What We Will Cover Today

- What are the changes imposed by the 2019 Final Rule?
- When are the changes effective, i.e. how long do employers have to comply?
- Are any efforts being made to block the changes?
- What options do employers have to ensure compliance with the Final Rule?
White Collar Exemptions

- Salary basis test:
  - Employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed.
- Salary level test:
  - The amount of salary paid must meet a minimum specified in the regulations.
- Duties test:
  - Primary duties must involve executive, administrative, or professional duties, as defined in regulations.

The Winding Path of the DOL's Overtime Rule

Overtime, Over-Time.

<table>
<thead>
<tr>
<th>Event Date</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>May 23, 2014</td>
<td>Preliminary injunction issued</td>
</tr>
<tr>
<td>November 30, 2015</td>
<td>Final Rule published in Federal Register</td>
</tr>
<tr>
<td>August 31, 2015</td>
<td>Final Rule held invalid</td>
</tr>
<tr>
<td>September 30, 2016</td>
<td>DOL issues Final Rule</td>
</tr>
<tr>
<td>January 2020</td>
<td>Effective Date</td>
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</table>
Change #1: Standard Salary Level Increase

$35,568
($684 per week)

$23,660
($455 per week)

Change #2: Highly Compensated Employee (HCE) Salary Level Increase

$107,432
($2,066 per week)

$100,000
($1923.08 per week)

Change #3: Employers Permitted to Use Incentive Compensation To Partially Meet Salary Level Requirement

Salary + Incentive Comp = $35,568

Incentive Compensation:
- Commissions
- Non-discretionary Bonuses
- Other Incentive Payments

Incentive Compensation Limit: 10% ($3,556.80)
Use of Incentive Compensation to Satisfy Salary Level

- 10% catch-up may be paid on an annual basis or more frequently (Obama rule required such payments at least quarterly)
- A single catch-up payment may be made to satisfy the salary level test within one pay period of the applicable 52-week period (e.g. the first pay period in January for employers on a calendar-year basis)
- 10% Rule does not apply to HCEs
  - HCEs must be paid at least the full standard salary level (at least $684/wk.) without regard to incentive compensation.

Change #4 (from Obama rule): No Automatic Increases to the Salary Levels

- DOL states its intention to update the salary levels on a "regular basis" using "notice and comment" procedures (i.e. issuing NPRMs)
  - DOL dropped initial proposal to undergo such updates at least every 4 years
  - Obama rule would have included automatic increases every three years

When Is the Final Rule Effective?

- January 1, 2020
Duties Test

No Changes to Duties Test

Things to Note

Will the Rule be Challenged/Overturned (Like the Last Time)?

• New salary level increases are considerably more modest and therefore will have a less dramatic impact on the business community
• Many employers already made changes to their pay structures in anticipation of compliance with the Obama rule in 2016
• Any legislative challenge by the Democratically-controlled House almost certainly would be rebuffed by the Republican-controlled Senate
• As part of the Final Rule, the DOL has formally rescinded the Obama-era regulation so, if the Final Rule is overturned, the 2004 salary levels will continue to apply (contrary to the interest of pro-employee groups)
Strategies for Responding to Changes

Option 1: Increase salary level for affected employees and retain exempt status (assuming employees satisfy duties test).

Change Considerations

- Will employers just absorb the additional cost?
  Alternatives:
  - Reduce variable compensation
  - Reduce fringe benefits
  - Reduce pay and/or provide slower and smaller wage increases for non-exempt employees
  - Delay promotions
- May impact other exempt employees above the salary level; global adjustment?
Strategies for Responding to Changes

- **Option 2**: Reclassify as non-exempt and overtime-eligible, and pay overtime.
- **Option 2.1**: Reclassify as non-exempt and adjust hourly rate to account for anticipated overtime so reclassification is cost-neutral.

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Strategies for Responding to Changes

- **Option 3**: Reduce hours to avoid overtime and shift work to other workers
- **Option 4**: Hire more part-time workers

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Challenges in Responding to Changes

- Recording time
- Loss of flexibility
- Loss of steady income
- Employee morale
- Overtime estimates not reliable
- Potential for increase in costs
- May require hiring of more workers
With Each Challenge Comes an Opportunity...

- It's an excellent time to conduct a wage and hour audit, including a review of the duties for each exempt position.

Questions

- Due to differences in salary levels, the Final Rule might result in some employees who hold the same job title being treated differently, i.e. one as exempt and one as non-exempt. Is that okay?

Questions

- What is the best way to communicate the decision to employees who are being reclassified as non-exempt?
Tip Pooling/Tip Credit

- Proposed Rule Change
- Status
- Impact
- Strategy

Website Accessibility Requirements

1. What is it?
2. Who does it apply to?
3. Why do I care?
   Domino’s Case

Today’s Presenters

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Thank You

With more than 900 attorneys practicing in major locations throughout the U.S. and Puerto Rico, Jackson Lewis provides the resources to address every aspect of the employer/employee relationship.

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