

## DOL Issues Final Rule Amending Overtime Exemptions Under FLSA

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On May 18, 2016 the United States Department of Labor (DOL), Wage and Hour Division issued its Final Rule regarding the "white-collar" exemptions to minimum wage and overtime requirements imposed by the federal Fair Labor Standards Act (FLSA). The Final Rule takes effect December 1, 2016 and represents the first revision of the white-collar overtime regulations since 2004.

The DOL estimates that the Final Rule will make 4.2 million currently-exempt employees subject to the FLSA's overtime requirement in the first year, absent some responsive action by the employer. The Final Rule represents a major regulatory change with which employers must comply. FLSA compliance has never been more critical, as the number of filings of federal wage and hour actions under the FLSA has increased steadily (and more than doubled) over the past ten years.

The Final Rule affects four key changes to the overtime exemption regulations for executive, administrative, and professional (EAP) employees and highly compensated employees (HCE):

- Weekly Salary Threshold
- Annual Compensation Threshold
- Automatic Updates
- Inclusion of Nondiscretionary Bonus and Incentive Payments

### Weekly Salary Threshold

The Final Rule doubles the weekly salary threshold required to trigger the EAP overtime exemptions from \$455 (\$23,660 annually) to \$913 (\$47,476 annually). Salaried employees earning less than \$47,476 annually will be ineligible for the EAP exemptions and must be paid FLSA overtime for hours worked over 40 per week, unless some other exemption applies. This new salary threshold is benchmarked at the 40<sup>th</sup> percentile of earnings for a full-time salaried worker in the lowest-wage census region.

### Annual Compensation Threshold

The Final Rule increases the threshold amount of total annual compensation required to trigger the HCE overtime exemption. It increases that amount from \$100,000, the level established in the 2004 regulatory amendments which created the HCE overtime exemption, to \$134,004. This new threshold is benchmarked at the 90<sup>th</sup> percentile of full-time salaried workers nationally.

### Automatic Updates

The Final Rule provides that the salary threshold for the EAP exemptions and the total compensation threshold for the HCE exemption will be automatically updated every three years to correspond with the benchmark values noted above. Notice of the automatically-recalibrated threshold amounts will be posted in the Federal Register and on the DOL's website 150 days prior to their effective date.

## Inclusion of Nondiscretionary Bonuses and Incentive Payments

The Final Rule permits, for the first time, inclusion of nondiscretionary bonuses and incentive payments (e.g., commissions) as part of the salary amount for purposes of the EAP exemptions, up to a maximum of 10% of the EAP salary threshold. In other words, \$4,747.60 in annual commissions earned can be counted toward the \$47,476 salary threshold for the EAP exemptions. This means that a worker who earns a \$42,728.40 annual salary and \$4,747.60 (or more) in commissions would reach the threshold annual salary level required for the EAP exemptions. The Final Rule does not affect the amount of bonuses, incentive payments, or deferred compensation which can be applied toward the total annual compensation threshold for the HCE exemption. Bonus or incentive payments must be made on a quarterly basis (or more frequently) to be counted toward the salary threshold amount.

## Duties Tests Unchanged

The Final Rule does not alter the so-called "duties tests" which apply to the EAP and HCE overtime exemptions. Even if they satisfy the amended salary and total compensation thresholds described above, employees will not be overtime ineligible under the EAP or HCE exemptions unless their respective job duties satisfy the applicable duties test. The duties test for the HCE exemption remains a relaxed version of the duties test for the EAP exemptions.

We recommend that employers who have not already done so begin a review, without delay, to determine the impact of the Final Rule and whether adjustments in policies and practices are warranted. We remain available to provide counsel through the assessment process, and in fashioning and implementing a response to the Final Rule that furthers each employer's goals while ensuring compliance and mitigating the risks associated with potential future litigation.

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