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Final Rule: Overtime

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Webinar Goals

- Inform you about the key provisions of Final Rule: Overtime
- Discuss strategies for managing and implementing new rules
- Discuss some of the economical ways that CDS can help you navigate the changing landscape of wage and hour law



New Regulations published on May 17

- Effective December 1, 2016
- Will have a dramatic impact on overtime exemptions for all employers

Compensation is a major political topic

- Many states have enacted or are considering significant increases to minimum wage
- Some states, notably California and New York, have enacted special rules for OT exemptions

What exemptions are impacted?

- The three major “white collar” or EAP exemptions:
 - Executive
 - Administrative
 - Professional
- To qualify for exemption, employees generally must:
 - Be paid a minimum weekly salary;
 - With some exceptions, regularly receive a predetermined amount of compensation each pay period regardless of number of hours worked; and
 - Primarily perform administrative, executive, or professional duties (duties test).

No Changes to the Duties Test

- When DOL released the proposed rule, it sought feedback related to the duties test and considered changing the duties tests
 - Employer comments: Changes to standard duties tests would be disruptive
- Hundreds of Thousands of comments made to the DOL and the DOL left the duties tests alone
- DOL and courts will continue to strictly construe exemptions

Duties Test

- Exempt Executive
 - Regularly supervises two or more other employees, and
 - Has management as the primary duty of the position, and
 - Can hire, fire, promote, or assign tasks to other employees

Duties Test (cont.)

➤ Exempt Professional

- Learned Professional
 - Lawyers, doctors, dentists, teachers, architects, clergy, RN's (not LPN's), Accountants (not bookkeepers), engineers, actuaries, scientists, pharmacists & other employees requiring "advanced knowledge"
 - Education beyond high school in fields that are distinguished from the mechanical arts or skilled trades

Duties Test (cont.)

➤ Exempt Administrative

- High level employees whose main job is to keep the business running
 - Office or non-manual work
 - Directly related to management or general business operations of the employer or employer's customers
 - Exercise of discretion and judgement with authority to make independent decisions on matters which affect the business as a whole or a significant part of it

What exemptions are not impacted?

➤ Some exemptions not impacted include:

- Outside Sales Employees
 - Still no minimum salary requirement; must meet other elements of the test
- Commissioned Retail Sales Employees
 - Exempt from overtime if certain tests are met

Outside Sales Exemption

- To qualify for the Outside Sales Exemption, all of the following tests must be met:
 - The employee's primary duty must be making sales, or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
 - The employee must be customarily and regularly engaged away from the employer's place or places of business

Commissioned Retail Sales Employees

- To qualify for this exemption, three conditions must be met:
 - The employee must be employed by a retail service establishment, and
 - The employee's regular rate of pay must exceed 1.5 times the minimum wage for every hour worked in a workweek in which overtime hours are worked, and
 - More than half the employee's total earnings in a representative period must consist of commissions
 - representative period for determining if enough commissions have been paid may be as short as one month, but must not be greater than one year

What is the new minimum salary threshold for the White Collar/EAP exemptions?

- Minimum salary threshold to qualify for a white collar exemption is more than doubling
- Minimum salary is currently:
 - \$23,660 a year (\$455 a week)
- Minimum salary effective December 1:
 - \$47,476 a year (\$913 a week)
- New Salary threshold is currently set at the 40th percentile of full-time salaried workers in the lowest income census region (currently the South)



How will minimum salaries automatically update overtime?

- New rules automatically update the minimum salary threshold requirement every 3 years.
- The first such change will take place on January 1, 2020
- Currently, the salary threshold is projected to increase to over \$51,000 on January 1, 2020



New Rules on Bonuses and Commissions

- Employers may count nondiscretionary bonuses and incentive payments to satisfy up to 10% of the standard salary threshold
- Larger bonuses are permissible, but the amount that can be used to meet the standard salary threshold is capped at 10%
- Payments must be made on a quarterly or more frequent basis (once every 13 weeks)
 - If employee does not earn enough in nondiscretionary/incentive payments in a given quarter to remain non-exempt, the employer has up to one pay period to make up the short fall
 - If catch up payment is not made, they must pay employee OT for any OT hours worked during that quarter

What bonuses count?

- Bonuses must be nondiscretionary
- Bonuses promised to employees to induce them to work more efficiently or remain with the company
- Examples:
 - Bonuses tied to productivity or profitability (i.e. an announced bonus based on a specified percentage of employer profits in previous quarter)
 - Commissions
 - Attendance Bonuses
 - Production Bonuses
 - Retention Bonuses



What bonuses do not count?

