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Overtime Overhaul – The Final Regulations are Finally Here

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After two years of wait, debate and overall angst for employers across the country, the new overtime rules were announced today. The details of the rule are available, but final publication of the rule in the *Federal Register* will not be until May 23, 2016. Although this new overtime regulation will still significantly impact employers in virtually every industry, there are some significant and positive changes from the rule initially proposed by the Department of Labor (DOL) last year. The most important news is that the Office of Management and Budget (OMB) listened to employers' concerns about the complexity of compliance and provided an extended period until **December 1, 2016**, before the Final Rule becomes effective.

The salary threshold is still doubling, so it is difficult to call this "good news," but the Final Rule has some concessions that will make it a little more palatable for employers:

- **The 2016 salary threshold will be \$913/week, which is \$47,476/year.** This is \$2,964 less than the originally proposed \$50,440 salary threshold. The salary threshold will be based upon the 40th percentile of the lowest-wage region, the South, rather than the entire country as initially proposed. This change is likely the result of criticism the DOL received for basing their proposed rule on national statistics, which did not take into account regional salary fluctuations. For the highly compensated employee exemption (HCE), however, the DOL is still basing the new wage on the weekly earnings of the 90th percentile of full-time salaried workers nationally, which will mean **an increase in the HCE annual salary threshold from \$100,000 to \$134,004.**
- **Bonuses and incentives (including commissions) can be included to satisfy up to 10 percent of the standard salary level.** For the first time, non-discretionary bonuses and incentives (including commissions – which is a shocker, since the DOL basically said no commissions in the proposed rule) can be included AND the rule allows employers to make a "catch up" payment. For employers to credit nondiscretionary bonuses and incentive payments toward a portion of the salary threshold, the Final Rule requires such payments to be paid on a quarterly or more frequent basis. If an employee does not earn enough in nondiscretionary bonuses and incentive payments (including commissions) in a given quarter to retain their exempt status, the Final Rule permits a "catch-up" payment at the end of the quarter. The employer has one pay period to make up for the shortfall.
- **The automatic updates will be every three years beginning January 1, 2020.** Rather than the initially proposed annual updates, the Final Rule provides for updates every three years. This will be based on the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage region, which is currently and will likely remain the South.
- **No changes to the duties test.** There was some speculation that the DOL would revise the duties test in the Final Rule, but they did not touch them . . . but that doesn't mean they won't make changes to the test in the future.

The DOL also published specific guidelines for Higher Education (responding to lingering questions as to how the Final Rule would apply to some specific positions, including athletic coaches and graduate assistants) and for Non-profits and State and Local Governments.

Remember, salary threshold is just one of the requirements for exemption. To be exempt from overtime, you must satisfy three tests:

1. The employee must be paid on a **salary basis**, which means a predetermined amount of pay that constitutes all or part of the employee's compensation for the pay period. This predetermined amount is a fixed amount and may not be reduced based on the quality or quantity of the work performed;
2. The employee's salary must meet a **minimum salary level**, which after the effective date of the Final Rule will be \$913 per week, which is equivalent to \$47,476 annually for a full-year worker (the salary threshold test); and
3. The employee's primary **job duty** must involve the kind of work associated with exempt executive, administrative or professional employees (the job duties test).

It is now time for employers to review, analyze, prepare and reclassify employees to comply with the Final Rule. Baker Donelson will be hosting a webinar tomorrow, May 19 ([click here to register](#)), and Monday, May 23 ([click here to register](#)), from 11:30 a.m. to 12:30 p.m. ET, to review the new changes in detail and provide employers with advice on critical steps to take in the coming months.