

OVERTIME RULES

Employers! Do you need to reclassify some workers?

On May 18, the U.S. Department of Labor (DOL) announced the publication of the much-anticipated final rule updating the overtime regulations under the federal Fair Labor Standards Act (FLSA).

In 2014, President Obama directed the DOL to modernize the regulations governing the executive, administrative and professional exemptions. A proposed rule was published in July 2015 and the DOL received nearly 300,000 comments on that proposed rule during the two month comment period. The final rule, which will be effective December 1, 2016, raises the salary threshold level required for exemption from overtime as an administrative, executive, professional, outside sales, or computer employee (the EAP or "white-collar" exemptions).

The FLSA requires that workers be paid a minimum wage for all hours worked in a workweek and no less than one and one-half times the worker's regular rate of pay for hours worked over 40 in a workweek. However, the FLSA provides certain exemptions from these requirements. In order to be exempt from minimum wage and overtime as an EAP employee under the FLSA, the employee must satisfy three tests: (1) the employee must be paid a fixed salary that is not subject to reduction because of variations in quality or quantity of work performed (the salary basis test); (2) the salary must be of an amount at least equal to the specified threshold amount (salary level test); and (3) the employee's primary job duties must be those duties delineated in the regulations applicable to each of the EAP exemptions (the duties test).



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The key provisions of the final rule relate primarily to updating compensation levels for EAP workers. According to the DOL's Fact Sheet, the rule:

- ▶ Sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage census region, currently the South, which is \$913.00 per week or \$47,476 annually for a full-year worker;
- ▶ Sets the total annual compensation requirement for highly-compensated employees (HCE) subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally, which is \$134,004; and
- ▶ Establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles and to ensure that they continue to provide useful and effective tests for exemption.

A significant change created by the final rule is that now, for the first time, employers may use non-discretionary bonuses and incentive payments, including commissions, to satisfy up to 10 percent of the required salary threshold for employees other than HCEs. In order

to credit a non-discretionary bonus or incentive payment toward a portion of the salary level, such payments must be paid on a quarterly or more frequent basis. The employer is permitted to make a "catch up payment" at the end of the applicable pay period.

The final rule did not create any changes to the duties test. The DOL stated that the standard duties test and the HCE duties test both remain unchanged, it being the Department's belief that, "as a result of the change to the salary level, the number of workers for whom employers must apply the duties test to determine exempt status is reduced, thus simplifying the exemption." Fact Sheet.

What employers should do now

Employers should determine which of their employees who are currently treated as exempt are receiving salaries below the new threshold amount, \$47,476. Once this group is identified, the employer should determine whether it would be better to raise the employee's salary to \$47,476 to maintain the exemption or to reclassify the employee as non-exempt. Employers may want to consider controlling overtime expenses by decreasing hours worked or reassigning duties to spread work among employees. If an employer reclassifies employees, the employer should consider whether formerly exempt employees may need training on time-keeping and compliance with employer policies such as use of email after regular work hours. In addition, employers may want to consider how best to communicate any required changes to minimize any adverse effect on employee morale.