THE KULLMAN FIRM
A PROFESSIONAL LAW CORPORATION

CLIENT E-NEWSLETTER

# SPECIAL BULLETIN

## LABOR DEPARTMENT ISSUES FINAL OVERTIME EXPANSION RULE

On May 18, 2016, the U.S. Department of Labor (DOL) issued the final version of the much anticipated overtime expansion rule, raising the minimum salary threshold required to qualify for the Fair Labor Standards Act (FLSA) "white collar" exemption[1] to $47,476 per year, down approximately $3,000 from the DOL's proposed version of the rule issued last year. The rule is set to take effect on December 1, 2016.

### *Changes to Current Minimum Salary Thresholds*

The final rule, which was last updated in 2004, increases the minimum salary threshold from $455 per week, or $23,660 annually, to $913 per week, or $47,476 annually, which is more than double the current minimum salary threshold for the FLSA white collar exemption. According to the DOL, the new salary requirement equals the 40th percentile of weekly earnings for full-time, salaried workers in the nation's lowest income region (currently the South). Importantly, the final rule also provides for "automatic" adjustments to the minimum salary threshold every three years (meaning it will likely increase with each "automatic" update), beginning on January 1, 2020. According to the Obama Administration, the automatic updates are to ensure that the minimum salary threshold does not drop below the 40th percentile benchmark.

In addition, the final rule raises the total annual compensation threshold for the Highly Compensated Employee exemption from $100,000 to $134,004, which will also be automatically updated every three years. The DOL says that this new figure is set at the 90th percentile of earnings for full-time, salaried workers nationwide.

To offset these increases, the final rule allows employers, for the first time, to count bonuses, incentives, and commissions toward as much as 10 percent of the salary thresholds for the standard exemption, so long as employers pay those amounts on a quarterly or more frequent basis. The final rule also allows employers to make a "catch-up" payment at the end of each quarter.

### *Primary Duty Test*

In its proposed final rule last year, the DOL sought input on whether changes should be made to the primary duties test under the white collar exemption. More specifically, the DOL sought comment on whether the Department should consider adopting the California model, where a worker must spend at least 50 percent of his or her time performing exempt work to qualify for the exemption. The final rule, however, made no changes to that test.

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[1] To qualify for the "white collar" exemption, employees must meet certain tests related to job duties – in addition to being paid a fixed salary that equals or exceeds the minimum weekly threshold – to be exempt from minimum wage and overtime requirements under the FLSA exemptions for executive, administrative, professional, outside sales, and computer employees.

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## EEOC ISSUES FINAL RULES ON EMPLOYER WELLNESS PROGRAMS

On May 16, 2016, the U.S. Equal Employment Opportunity Commission (EEOC) finalized two rules specifying the extent to which employer-sponsored wellness plans can comply with the Americans with Disabilities Act (ADA) by offering incentives while still protecting against discrimination. The new rules, which will go into effect in 2017, apply to all workplace wellness programs, including those in which employees or their family members may participate without having to enroll in a particular health plan.

According to the EEOC, the final rules are the agency's attempt to harmonize HIPAA's goal of allowing incentives to encourage participation in wellness programs with ADA and GINA provisions that provide important safeguards to employees to protect against discrimination by requiring that participation in certain types of wellness programs be voluntary.

The first rule unveiled by the EEOC amends agency regulations implementing Title II of the Genetic Information Nondiscrimination Act (GINA), which protects workers from certain employment-related actions based on their genetic information, including the health status of their family. Specifically, the final rule changes regulations to allow employers offering certain wellness programs to provide some financial and other incentives in exchange for an employee's spouse providing health information, as long as that information is not used to discriminate against the employee.

Under the final GINA rule, the maximum incentive value attributable to a spouse's participation in a wellness program cannot exceed 30 percent of the total cost of employee-only coverages. Notably, the rule also prohibits any incentives in exchange for the current or past health status information of employees' children or in exchange for certain genetic information, such as family medical history or the results of genetic tests of an employee, an employee's spouse, and an employee's children.

The second rule amended the EEOC's regulations for implementing Title I of the ADA to allow employers to offer limited incentives for wellness programs that are part of a group health plan and that ask questions about employees' health or include medical examinations. Under the ADA final rule, wellness programs that are part of a group health plan and that ask questions about employees' health or include medical examinations may offer incentives up to 30 percent of the total cost of coverage for an employee.

Importantly, the existing prohibition in GINA over the use of genetic information by employers in making employment decisions remains unchanged, as will the existing provisions of the ADA that prohibit discrimination on the basis of disability.

If you have any questions, please contact the attorney with whom you usually speak.

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