



New Department of Labor Overtime Regulations Limiting Exemptions

May 23, 2016

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New Department of Labor (DOL) overtime regulations are here, and they take effect on December 1, 2016. The [final rule and other resources are available on the DOL website](#). What do the new regulations mean for employers? Let's start by reviewing the basics.

How Overtime Works

The Fair Labor Standards Act (FLSA) requires employers to pay employees a minimum wage of \$7.25 per hour. If an employee works more than 40 hours in a work week, then the employer generally must pay the employee time-and-a-half (i.e. 150% of his or her regular rate of pay) for the "overtime" hours.

The White Collar Exemptions

Not all employees are entitled to increased overtime pay. Some employees are exempt. The three primary exemptions - known as the "white collar" exemptions - are:

- Administrative;
- Executive; and
- Learned Professional.

There are plenty of other, sometimes quirky, exemptions ranging from movie theatre employees to seaweed farmers.¹ This paper focuses on the white collar exemptions. An employee falls under a white collar exemption if (s)he meets three criteria: (1) the primary duties test; (2) the salary basis test; and (3) the

¹ 29 U.S.C.A. § 213 (a)(5), (27).

salary level test. DOL defines an employee's "primary duty" as "the principal, main, major or most important duty that the employee performs."²

Each white collar exemption requires different primary duties. For example, the executive exemption requires that the employee's "primary duty" is managing an enterprise (or subdivision), regularly directing the work of at least two full-time employees, and the authority to hire or fire other employees (or have significant input in such decisions).³ Under the administrative exemption, the employee's primary duty must be "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers [and] the exercise of discretion and independent judgment with respect to matters of significance."⁴ The learned professional's primary duty must be "the performance of work requiring advanced knowledge . . . in a field of science or learning . . . customarily acquired by a prolonged course of specialized intellectual instruction."⁵

If the employee's primary duties satisfy the primary duties test, the employee will be exempt – but only if (s)he also meets the salary basis test. The employee must be paid a salary, which means (s)he is paid a predetermined amount of compensation per week, regardless of the number of days or hours actually worked. Furthermore, under the existing salary level test, this amount must be at least \$455 per week.

The current rule also carves out an exemption for "highly compensated workers" (or "highly compensated employees" or "HCEs"). To meet this exemption, the employee must make at least \$100,000 per year (including at least \$455 per week on a salary basis), perform office or non-manual work, and regularly perform at least one of the exempt duties of the white collar exemptions.⁶

² See, U.S. Dept. of Labor Fact Sheet #17C, Exemption for Administrative Employees Under the Fair Labor Standards Act (FLSA) (available online at http://www.dol.gov/whd/overtime/fs17c_administrative.pdf).

³ See, U.S. Dept. of Labor Fact Sheet #17A, Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA) (available online at http://www.dol.gov/whd/overtime/fs17a_overview.htm).

⁴ *Id.* Examples include some accountants, financial services employees, and HR managers.

⁵ *Id.* Examples include professionals in engineering, medicine, chemistry, and pharmacy.

⁶ U.S. Dept. of Labor Fact Sheet #17H, Highly-Compensated Workers and the Part 541-Exemptions

The New Rule

The new rule makes several changes to the white collar exemptions, including:

- **Higher Salary Level** - The new regulations will raise the dollar amount required to meet the salary level test from \$455 per week to \$913/week (\$47,476 annually). Employees who earn less than \$913/week will not be exempt under the white collar exemptions.
- **Automatic Adjustments to Salary Level** - The \$913/week figure is based on the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South); and, it will automatically update every three years, starting on January 1, 2020.
- **Higher HCE Threshold** - The total compensation to qualify as a HCE is now \$134,004 annually (compared to \$100,000 previously). That number is based on the 90th percentile of full-time salaried workers nationally, and will likewise automatically update every three years.
- **Bonuses and Commissions “Count”** - Employers may now include nondiscretionary bonuses and incentive payments/commissions to satisfy up to 10% of the minimum salary level for an exempt employee. Bonuses and commissions were previously excluded from the calculation altogether.

The new rule takes effect December 1, 2016.

What should employers do?

At a minimum, employers must identify employees who are currently classified as exempt but who earn less than \$913/week (or \$47,476 annually) because they will likely no longer be exempt as of December 1st, unless their compensation changes. Employers may also wish to take this opportunity to perform a broader assessment of employee classification generally. [DOL is hosting webinars in May and June](#) that may also be helpful.

Under the Fair Labor Standards Act (FLSA) (“Thus, for example, an employee may qualify as an exempt highly-compensated executive if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.”)(available online at http://www.dol.gov/whd/overtime/fs17h_highly_comp.pdf).

What can employers do with an exempt employee who will no longer be exempt under the new rule? Employers may:

- Increase the employee's salary to meet the new minimum threshold and continue to treat that employee as exempt;
- Maintain the same salary, but with the understanding that the employer must now pay that employee overtime (and therefore the employee must meticulously account for all time worked, which may be a change for him or her);
- Convert the employee's pay to an hourly wage, and pay overtime for hours worked over 40; and/or
- Limit the employee's hours to 40 per week.

Of course, employers may want to take a look at their workforce generally and consider broader strategies for responding to the new regulations. Employers may consider adjustments to compensation and benefits, bonus and commission plans, or the overall make-up of their workforce.

Are you ready? McQuaide Blasko continues to monitor developments in this area, and our [Labor and Employment Law Practice Group](#) is prepared to help. Please contact us at 814.238.4926 if you have questions about these changes, or any other labor and employment law needs.

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