BURR ALERT

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DOL Will Require Overtime for Employees Who Earn Less Than $50,000

In a much-anticipated move, on June 30, 2015, the Department of Labor issued a proposed rule requiring a weekly salary of at least $970.00, or $50,440.00 annually, for employees to be exempt from the Fair Labor Standards Act's (FLSA's) overtime provisions under the common "white collar exemptions." Designed to adjust the original 1975 salary requirements for inflation, the proposed rule more than doubles the current salary requirement of $455.00 per week or $23,660.00 per year. The FLSA requires employers to pay employees who do not meet an exemption 1.5 times their regular rate for hours worked over 40 in a workweek. The proposed rule sets the new salary requirements for the executive, administrative, professional, and computer professional exemptions,[1] which cover most salaried employees exempt from the FLSA's overtime provisions.

Under the proposed rule, to be exempt under one of the covered exemptions, employees must receive a salary of at least $970.00 for each week they work and meet the exemption's "duties test." Although much speculation existed that the proposed regulations would also address the "duties" requirements for the exemption, the rule does not revise the "duties" requirements. Instead, the DOL seeks comments regarding changes, particularly whether the duties test should require an exempt employee spend a certain percentage of his/her time worked performing exempt tasks (such as the California rule requiring 50% of time on exempt tasks). Thus, the final rule may contain revisions to the duties tests as well as the salary revisions.

After the proposed rule is published in the Federal Register, the DOL will accept comments on the rule for 60 days. Thereafter, the comments will then be evaluated, and the rule will be finalized. Given that the proposed rule is consistent with President Obama's March 2014 directive to the DOL to revise the regulations, the final rule is likely to be similar to the proposed rule. Congress may attempt to amend the FLSA or withdraw funding for the DOL's rulemaking process, but such efforts are unlikely to succeed. A final rule is expected to take effect in early to mid 2016.

The rule's potential impact on labor costs is substantial. A $40,000.00 salaried supervisor working 55 hours per week, 50 weeks per year, would be entitled to overtime pay of more than $20,000.00 per year if paid time-and-a-half overtime under the rule. To comply with the requirements, employers will be forced either (1) to raise the employees' salary to $970 per week, (2) to limit salaried employees to 40 hours per week, or (3) to pay them overtime for time worked over 40 hours.

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[1] The rule does not revise the outside sales exemption, one of the "white collar" exemptions. The outside sales exemption does not have a salary basis or level requirement as outside sales employees may be paid by commission.

However, various options are available for controlling labor costs, including adjusting pay or adopting alternative pay practices. Notably, the Fair Labor Standards Act regulations do not require that nonexempt employees paid by salary receive 1.5 times their salary divided by 40 for overtime hours worked. The calculation depends on the number of hours for which the salary was designed to compensate. For example, employees paid pursuant to the "fluctuating workweek" method, who receive a fixed salary to compensate for all hours they work which fluctuate from week to week, need only be paid overtime at 0.5 times their regular rate for work performed over 40 hours.

To prepare for the final rule, employers should carefully analyze the duties and pay of employees with salaries of less than $50,440.00 per year and consider an attorney-client privileged FLSA audit and pay analysis to discuss the exempt status and pay options for employees covered by the proposed regulation. Burr & Forman has been conducting these audits and analyses to prepare for the implementation of the rule. Should you desire such an audit or have any questions, please contact the Burr & Forman attorney with whom you normally work.

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