

Final Federal Rule to Increase Overtime Salary Thresholds

September 27, 2019

On September 24, 2019, the U.S. Department of Labor (the “DOL”) announced a final rule that will raise the annual minimum salary requirements for the white collar overtime exemptions under the Fair Labor Standards Act (the “FLSA”). Unless exempt, employees covered by the FLSA must be paid an enhanced overtime rate not less than one and one-half times their regular rates of pay if they work more than 40 hours in a workweek. The DOL estimates that the new rule will cause approximately 1.3 million more workers to become eligible for overtime under the FLSA.

The final rule formally replaces a previously invalidated final rule from May 2016. The rule will take effect January 1, 2020, assuming that it is not stalled with legal challenges similar to the prior overtime rule that the DOL issued in 2016, and therefore employers should start preparing for compliance before year end.

Key components of final rule. To qualify for an exemption from overtime, a position must satisfy both the applicable “salary level test” and the applicable “duties test.” Notably, the DOL’s new rule changes the salary level tests for white collar exemptions but does not alter the duties tests.¹

The final rule will change the salary level tests as follows:

- Raise the minimum salary level for the “white collar” (executive, administrative and professional) exemptions of the FLSA from \$455 per week (\$23,660 annually) to \$684 per week (\$35,568 annually). This is considerably less than the 2016 rule, which would have set the salary level at \$913 per week (\$47,476 annually). It is slightly more than the proposed rule that the DOL issued in March 2019 that would have set the threshold at \$35,308.

¹ For more information about the white collar exemptions, including the duties tests, see the Department of Labor, Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA), https://www.dol.gov/whd/overtime/fs17a_overview.htm.

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- Raise the total annual compensation requirement for the highly compensated employee exemption from \$100,000 to \$107,432. This is significantly lower than the 2016 rule, which would have set the requirement at \$134,004, and the proposed rule that the DOL issued in March 2019 that would have set the threshold at \$147,414.
 - Allow employers to count nondiscretionary bonuses, commissions and incentive payments that are paid annually (or more frequently) to satisfy up to 10 percent of the salary threshold.

The final rule also makes clear that it is the DOL's intention to pursue regular updates to the minimum salary requirements through the notice-and-comment rule-making process.

The rule does not impact positions in states that already set higher minimum salary levels for white collar exemptions (such as New York, which has a statewide minimum of at least \$43,264 and a New York City minimum of at least \$58,500 for employers with 11 or more employees).

Employers should immediately audit for compliance with FLSA exemptions. Given the short time frame for complying with the new rule, employers should immediately begin auditing for compliance with FLSA exemptions to ensure compliance when the rule takes effect on January 1, 2020.

Employers should assess whether any positions in their workforce will be affected by the increased salary requirements. If any impacted positions are identified, the employer then should decide on one of the following two options for each affected position:

1. reclassify the position from exempt to nonexempt on or before January 1, 2020 and begin paying overtime for the position because the salary falls below the minimum requirement; or
2. implement a salary increase sufficient to maintain the exemption by meeting the new minimum salary requirement. Remember that nondiscretionary bonuses, commissions and incentive payments can be counted as up to 10 percent (\$3,556.80) of the total salary requirement.

While we encourage our clients to regularly audit for compliance with FLSA exemptions, the imminent rule change creates a prime opportunity for employers to consider FLSA

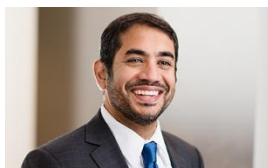
compliance more generally, including whether any positions should be reclassified because they fail to satisfy the “duties test.”²

Focus on FLSA exemptions and compliance in transactional due diligence. We expect the rule change to be a focus for transactional due diligence for the remainder of 2019 and 2020. Depending on the composition of the target’s workforce, a prudent investor or buyer will want to know the costs associated with compliance with the rule change, whether the target has budgeted for those costs and whether the target has any FLSA compliance issues generally.

Please do not hesitate to contact us with any questions.



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² See *id.*