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## Final Overtime Rule Released: What Are The Implications for Connecticut Employers

Connecticut employers are probably going to have more questions than answers after the release of the final version of the overtime rule announced by the U.S. Department of Labor on May 18, 2016. This Alert will address the implications that this federal rule will have on Connecticut employers. Shipman & Goodwin is also finalizing details on an educational program in the next few weeks to assist employers. While the rule will go into effect December 1, 2016, we know that many employers set their budgets effective July 1 or September 1; thus, time is of the essence in getting into compliance.

### What Does the New Rule Say?

Before we discuss the implications to Connecticut employers, it's important to understand what the rule does and does not say. The rule updates only the Executive, Administrative, and Professional exemptions, commonly referred to as the "white-collar exemptions" under the Fair Labor Standards Act. All other exemptions to overtime requirements remain unaffected. The White House estimates that over 45,000 employees in Connecticut will be impacted by this rule.

### What Changed?

- **Salary Level:** The new threshold salary level for determining exempt status is \$913 per week or \$47,476 annually (was \$455 per week).
- **Highly Compensated Employee ("HCE"):** The new threshold annual compensation requirement for the HCE exemption is \$134,004 (was \$100,000 annually).
- **Automatic Adjusting:** The threshold salary level will change every three years based on the salary level at the 40<sup>th</sup> percentile of full-time salaried workers in the lowest-wage Census region or, for the HCE exemption, based on the total compensation level at the 90<sup>th</sup> percentile of full-time salaried workers nationally.
- **Bonuses:** Up to 10% of a standard salary level can come from non-discretionary bonuses, incentive payments, and commissions, paid at least quarterly.
- **Standard Duties Test:** There have been no changes to the duties test.

### What Employers are Covered by this Change?

Any employers that have historically been covered by the FLSA will remain covered. Coverage under the FLSA is usually achieved in one of two ways: (1) the organization is a covered enterprise; or (2) a particular worker is individually covered. While many non-profit organizations may not be covered enterprises under the FLSA, most non-profits are likely to have some employees who are covered individually and are therefore entitled to the minimum wage and overtime protections guaranteed by the FLSA.

An employee who engages in interstate commerce or in the production of goods for interstate commerce is covered by the FLSA. Employees whose work involves or relates to the movement of persons or things across state lines are also considered engaged in interstate commerce -- and using the telephone or computer for interstate communications may be enough to qualify.



## Connecticut's Rules Still Apply -- But May be Trumped in Many Instances

Connecticut's wage and hour rules still apply. Because each law requires that the more protective rule will apply, employers will have to analyze whether they meet the exemption under both sets of tests.

For many years, Connecticut's wage and hour law was more protective than the federal law with a salary level of \$475 per week compared to the old federal salary level of \$455 per week. With the release of the new overtime rule, however, the federal law will now be the more protective scheme with a salary level of \$913 per week. Because laws are interpreted to follow the more protective standard, many Connecticut employers who have employees that would otherwise qualify for a white-collar exemption, will now need to pay their employees at the new federal level. In some instances, that may not be enough; there are circumstances where the state law differs from federal law on the scope of duties test under state law. Furthermore, Connecticut does not have an exception for Highly Compensated Employees. In these instances, a case-by-case, position-by-position analysis may be needed. Simply applying federal law may have unwanted consequences down the line.

Another question needing clarification is whether Connecticut employers should consider non-discretionary bonuses, incentive payments, or commissions when calculating salary levels. The CTDOL has said "salary basis" means a "predetermined amount paid for each pay period on a weekly or less frequent basis, regardless of the number of days or hours worked, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." Should Connecticut employers follow the state standard? Is that approach more protective for employees? Or should it adopt the federal standard?

There is no obvious answer to any of these questions because they all must be handled on a case-by-case basis. The one thing that is for certain is that the new overtime rule will muddy the waters for Connecticut employers. It is possible that the CTDOL will issue its own guidance addressing how employers should resolve conflicts between Connecticut's wage and hour law and the new federal minimum wage and overtime rule. Hastily increasing base salaries to avoid overtime obligations may not be the right response. In some cases, you may want to instead limit the hours worked by employees and re-classify them as non-exempt. For now, the best strategy is to begin consulting with HR experts and employment lawyers who can assist in formulating a compliance plan based on your organization's unique structure.

The new rule, however, does present a unique opportunity for employers to review the classification of all existing employees and perhaps reclassify them under the purview of this new rule. Certainly, employees may be more understanding in the long run because of the publicity that this rule has generated and may be less skeptical of such changes as well. Employers, however, should be mindful of the penalties that can attach to past misclassification of employees and should consult with legal counsel about how to make any such changes with an eye towards minimizing the risk of a claim. More than ever, communication with employees will be critical.

### Questions or Assistance:

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