- Purely discretionary bonuses
- Decision to award bonus and the amount of payment is solely at the employer's discretion and not in accordance with preannounced standards
- Examples:
 - Unannounced bonus (i.e. Company has unexpected surplus and decides to give employees bonus based on how hard the employee is perceived to work)
 - Spontaneous reward for specific act

What is the new minimum salary threshold for the Highly Compensated Employee Exemption?

- Annual compensation threshold increasing from \$100,000 a year to \$134,004 a year
 - PLUS (not a change):
The employee's primary duty includes performing office or non-manual work; and
 - The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee
- New salary threshold set to 90th percentile of full-time salaried workers nationwide
 - Will also increase on January 1, 2020
 - Projected to increase to approximately \$147,524

What do the rule changes mean for private employers?

- In general, exempt employees currently making an annualized salary of less than \$47,476 will:
 - Need to be given a raise OR
 - Converted to non-exempt
 - Non-Exempt will need to be paid 1.5 times regular rate for all hours worked over 40 in a work week
- Coordinate commission/bonus systems with your decision whether to classify a certain position as exempt or non-exempt
- Consider re-evaluating all of your positions classified as exempt

Strategies for Compliance

- What factors go into the question of whether to meet the new salary rule or convert an employee to non-exempt?
 - If an employee is converted from salaried exempt to non-exempt hourly employee, how do you set the employee's normal hourly rate?
 - Simply dividing an employee's annual salary by 2,080 hours (i.e. 40 hours per week multiplied by 52) could be a costly approach
 - Consider factoring expected overtime hours into the calculation

Example

- Employee receives a salary of \$41,600 and works 45 hours/week
- If converted to hourly based on 2,080 hours, rate would = \$20/hour ($\$41,600/2,080$)
- But at \$20/hour, because employee works 5 hours overtime/week, will receive additional \$7,800 per year ($5 \text{ hours} \times \$30 \times 52 \text{ weeks}$)
- To maintain same total annual compensation, hourly rate would need to be \$16.84/hour.

Strategies for Compliance

- If considering whether to convert to hourly, think through:
 - Whether weekly compensation will vary, and how that may impact employees
 - Impact on employee morale due to loss of "prestige"
 - Perhaps convert to a salaried, non-exempt position
 - In some states (not PA) perhaps "fluctuating workweek"

Strategies for Compliance (cont.)

- If dealing with an employee who was previously covered under the “highly compensated employee” exemption:
 - Might position qualify for another (EAP/white collar) exemption?
 - If not, can duties be reassigned so that position qualifies for another exemption?
 - If short of \$134,004, can make up shortfall with year-end bonus

Impact of Bonuses on Compliance

- Bonuses/Commissions can be “counted” towards the minimum salary for exempt employees
- Important to have a clear commission/bonus plan coordinated with overall pay strategy



Bonuses/Incentive Pay for Non-Exempt Employees

- Bonuses, commissions, and other non-discretionary incentive pay for non-exempt employees
 - Must be included in the regular rate and factored into OT rate
 - Can be complex
 - Key Issue: Over what period was the commission/bonus “earned”?
 - Requires retroactive re-calculation of regular and OT rate
 - Can be dictated by employer in written bonus/commission plan or policy
 - Frequent litigation target

Bonus and Highly Compensated Employees

- Can utilize bonuses with a Highly Compensated Employee as long as the employee has a minimum guarantee of \$134,004 and makes at least \$913 per week
- If employee's total annual compensation does not total at least \$134,004 by the last pay period of a 52 week period, employer may make a year-end bonus to ensure the \$134,004 level is reached and reserve exemption
 - Payment must be made within one month of the end of the 52 week period

Reevaluating Exempt Employees

- Employers should be evaluating whether exempt employees meet the duties tests
- Now is the opportune time to convert currently exempt employees to non-exempt; especially if there is a close case
- Changes often draw scrutiny but during this time period of change between now and December 1, changes will be so common they may fly under the radar

Takeaways: Preparing for December 1, 2016

- Audit any exempt positions making less than salary threshold
- Identify options for any affected positions
 - Reclassify positions
 - Control hours
 - Utilize different exemption and/or one without a salary threshold
- Evaluate (cost, morale, etc.) and select best options
- Develop a communications plan

Takeaways: Preparing for December 1, 2016 (cont.)

- Consider whether to implement policy to control overtime
- Ensure prepared for timekeeping and recordkeeping
- Train supervisors
- Implement selected options
- Monitor (compliance, cost, impact on operations)

Questions or Comments

Contact Information



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Our Payroll Team

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Thank You
