

# The Bennett Law Firm

## *Client Update*

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### **Department of Labor Announces New Overtime Rule With a December 1, 2016 Effective Date**

Last evening, the Department of Labor announced the issuance of the much anticipated Final Rule on the so called white collar overtime pay exemptions. DOL is expected to issue the actual Rule later today, but has provided a summary of the key points:

#### **New Salary Threshold**

The new salary threshold for those employees who meet the job duties test for the executive, administrative or professional exemptions will increase from \$455.00 a week to \$913.00 a week. The annual amount will be \$47,476.00. This amount is slightly lower than the amount DOL earlier proposed. It reflects the 40th percentile of earnings of full time salaried employees in the lowest wage Census Region, currently the South. The prior higher number was based on the 40th percentile of earnings nationally and did not account for regional differences.

#### **Automatic Adjustment in Threshold Every Three Years**

DOL had proposed that the threshold salary amount automatically update on an annual basis. In the Final Rule, DOL has considerably slowed down that update process. The Final Rule provides for automatic updating every three years.

#### **Limited Credit for Certain Bonuses and Incentive Payments**

For the first time, DOL will permit employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the threshold amount. This credit could allow an employer to pay a weekly fixed salary of \$821.00. However, in order for employers to get this credit toward satisfying the salary threshold, such payments must be paid on a quarterly or more frequent basis. An employer may make a “catch-up payment at the end of each quarter if the employee has not been paid sufficient non-discretionary bonuses to satisfy the salary threshold. Importantly, although some employers pay employees significantly larger nondiscretionary bonuses, the amount that can be credited toward meeting the \$913.00 a week

threshold is capped at 10 percent of that required minimum salary.

### **Job Duties Tests**

The Final Rule is not changing any of the existing job duty requirements to qualify for the three white collar exemptions. A common issue in wage and hour compliance is an employer's failure to carefully assess whether an employee classified as exempt actually meets the job duties test for one of the white collar exemptions. Employers should carefully review the day to day job duties of employees classified as exempt because this area is where the most litigation results.

### **Highly Compensated Employees**

With regard to the exemption for Highly Compensated Employees ("HCE"), DOL is increasing the threshold amount of total earnings from \$100,000.00 to \$134,004.00. An employer must pay a Highly Compensated Employee the full minimum salary threshold of \$913.00 a week without regard to the payment of nondiscretionary bonuses and incentive payments. DOL takes this position because DOL already permits employers to fulfill almost two-thirds of the total annual compensation requirement with commissions, nondiscretionary bonuses and other forms of nondiscretionary deferred compensation. In order to qualify for the HCE exemption, in addition to meeting the \$134,004.00 total earnings requirement, the employee's primary duty must include office or non-manual work and the employee must customarily and regularly perform at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee. Essentially, employees who earn at least \$134,004.00 under the Final Rule will be subject to an abbreviated job duties test.

### **Certain Computer Professionals**

Certain computer employees will continue to be eligible for the professional exemption provided they meet the salary threshold (or are paid at least \$27.63 an hour) and are employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled computer employee.

### **Effective Date**

DOL is providing employers with a little more time than is customary to plan for the significant change. The effective date of the Final Rule will be December 1, 2016.

### **Recommended Action**

All employers should assess the jobs of those employees who are currently classified as exempt under any of the executive, administrative and professional exemptions. For those employees who currently earn less than a fixed weekly salary of \$913.00 (or less than \$821.00 plus at least an average \$91.30 a week in nondiscretionary bonuses/incentive pay), employers will need to

determine whether to increase such employees' weekly compensation to \$913.00 or whether to convert such employees to non-exempt employees entitled to the receipt of overtime pay.

In addition to the above assessment, employers should assess the job duties of those employees who will remain exempt under one of the white collar exemptions to make sure that the employer also satisfies that part of the exemption requirement. Given the increase in the salary threshold, moving forward under the Final Rule, misclassification of employees who do not meet the job duties test will create additional exposure as the overtime rate will now be based on a higher regularly hourly rate of pay. We recently reported on one such case where two employees were employed as managers but claimed that they managed in title only. The evidence was sufficient to require a trial. FLSA actions provide for damages equal to twice the amount of the unpaid wages and many states provide for treble damages under parallel state wage and hour laws. Both state and federal wage and hour laws also provide attorneys' fees to a successful Plaintiff.

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