U.S. CHAMBER OF COMMERCE

Summary of Provisions in New Overtime Regulation

The Department of Labor (DOL) issued its **final rule** making changes to Part 541 governing overtime exemptions under the Fair Labor Standards Act (FLSA) on May 18, 2016. The rule was published in the ***Federal Register*** on May 23, 2016. The Chamber **expressed dismay** that the final rule includes such a significant increase to the salary threshold and automatic increases in the future. These will present considerable challenges to employees and employers.

Here are the key elements of the new regulation:

- **Salary Threshold Changed to $913/week ($47,476 per Year)**

This threshold doubles the current salary threshold level. While this level is slightly lower than the threshold in the proposed rule ($50,440/annually), it still encompasses many employees that are currently classified as exempt. This new salary level is explicitly intended to expand the number of employees eligible for overtime compensation, as compared to the 2004 revisions that were designed to identify those employees that are clearly not engaged in exempt-type work.

- **Automatic Salary Threshold Increases Every 3 Years (Not Annually) to Maintain Level at 40th Percentile in Lowest-Wage Census Region**

DOL reduced the frequency of the automatic increases in response to concerns raised by the Chamber and many others. Instead of annual increases, the threshold will be adjusted every 3 years to maintain the level at the 40th percentile of full-time salaried workers in the lowest-wage Census region. Automatically updating the salary threshold, however, does not allow the government to take into account changing economic conditions, specific impact on certain industries, or regional differences. It also denies the public the ability to have input on the threshold as required by the regulatory process. Finally, the Fair Labor Standards Act does not authorize such an updating mechanism.

- **Duties Test is Unchanged**

The DOL had indicated it was considering adding a "quantitative" requirement to the duties test similar to what California has where the employee has to be performing their primary duties "more than 50% of the time." The final regulation includes no changes to the current duties test. The absence of a duties test change is a significant win for the thousands of stakeholders who expressed concern in this area. The Chamber argued strenuously that any changes would create confusion and major litigation possibilities.

- **Effective Date is December 1, 2016**

The Chamber advocated for a longer implementation period than the 60 days suggested in the proposal, and the final rule provides a period of almost 200 days, going into effect on December 1, 2016. Employers in conjunction with their HR professionals should review their current workforce immediately to determine which employees are affected, and whether to re-classify those employees or increase salaries to maintain exempt status, and also implement a communications strategy to explain the changes. Employers will also want to keep in mind the periodic adjustments and set a regular review process.

- **Highly Compensated Employee (HCE) Exemption Is Now $134,004 Per Year**

The final rule increases the salary threshold for HCEs to $134,004, instead of the proposed $122,148. The new regulation retains the methodology in the proposed rule setting the threshold at the 90th percentile of full-time salaried workers nationally. This threshold will also be updated every three years. The HCE exemption is available for employees who meet this salary threshold and perform one of the duties associated with the executive, administrative, and professional exemptions, thus making the duties component much easier to satisfy.

- **Up to 10% of the Salary Can Come From Bonuses or Commissions**

The Department floated allowing a 10% credit for bonuses or commissions and this is what they included in the final regulation. For employers to credit nondiscretionary bonuses and incentive payments toward a portion of the standard salary level test, however, such payments must be paid on a quarterly or more frequent basis and the employer is “permitted” to make a “catch-up” payment. More specific details of this new development are still unclear.