



# **Fair Labor Standards Act – 2016 Update to the White Collar Exemptions**

# Background

In July 2015, the Department of Labor announced that it was planning to revise the regulations governing which executive, administrative and professional employees (white collar workers) are entitled to the Fair Labor Standards Act's overtime pay protections.

The Department last updated the regulations in 2004 and the current salary minimum is \$455 per week (\$23,660 per year).

The proposed rule would increase the salary level to the 40th percentile of weekly earnings for full-time salaried workers projected to be \$970 per week (\$50,440 per year) in 2016. There will also be changes for highly compensated employees. Currently to qualify for this exemption, employees must earn at least \$100,000 per year. The new minimum salary level is projected to be tied to the 90th percentile of salaried full-time workers (\$122,148 per year) in 2016.

The DOL plans to automatically increase the salary level each year, either based on percentiles of earnings for full-time salaried workers or changes in inflation.

The DOL, in the draft regulations, did not include any amendments to the "duties" test but did indicate that comments are being solicited for possible changes.

# New Rules

The Final Rule, **which takes effect on December 1, 2016**, takes into account input from 270,000 public comments and extensive outreach meetings with employers, business associations, small businesses, workers, worker advocates, non-profit organizations, educational institutions, and state and local government representatives. The Final Rule will:

- raise the salary threshold from \$23,660 to **\$47,476 a year**, or from \$455 to **\$913 a week**. This doubles the current salary threshold while being responsive to public comments regarding regional variations in income by setting the salary threshold at the 40th percentile of full-time salaried workers in the lowest income Census region (currently the South).
- raise the “highly compensated employee” threshold – from \$100,000 to **\$134,004**.
- Update the thresholds every three years. Based on projections of wage growth, the threshold is expected to rise to more than \$51,000 with the first update on January 1, 2020.
- make **no changes** to the “duties” test.
- for the first time, allow employers to count bonuses and commissions toward as much as **10 percent** of the salary threshold.

# Economic Impact

U.S. Department of Labor's (DOL's) final changes to the overtime exemptions, it's becoming clear that the new rule will cost many employers a lot of money.

Employers will spend \$592.7 million to comply with the new rule, the DOL estimated, saying that each of the 7.4 million affected establishments will need one hour to get up to speed on the changes. The department calculated that it will cost \$254.5 million for businesses to become familiar with the regulation; \$160.1 million to make necessary adjustments; and \$178.1 million in managerial costs.

In addition, the net transfer from employers to workers will be \$1.48 billion, the DOL estimated, with \$1.39 billion of that resulting in more overtime compensation or increased salaries.

# Frequently Asked Questions

**Does the FLSA and the Department's proposed overtime rule for white collar workers apply to state or local government workers?**

A. Yes, state and local government employers are subject to the FLSA and the Department's proposed regulations concerning white collar employees.

**Is there a small business exemption from the FLSA or the Department's proposed overtime rule for white collar workers?**

A. The FLSA does not provide an exemption for small businesses

**Is there an exemption for non-profit organizations from the FLSA or the Department's proposed overtime rule for white collar workers?**

A. There is no exemption for non-profit organizations under the FLSA or in the proposed rule.

**I'm paid a salary and my job title is manager. Am I exempt from overtime pay?**

A. Job titles do **not** determine exempt status, and the fact that a white collar employee is paid on a salary basis does not alone provide sufficient ground to exempt that employee from the FLSA's minimum wage and overtime requirements.

**Is the Department proposing adjustments to the standard duties tests?**

A. While the Department is not proposing any specific changes to the standard duties tests, the Department is seeking comments on whether the current duties tests are working as intended to screen out employees who are not bona fide "white collar" exempt employees

# Frequently Asked Questions

## **Why is the Department proposing to automatically update the salary level and HCE total annual compensation level?**

A. The Department is proposing to automatically update the standard salary and HCE total annual compensation requirements to ensure that they remain meaningful tests for distinguishing between bona fide executive, administrative, and professional workers who are not entitled to overtime and overtime-protected white collar workers. Experience has shown that the salary level test is a strong measure of exempt status only if it is up to date. Left unchanged, the test erodes due to inflation, becoming substantially less effective as wages for overtime-protected workers increase over time. Automatically updating the salary level and HCE total annual compensation requirement using the most recent data will ensure that these tests continue to accurately reflect current economic conditions.

## **How many employees does the Department think will be impacted by the salary level increase?**

A. In the first year, the Department estimates that 4.6 million workers exempt under the current regulations who earn at least the current weekly salary level of \$455 but less than the final salary level of \$913 would, without some intervening action by their employers, become newly entitled to overtime protection under the FLSA. Similarly, an estimated 36,000 currently exempt workers who earn at least \$100,000 but less than \$134,004 and who meet the minimal HCE duties test but not the standard duties test may also become eligible for minimum wage and overtime. Additionally, the Department estimates that 6.0 million salaried white collar workers who are currently entitled to overtime due to their job duties, and who earn at least \$455 per week but less than the proposed salary level, would have their overtime protection strengthened because their exemption status would be clear based on the salary test alone without the need to examine their duties.

# Frequently Asked Questions

## **What if a state has its own overtime laws?**

- A. The FLSA provides minimum standards, and does not preempt a state from establishing more protective standards. If a State establishes a more protective standard than the provisions of the FLSA, the higher standard applies in that State.

## **Will the Department consider bonuses as part of the new salary level test?**

- A. Yes, for the first time, the Final Rule allows employers to count bonuses and incentive payments toward up to 10 percent of the new salary level.

# What Now?

Now that the U.S. Department of Labor has published its final overtime rule, employers across the nation will have to notify exempt workers that their salaries don't meet the federal threshold to remain exempt.

Employers can expect many employees to feel hurt and under-appreciated, many workers place a premium on the prestige of being considered an exempt or salaried employee—no matter how much we emphasize that it's just a categorization of pay and not a reflection of importance or level of contribution. It may seem like they're being demoted.

Reclassified workers will—perhaps for the first time in their careers—have to track their start times, end times, break times and meal times.

Here are some things that an employer should start doing now before the change is fully implemented:

- Employers should be talking to their employees. Reduce the element of surprise by beginning the dialogue now. Share with them not just what is happening but why it is happening and that it is not a reflection on their performance.
- If you provide for different levels of benefits based on exempt status, those changes will have to be communicated as well.
- The new rule doesn't mean that an employee has to be paid hourly, only that they are entitled to overtime.

# What Now?

- Employers should examine their telecommuting policies as well as their travel policies.
- New policies regarding salaried workers who take company phones and laptops home may have to be developed.
- Employers will want to address work that is performed after regular business hours.
- Update timekeeping systems

Be prepared. There will be no avoiding the need to possibly shift priorities, tasks and responsibilities, which will almost certainly impact productivity and operational efficiency.