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CLIENT ALERT

NEW OVERTIME RULE FROM DEPARTMENT OF LABOR REQUIRES STRATEGIC DECISIONMAKING BY EMPLOYERS

For most employers and their employees, all they have believed they've needed to know about overtime rules has been the figure \$23,660. That has been the threshold for the “**salary level test**,” one of three tests governing whether overtime pay (at one and half times the hourly rate) is required. Many have operated under the common misconception that employees with an annual salary above that level were simply not entitled to overtime because they met both the “salary level test” and the “**salary basis test**” since they were paid a salary rather than an hourly wage. Many employees who earned at least that much in the form of a fixed salary simply did not inquire further. As a result, little attention was paid to the key “**duties test**” that must also be met to render an employee “exempt” from the requirement of overtime pay.

With yesterday's rule change by the United States Department of Labor, the playing field is about to change. Absent congressional action before the December 1, 2016 effective date, the salary threshold will dramatically increase to \$47,476. The figure will be further adjusted every three years.

The immediate result will be an additional 4.2 million workers eligible for overtime pay if they work more than forty hours in a week. To determine how best to address this changed landscape and the inevitable questions from employees about the new threshold, employers will need to consider a number of options.

OPTIONS FOR EMPLOYERS

For positions with salaries close to the new threshold where overtime is common, it may be prudent to simply increase the salary to \$47,476. However this “fix” only works if the position satisfies the “duties test,” meaning that the responsibilities of the position are those of an executive, administrative or professional employee. That determination requires a review of

each position. Note that it is not enough to bestow a “manager” title – the employee’s actual job responsibilities must satisfy the duties test.

For employees who rarely work overtime hours, providing overtime pay may be the best choice. This option is available even for salaried employees as there is no need to convert an employee to hourly pay in order to calculate his or her overtime rate.

For positions with predictable schedules where the employer controls the assignments, it may be possible to realign 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, although this approach is hardly fail safe.

TWO OTHER KEY FIGURES

In understanding the new rule, two other figures are important to keep in mind.

Ten percent: For employees whose compensation includes nondiscretionary bonuses and incentive payments (including commissions), those dollars may be counted to satisfy up to ten percent of the new salary threshold. For example, an employee with a salary of \$43,000 and \$4,500 in qualifying additional compensation will meet the new salary minimum.

\$134,000: This is the new salary threshold for a separate overtime exemption for “highly compensated employees.” For example, an employee whose limited supervisory responsibilities may be insufficient to satisfy the standard “duties test” may nonetheless be exempt from overtime pay under this separate provision. The salary threshold for this exemption has been increased to \$134,000 from \$100,000.

CONCLUSION

The new rule will raise any number of legal and strategic issues specific to your workplace. For now, the key point is that if you have exempt employees who earn less than \$47,476 annually, and you make no changes, those employees need to be reclassified as non-exempt and paid overtime at time and a half for all hours above forty in a week.

It is also important to remember that teachers and certain other professionals are not affected by the new rule. For these employees, the new salary threshold is of no moment because existing law renders them exempt from overtime without the need to meet the “salary test.”

In order to understand the new overtime landscape slated to come into effect December 1, and to evaluate available options for compliance which will cause the least disruption, feel free to contact Paul Holtzman (PHoltzman@kb-law.com) or Jill Brenner Meixel (JMeixel@kb-law.com) at (617) 482-7211.