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DOL Final FLSA Overtime Rules Effective December 1, 2016

ON MAY 18, 2016, the U.S. Department of Labor (DOL) released its long anticipated revised rules determining which white-collar employees are - or are not - entitled to the Fair Labor Standards Act's (FLSA) minimum wage and overtime pay protections.

Under the FLSA, employees properly classified as executive, administrative, professional, computer and outside sales employees are exempt from the FLSA's minimum wage and overtime pay protections, if they meet certain other criteria, particularly a minimum annual base salary. Otherwise, under the FLSA all non-exempt employees must be paid time and one-half for all hours over 40 worked in any given week.

Currently under the existing DOL rules, executive, administrative, professional, computer and outside sales employees earning more than $23,660 a year are exempt from receiving overtime pay no matter how many hours a week they work (referred to as the white-collar exemption). Effective December 1, 2016, the DOL's new rule raises that white-collar exemption base salary amount to $47,476. The new base salary is calculated to equal the 40th percentile of weekly earnings for full-time, salaried workers in the nation's lowest income region, currently bringing the salary to a projected level of $913 per week ($47,476 annually). Employers who classify any employees as exempt under the white-collar exemption will be impacted by the new rules. The DOL estimates 4.2 million workers will be eligible for overtime as a result of the changes. Notably, despite much speculation to the contrary, the DOL did not change the basic duties tests that determine if employees are properly classified in the white-collar exemption.

Summary of the New Rules

- The white-collar exemption base salary threshold is increasing to $913 per week, annually $47,476, up from $455 per week or $23,660 per year. The new salary level more than doubles the current salary level, but is lower than the salary level originally proposed by the DOL in July 2015, which was $50,440 annually.

- The white-collar exemption base salary threshold will be updated every three years beginning January 1, 2020. The update will be made to keep the base salary threshold equal to the future 40th percentile of weekly earnings for full-time, salaried workers in the nation's lowest income region. Prior to the new rule, the white-collar exemption base salary threshold had not been revised for 12 years.

- Employers will be able to satisfy up to 10 percent of this new white-collar exemption base salary threshold through nondiscretionary bonuses and other incentive payments, including commissions, provided that the payments are made at least quarterly. Under current rules, commissions, nondiscretionary bonuses or other incentive payments are not included in the calculation to satisfy the base salary threshold requirement. This credit will not be allowed for salaries paid to employees classified as

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exempt under the highly compensated employee category.

- The white-collar exemption base salary threshold for the highly compensated employee exemption will increase from $100,000 to $134,004 and will also be updated every three years.

- The new DOL rules do not change any of the exemption requirements as they relate to the kinds or amounts of work necessary to qualify for exempt status (the "duties test").

What Employers Should Do Now

Employers should assume that the new rules will take effect as scheduled on December 1, 2016.

To properly prepare and anticipate changes that may be necessary under the new DOL rules, we recommend that all employers:

- Identify your employees currently classified as exempt;

- Analyze whether the white-collar exemptions you have been relying on will still be met under the new white-collar exemption base salary;

- Consider possible application of alternative FLSA exemptions; and

- Develop compensation programs that comply with FLSA for employees who previously were treated as exempt but who will no longer qualify.

Please contact the Aronberg Goldgehn attorney with whom you work if you would like to review this issue further.