

# PUBLICATION

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## DOL Releases Final Overtime Rule – Slated to Become Effective January 1, 2020

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**The U.S. Department of Labor's (DOL) highly anticipated changes to the overtime provisions of the federal Fair Labor Standards Act (FLSA) (Final Overtime Rule) have been released and will take effect on January 1, 2020. The minimum salary threshold for the so called "white collar" exemptions will increase from \$455 per week (\$23,660 annually) to \$684 per week (\$35,568 annually). All employees who are paid a salary falling below the salary threshold will be categorically non-exempt – that is, eligible for overtime for all hours worked over 40 in a work week.**

The Final Overtime Rule also provides that employers may include non-discretionary bonuses, incentive payments and commissions to satisfy up to ten percent of the higher salary threshold (the 10% Rule). Under the 10% Rule, an employer would be required to compensate exempt employees at a "standard salary level" of 90 percent of the salary threshold of \$684 per week. If an employee's compensation falls short, employers would be required to make a final "catch-up" payment within one pay period after the end of a 52-week period to bring an employee's compensation up to the required salary threshold level of \$684 per week.

Finally, the salary level for the FLSA's Highly Compensated Employee Exemption (HCE Exemption) also will increase. Generally, to be exempt under the HCE test, an employee currently must earn at least the required regulatory amount, which is \$100,000 annually, of which \$455 must be paid on a salary or fee basis, and must customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, professional or administrative employee. The Final Overtime Rule changes the HCE Exemption compensation level to \$107,432, of which \$684 must be paid weekly on a salary or fee basis.

The DOL estimates that 1.3 million workers will now be eligible for overtime under the Final Overtime Rule. These changes are considered a more moderate approach than the ill-fated 2016 DOL proposal. In 2016, the Obama Administration's DOL published revisions to the overtime regulations that nearly doubled the salary threshold to \$913 per week (\$47,476 annually). In addition, the 2016 proposal included automatic increases to the salary threshold every three years. The new proposal does not include an automatic increase, but instead, the DOL states that it intends to update the salary threshold and HCE annual compensation levels more regularly in the future through notice and comment rulemaking.

### **"Exemption" from Overtime Under the White Collar Exemptions – Not Just a Salary Test**

The FLSA requires employees to be paid at least the federal minimum wage for every hour worked and overtime for any time worked in excess of 40 hours in a workweek. In addition, the FLSA provides strict record-keeping requirements for employees to track their working hours. There are employees, however, that are "exempt" from the FLSA's minimum wage, overtime and record-keeping requirements. Although everyone has been focused on the salary level threshold because of the myriad of controversy around the DOL's proposals, the salary level threshold is just one of the requirements that must be met for exemption from overtime. In fact, the "white collar" exemptions depend upon three things:

- 1. How an employee is paid – salary basis**

The first requirement for exemption is that the employee must be paid on a "salaried basis," meaning the employee receives a fixed, guaranteed minimum amount for any workweek in which the

employee performs *any* work. Simply stated, there is no change in salary regardless of the hours worked.

**2. How much an employee is paid – salary level/threshold**

Besides being paid on a salary basis, to qualify for an exemption, the employee currently must be paid a minimum of \$455 per week (\$23,660 annually) and, as of January 1, 2020, must be paid \$684 per week (\$35,568 annually). Meeting the salary threshold alone *does not* qualify an employee for exemption for overtime.

**3. What kind of work the employee does – job duties test**

An employee who meets the salary basis and salary level/threshold tests is exempt only if the employee also performs exempt job duties. There are three primary "white collar" exemptions: Executive, Administrative, and Professional. Regardless of the job title, the employee must meet each job duty requirement under one of the exemption categories to satisfy this test.

To qualify for exemption from overtime under the white collar exemptions (i.e., the Administrative, Professional, and Executive Exemptions), all three of these tests must be satisfied. A salaried employee is not the same as an "exempt" employee, although the two phrases are often used interchangeably. Although there is often confusion over the job duties test, neither the 2016 overtime rule nor new Final Overtime Rule changed the job duties.

**What Should Employers Do Now?**

Now is the time to start preparing. It is important to understand exemptions and their impact on your structure, budget and employees. Here are some initial steps to take right now:

4. Identify employees who will need to be reclassified i.e., current employees who are currently exempt but paid less than \$35,568 annually.
5. Determine the number of hours the employee works. This seems simple, but exempt employees are not required to track their hours; therefore, employers may not be fully aware of the hours an exempt employee is working.
6. Analyze the financial impact. Will you raise pay to the new threshold level, reclassify as non-exempt and pay overtime, or lower hourly rate to offset the overtime requirement?
7. Review job descriptions and tasks of impacted positions to determine whether certain exempt tasks may be reassigned or maintained with the current position.
8. Consider how pay changes or other changes in job assignments may impact your organization. Will you need to make process or structural changes?
9. Develop administrative plans to ensure compliance when the regulations become official, as well as plans to communicate these changes to the affected employees. This means you will need to prepare and train your managers.
10. Lastly, don't hesitate to seek legal help to ensure compliance and help maneuver through the DOL regulations and classification changes. These rules are complex, and there are serious financial consequences if you are found to be in violation of them.