



CLIENT ALERT

NEW OVERTIME RULE FROM DEPARTMENT OF LABOR TO GO INTO EFFECT JANUARY 1, 2020

This fall, the United States Department of Labor released a final rule that will increase the minimum salary to be considered exempt from overtime requirements under the Fair Labor Standards Act (FLSA). This final rule is similar to a proposed rule promulgated in 2016, described in a [previous alert](#) and subsequently [blocked by a federal court](#), though it contains a number of key differences. The new final rule will take effect January 1, 2020.

The three tests used to determine whether overtime pay is required remain the same: employees are generally exempt only if they receive a salary rather than hourly compensation (the “salary basis test”); if that annual salary exceeds a specific threshold (the “salary level test”); and if the nature of their employment responsibilities falls into a defined category (the “duties test”).

The final rule changes the threshold for the “standard salary level” from the currently enforced level of \$455 per week to the increased level of \$684 per week (equivalent to \$35,568 per year compared to the previous threshold of \$23,660 per year). However, employers now will be allowed to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to ten percent (10%) of the standard salary level, so long as these additional payments are made at least annually. The final rule also increases the annual compensation level for exempt “highly compensated employees” from \$100,000 to \$107,432 (generally, these are employees whose limited supervisory responsibilities do not pass the “duties test” (defined below)). The Department of Labor estimates that these changes will affect 1.3 million currently exempt workers, absent action by their employers.

Some employers may have made changes in advance of the proposed rule originally set to go into effect in December 2016. Others will need to consider a number of options to determine how best to comply with the new threshold requirements.

OPTIONS FOR EMPLOYERS

For positions with salaries close to the new threshold where overtime is common, it may be prudent to simply increase the position’s salary to \$35,568. This option is only available if the position satisfies the “duties test,” meaning that the position’s responsibilities are those of an executive, administrative, or professional employee. This determination is fact-specific and

based on the position's actual responsibilities; it is not sufficient to simply provide the position with a title that suggests satisfaction of the test.

For those employees who rarely work overtime hours, it may be best to provide overtime pay. This option is available for currently salaried employees as well as those who are paid hourly, as it is possible to calculate an hourly overtime rate for salaried employees. Employers will need to clearly communicate changes to affected employees and have adequate policies and procedures (such as timekeeping practices) in place in order to ensure compliance.

Employers also may be able to realign work hours and workload, or bring on additional staff, to preclude the necessity for overtime work. In this case, the employer will want to adopt clear policies prohibiting overtime without written approval, though this approach is not foolproof, and the employer also will need to be able to control assignments and scheduling.

It is important to remember that many professionals – including teachers – are not affected by the new final rule. Existing law renders them exempt from overtime without the need to meet the salary threshold.

CONCLUSION

The final rule will raise a number of legal and strategic issues specific to each workplace and the individual employees that may be affected. The key point is that, unless changes are made, exempt employees who currently earn less than \$35,568 annually will need to be reclassified as non-exempt and paid overtime at time and a half for all hours worked above forty hours in a given week.

In order to understand the new overtime rules and evaluate options for compliance which will cause the least amount of disruption before the new rules go into effect on January 1, 2020, feel free to contact Paul Holtzman (pholtzman@kb-law.com), Jill Brenner Meixel (jmeixel@kb-law.com), or Allison Belanger (abelanger@kb-law.com) at (617) 482-7211.