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DOL Issues Final Rule Regarding Updated FLSA White Collar Exemptions

The long-awaited final rule from the Department of Labor ("DOL") regarding Fair Labor Standards Act ("FLSA") exemptions has finally been issued, to take effect Dec. 1, 2016. Companies should begin preparing for the likelihood that many previously exempt employees will become eligible for overtime pay; the White House announced that this new rule is expected to extend overtime protections to an additional 4.2 million Americans.

Why are the exemptions being modified?

In March 2014, President Barack Obama ordered the Department of Labor ("DOL") to "update," "modernize" and "streamline" the existing overtime regulations, noting that ". . . regulations regarding exemptions from the Act's overtime requirement, particularly for executive, administrative, and professional employees (often referred to as 'white collar' exemptions) have not kept up with our modern economy. Because these regulations are outdated, millions of Americans lack the protections of overtime and even the right to the minimum wage." President Obama's directive was to "consider how the regulations could be revised to update existing protections consistent with the intent of the Act; address the changing nature of the workplace; and simplify the regulations to make them easier for both workers and businesses to understand and apply." In accordance with this directive, on May 5, 2015, the DOL submitted proposed changes to the overtime exemption regulations to the Office of Management and Budget ("OMB") for approval. The OMB reviewed the proposed changes and released them for public comment, receiving nearly 300,000 comments. Today, the DOL issued the final rule, which will take effect on Dec. 1, 2016.

What are the key changes?

- *Salary Threshold Increase*: The minimum salary threshold for the white collar exemptions will increase for the first time in over a decade to $913 per week, or $47,476 per year. This more than doubles the current threshold of $455 per week/$23,600 annually, but is slightly less than the originally proposed increase.
- *Highly Compensated Employees:* The new rule raises the salary threshold for the highly compensated employee ("HCE") exemption from $100,000 to $134,004 per year.
- *Automatic Increases to Threshold:* The salary threshold will be automatically increased every three years to maintain it at the 40th percentile of full-time salaried workers in the lowest-wage census region. The threshold is expected to rise to more than $51,000 with its first update on Jan. 1, 2020. Likewise, the HCE salary threshold will be updated to maintain it at the 90th percentile of annual earnings of full-time salaried workers nationally.
- *Bonuses and Commissions:* For the first time, certain non-discretionary bonuses and incentive payments (such as commissions) may be counted to satisfy up to 10 percent of the salary threshold (provided they are made on a quarterly or more frequent basis, with a "catch-up" option)—something that is not permitted under the current rule.

410 17th Street, Suite 2200
Denver, Colorado 80202

What didn't change?

The salary threshold is just the first hurdle; in order to qualify for an exemption, employees also must satisfy the applicable "duties" test, analyzing whether an employee's primary duties are exempt ones. Although the DOL requested comments on whether the duties test should change (e.g., shifting from a qualitative focus to a quantitative one, such as that used in California, or eliminating the concept of "concurrent duties"), the final rule did not include any changes to the duties tests.

What should companies do now?

It is likely that many currently exempt employees no longer will qualify for the exemption going forward. Companies should act now to audit their exempt positions (preferably under legal counsel's oversight). The Dec. 1 effective date provides a short window for companies to audit, evaluate, and adjust their workforces to comply with the new rule, but this presents a unique opportunity to reassess all employee classifications. Analyzing this issue now will enable companies to get a jump-start on compliance with the new regulations and permit them to proactively "right-size" compensation for employees near the salary threshold.

Christine A. Samsel
Shareholder
csamsel@bhfs.com
303.223.1133 (CO)
310.500.4622 (CA)

Hannah M. Caplan
Associate
hcaplan@bhfs.com
303.223.1258