

Department of Labor Publishes its Final Rule to Overtime Law



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On Tuesday, September 24, 2019, the Department of Labor published its Final Rule in connection with the so-called “white collar” overtime exemptions. The Final Rule, which goes into effect on January 1, 2020, raises the salary threshold for these overtime exemptions from \$455 per week to \$684 per week (equivalent to \$35,568 for a full-year employee). Employers may also use **non-discretionary** bonuses and incentive payments, including commissions, to satisfy up to 10% of the new salary threshold, so long as they are paid at least annually. The rule also raises the total compensation requirement for “highly compensated employees” from the current \$100,000 per year threshold to \$107,432 per year.

Employers may recall an earlier attempt by the Obama administration to increase the salary threshold for the white collar exemptions to roughly \$47,500. While that 2016 rule was blocked by a Texas federal judge in the days leading up to its effective date, many employers had implemented changes or taken other steps in preparation for that proposed rule. Nonetheless, employers should use this publication of the Final Rule as an opportunity to again review their current pay and employee classification practices.

First, and most importantly, employers should remember that meeting the salary threshold is just one requirement for classifying workers as exempt. Put another way, **it is not enough simply to pay an employee above the salary threshold in order to avoid paying overtime to that employee.** In order to be exempt, employees must also meet the “duties” tests for one of the recognized exemptions. Each of the “white collar” (executive, administrative, and professional) exemptions has a different “duties” test—which are concisely described in the DOL’s recently

revised fact sheet, *Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act* available online at https://www.dol.gov/whd/overtime/fs17a_overview.htm. While the new rule made no changes to these duties tests, employers should use the imminent change as an opportunity to review carefully the current duties of their employees to ensure that those who have been classified as exempt satisfy the requirements of those tests. Any changes—even to the classification of workers not impacted by the salary threshold change—can be strategically rolled out in conjunction with the new rule implementation.

Second, just as they may have done in preparation for the ill-fated 2016 rule, employers should decide how they will classify those employees who are currently exempt but who make less than the new threshold. Some options for addressing the threshold change include:

- For those employees close to the new threshold, you may decide to raise the salary to keep the employee’s status as “exempt.”
- For other employees, you may elect to disallow or significantly limit overtime. Newly non-exempt employees must track all of their work time, including unpaid breaks—something they may not be used to doing. You should make expectations regarding tracking of time and working overtime known to these employees in writing.
- For employees well below the threshold who do not consistently work overtime, paying the occasional overtime may be the better economic approach.
- You may decide to reduce the hourly base rate so that, when overtime is added, weekly compensation remains unchanged. Employers should recognize, however, that this approach may result in decreased morale or resignations of critical employees.

Although there may again be legal challenges to the rule, employers would be wise to review their policies as suggested above to prepare for the January 1 implementation date.

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