Local Governments:

Comp time: State and local government agencies may arrange for their employees to earn comp time instead of cash payment for overtime hours worked.

- Any comp time arrangement must be established pursuant to the provisions of a CBA, MOU or any other agreement between the employer and employee before the performance of the work.
- The agreement may be evidenced by notice to the employee that compensatory time will be given in lieu of overtime pay.
- The comp time must accrue at one-and-one-half hours per overtime hour worked, and when used, the comp time is paid at the regular rate of pay.

¹ These numbers equate to the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, currently the South.

² The annual equivalent of the 90th percentile of full-time salaried workers nationally.

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Fire and police small-agency exemption: The FLSA also provides an exemption for fire protection or law enforcement employees, if they are employed by an agency that employs fewer than five fire protection or law enforcement employees.

- These employees may be paid overtime on a “work period” basis, which may be from 7 consecutive to 28 consecutive days in length.

Impact of the New Rule is Limited by Other Rules and Exemptions:

Many employees of state and city governments won't be affected by the final rule:

- Hourly workers who are entitled to overtime or comp time regardless of how much they make.
- Workers with regular workweeks of 40 or fewer hours will not be affected by the new overtime rules.
- Salaried workers who do not primarily perform executive, administrative or professional duties are not eligible for the white collar overtime exemption. These employees should already be getting paid overtime for any hours they work over 40 in one week.
- Workers who do not perform executive, administrative or professional duties, BUT are highly compensated and earn more than \$134,004 in a year, are generally ineligible for overtime.

State and Local Government Employers Have Discretion to Choose Between Several Options For Complying With the Final Rule

Many options are available for complying with the new salary threshold, including:

- *Provide comp time:* Unlike private sector employers, public sector employers can provide comp time rather than cash for overtime hours worked.
- *Raise salaries:* For workers whose salaries are close to the new threshold, employers may choose to increase these workers' salaries to meet the new threshold and maintain their exempt status.
- *Pay overtime above a salary:* In some cases, employees do not usually work overtime, but only occasionally have periods that require overtime hours. Here, the agency can choose to continue to pay the employee her regular salary, and then pay overtime or provide comp time for overtime hours in excess of 40 per week when they occur.
- *Evaluate and realign employee workload:* Employers can limit the need for overtime by ensuring that workloads are evenly distributed, that staffing levels are appropriate, and that workers are managing their time well.

The effective date of the final rule is December 1, 2016. The initial increases to the standard salary level and HCE total annual compensation requirement will be effective on that date. Future automatic updates to those thresholds will occur every three years, beginning on January 1, 2020.