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2016 FLSA Overtime Rule Changes: 5 Key Facts

Update: *On November 22, 2016, a federal judge blocked the Department of Labor from implementing and enforcing the final rule and related changes discussed below. What you need to know:*

- *The rule has been delayed and will not go into effect on December 1, 2016 as expected.*
- *However, the rule might still become effective at some point in the future.*
- *Given the uncertainty, employers may want to discuss possible next steps with legal counsel.*

The Department of Labor (DOL) issued changes that substantially increase the minimum salary requirement for certain exemptions under the Fair Labor Standards Act (FLSA). The final rule will take effect on December 1, 2016.

The FLSA requires covered employers to pay “nonexempt” employees at least the minimum wage for each hour worked as well as overtime pay for all hours worked in excess of 40 in a workweek. While most employees are non-exempt, the FLSA includes exemptions for certain administrative, professional, executive, highly compensated, outside sales, and computer professional employees.

Currently, to be considered “exempt,” these employees must generally satisfy three tests:

- 1. Salary-level test:** Employers must pay employees at least the current minimum salary per week.
- 2. Salary-basis test:** With very limited exceptions, the employer must pay employees their full salary in any week they perform work, regardless of the quality or quantity of the work.

- 3. Duties test:** The employee’s primary duties must meet certain [criteria](#).

There is also an exemption for “highly compensated” employees who are paid a total annual compensation of at least \$100,000 (\$134,004 effective December 1, 2016). These employees are exempt from the FLSA’s overtime requirements if they customarily and regularly perform at least one of the exempt duties or responsibilities of an executive, administrative, or professional employee.

Key Fact #1: Salary Thresholds Increased

Under the new rule the salary threshold for the executive, administrative, and professional employee exemptions was set at the 40th percentile of earnings of full-time salaried workers in the lowest wage Census Region (currently the South). This is \$913 per week (or \$47,476 per year).

The salary threshold for highly compensated employees was also increased. The new rule raised the salary threshold for highly compensated employees to the 90th percentile of full-time salaried workers nationally, or \$134,004.

Key Fact #2: Automatic Updates to Salary Requirements

The new rule established automatic increases to the two salary thresholds every 3 years beginning January 1, 2020. The DOL wants to make adjustments that would keep the salary requirements fixed at the 40th and 90th percentiles.

The Department will publish all updated rates in the Federal Register at least 150 days before their effective date, and also post them on the Wage and Hour Division’s website.

Key Fact #3: No Changes to Duties Tests

The DOL did not make any changes to the duties test for the administrative, executive, professional, or highly compensated employee exemptions.

Key Fact #4: Non-discretionary Compensation Can Help Satisfy the Standard Salary Level

For the first time, employers may use nondiscretionary bonuses (generally defined as those announced or promised in advance), incentive payments, and commissions, to satisfy up to 10 percent of the minimum salary requirement for the administrative, professional, and executive exemptions, as long as these forms of compensation are paid at least quarterly.

To satisfy the rule, employers may make one final catch-up payment no later than the next pay period after at the end of the quarter if the bonus, incentive payment, or commission ended up being less than anticipated and the employee's weekly salary plus nondiscretionary bonuses, incentives and commissions does not equal or exceed 13 times the minimum weekly salary of \$913.

Key Fact #5: New Rule Could Have Substantial Impacts

The DOL estimates that in the first year as many as 4.2 million workers would either need to: (1) be reclassified as non-exempt and paid overtime whenever they work more than 40 hours in a workweek; or (2) receive an increase in their salary to meet the new requirement. In response to the new rule, it is possible that some states will update their salary threshold as well. If this is the case, covered employers must comply with the higher minimum salary requirement.

Now is the time to evaluate your systems to help you manage your overtime costs and compliance.

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