

DEPARTMENT OF LABOR - NEW OVERTIME RULES

Under the Fair Labor Standards Act ("FLSA"), employers are required to pay overtime at a rate of one-and-one-half times the regular rate of pay to employees who work more than 40 hours in a week, unless the employee is subject to an exemption. Among the exemptions from the requirement of overtime pay are what are sometimes referred to as the "white collar exemptions." These exemptions apply to certain categories of employees, described as Executive, Administrative, and Professional, who perform the duties listed under the exemption and make a certain minimum salary.

On May 18, 2016, the U.S. Department of Labor released its final rule updating their overtime regulations, which takes effect on December 1, 2016. The focus of the rule is increasing the salary levels necessary for employees to be covered by the Executive, Administrative, and Professional exemptions to the overtime requirements. The duties tests for the white collar exemptions are not affected by the revisions. The primary provisions of the final rule are:

1. The standard salary threshold for the white collar exemptions increased from \$23,660 per year (\$455/week) to \$47,476 per year (\$913/week).
2. The total annual compensation requirement for highly compensated employees (HCE) subject to the minimal duties test is increased from \$100,000 to \$134,004 per year.
3. The salary and compensation levels will automatically be updated every three years to maintain the levels at specified percentages of full-time salaried workers.
4. Employers can now use nondiscretionary bonuses and incentive payments, including commissions, to satisfy up to 10 percent of the new standard salary level.

In considering the revision, the Department of Labor determined overtime pay was then available to 7 percent of full-time salaried employees, compared to 62 percent in 1975. Under the new rule, 35 percent of full-time salaried workers will now be entitled to overtime, based on their salary alone, without consideration of their duties. The Department of Labor predicts that the new rule will extend overtime pay to over 4 million workers within the first year of implementation.

The salary requirements will update automatically every three years, starting January 1, 2020. The updates will keep the standard salary level threshold equal to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region. The HCE compensation level will also automatically update to keep the threshold equal to the 90th

percentile of annual earnings of full-time salaried workers nationally. The updated salary levels will be published 150 days before their effective date, starting August 1, 2019.

In order for employers to credit nondiscretionary bonuses and incentive payments to the standard salary level test, the payments must be made at least quarterly. The credit is capped at 10 percent of the required salary amount. Although employers may not use nondiscretionary bonuses and incentive payments to satisfy the standard salary amount for HCEs, they can continue to use nondiscretionary deferred compensation to satisfy the total annual compensation requirement.

A variety of options are available to employers to deal with employees who were previously exempt but now subject to overtime under the new rule. Employers may decide to pay previously exempt employees overtime for hours worked in excess of 40 hours per week. In that scenario, an employer could reduce the base salary so that the overall pay with overtime is equivalent, so long as the base pay does not fall below minimum wage. If an employer determines it wants to keep an employee exempt, it could raise their rate of pay to exceed the threshold for the exemption. Employers may also determine to limit the hours worked by eligible employees to avoid overtime payments, although employers cannot refuse to pay overtime on the basis that it was not authorized.

Department of Labor guidance on the new rule and its application to employers can be found on their website, at <https://www.dol.gov/whd/overtime/final2016/index.htm>.

If you have questions about this update, please contact [Gillian Dale](#) or [April Connally](#).