

# DOL Final Rule Expands Overtime Eligibility with Changes to White Collar Exemptions

by Nancy S. Lester



You have likely heard that the Department of Labor (DOL) recently issued its long-anticipated overtime expansion rule, raising the salary threshold for workers to qualify for the Fair Labor Standards Act’s (FLSA) “white collar” exemptions. The DOL accomplishes its aim of expanding overtime eligibility by more than doubling the salary level employers must pay certain employees in order to be exempt from the FLSA’s overtime provisions.

The Final Rule establishes a salary threshold of \$913 per week, or \$47,476 annually, for executive, administrative, and professional employees to be exempt. This new salary threshold, which will become effective on December 1, 2016, more than doubles the current mini-

mum salary level of \$455 per week, or \$23,660 annually. In practical terms, this means that over four million *more* workers in the United States will be considered non-exempt and therefore eligible for overtime pay when the regulations go into effect.

## Need a Refresher?

The FLSA requires employers to pay employees at least the federal minimum wage (currently \$7.25 per hour) plus overtime at a rate of at least one-and-a-half times the employee’s regular rate of pay for any hours worked in excess of forty in a week, unless the employee is exempt. Generally, employees qualify for the “white collar” (executive, administrative, and professional<sup>1</sup>) exemptions if they meet three tests: the “salary basis” test — which asks how the employee is paid; the “salary level” test — which establishes a minimum salary that the employee must earn to be considered exempt; and the “job duties” test — which examines the primary job duties the employee performs. The salary threshold

required to meet the salary level test, now \$455 per week, was last revised in 2004.

### **Obama Mandated Updates to the FLSA's Overtime Regulations**

In March 2014, President Obama signed a Presidential Memorandum directing DOL Secretary Thomas Perez to revise the FLSA regulations to narrow the availability of exempt status under the white collar exemptions, thereby increasing the number of workers eligible for overtime pay. President Obama remarked that these exemptions “have not kept up with our modern economy.” Accordingly, he instructed Perez to propose revisions to “modernize and streamline” the existing overtime regulations. The final rule, issued on May 18, 2016, is the result of that directive.

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While the new salary level of \$913 per week is dramatically higher than the current minimum threshold, it actually is lower than the \$970 per week (\$50,440 per year) that was projected in the proposed regulations issued by the DOL's Wage and Hour Division (WHD) in 2015. The WHD indicated that it planned to set the new salary level to correspond to the 40th percentile of weekly wages for all full-time salaried workers in the US. After much criticism that the proposed amount did not take into account pay differentials in various regions of the country, the DOL derived the new \$913-per-week figure from the 40th percentile of all full-time salaried workers in the country's lowest-wage census region (the Southeast).

When the final rule becomes effective on December 1, 2016, employees who do not meet the new salary threshold will no longer qualify for the executive, administrative, and professional exemptions. This means they

will be non-exempt employees and, therefore, must be paid overtime compensation if they work more than forty hours in a week.

### **Don't Forget About the Job Duties Test**

The salary threshold is only part of the exemption analysis. Even if employees are paid above the minimum salary level, they still must meet the “job duties” test to be exempt. Before the proposed regulations were issued, most commentators expected that the DOL would change the job duties test in addition to the salary threshold. The job duties test focuses on subjective factors — i.e., an employee's “primary duties” — rather than the actual amount of time spent on a particular duty. Each white collar exemption contains certain types of primary duties that an employee must perform. Time spent on exempt duties, which usually require independent judgment and discretion, has been viewed as a useful guide but does not determine exempt status (except in California, which requires that more than 50 percent of an employee's time be spent on exempt duties in order for the position to be classifiable as exempt).

Many speculated that the new regulations could mirror the California rules or otherwise require a minimum percentage of the worker's time each week to be devoted to overtime-exempt duties in order to qualify for a particular exemption. Ultimately, that did not happen: the final rule did not make changes to the job duties test for any of the exemptions.

### **What Else Should You Know About the Final Rule?**

Additional highlights of the final regulations include:

- The minimum salary level for the white collar and HCE exemptions will automatically update every three years, beginning on January 1, 2020, to correspond to the 40th percentile of the lowest wage region — whether that is the Southeast or one of the other four census regions. The salary threshold is estimated to be \$51,168 in 2020.
- The final rule also increases the total annual compensation required to qualify for the highly-compensated employee (HCE) exemption from \$100,000 to \$134,004 per year.

This amount represents the 90th percentile of earnings for full-time salaried workers nationally.

- The total compensation requirement for the HCE exemption will also adjust every three years to continue to track the 90th percentile.
- For the first time, employers will be permitted to use nondiscretionary bonuses, incentive payments, or commissions to satisfy up to 10 percent of the salary threshold so long as those payments are made on a quarterly or more frequent basis. “Incentive pay” does not include the value of medical or retirement benefits or other incidental benefits provided by an employer.

Employers now have just a few months left to transition to the requirements of the final rule. This is a good time for employers to evaluate job duties, salaries, work hours, and other factors to determine what changes might be necessary to comply with the new regulations. Any adjustments must be in place for the payroll period that includes December 1, 2016, in order to ensure continued application of exempt status where appropriate.

#### Endnotes:

- 1 Certain computer professionals and outside sales employees are also included in the white collar exemptions. The FLSA’s salary requirements, however, do not apply to the outside sales exemption.



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