

CLIENT ALERT

September 30, 2019

1

LABOR AND EMPLOYMENT

DOL ISSUES FINAL OVERTIME RULE INCREASING THE WHITE-COLLAR EMPLOYEE SALARY THRESHOLD. EMPLOYERS HAVE UNTIL JANUARY 1, 2020 TO CHANGE PAYROLL PRACTICES

by Sara H. Jodka

30 FAQs about the New Rule

The Department of Labor ("DOL") unveiled the [final version of its overtime exemption rule](#) (the "Rule"), which sets the annual salary threshold for exempt employees to qualify for the Fair Labor Standards Act's ("FLSA") white-collar exemptions at \$35,568 per year or \$684 a week, an increase from the current \$23,600 annual salary rate. This will make an estimated 1.3 million additional US workers eligible for overtime compensation.

The Rule will become effective January 1, 2020. Many may remember that a similar—much more aggressive salary threshold increase—rule change was proposed to become law December 1, 2016, but was stopped by a Texas federal judge before it could take effect. In the event the Rule is not stopped, here is our (and some of the DOL's) list of employers' 30 most frequently asked questions as they work to transition their white-collar employees to meet the new Rule's requirements.

Q.1. What is the purpose of the "Overtime" Final Rule?
A.1. This Final Rule updates the regulations for determining whether white-collar salaried employees are exempt from the Fair Labor Standards Act's ("FLSA") minimum wage and overtime pay protections. They are exempt if they are employed in a bona fide executive, administrative, or professional capacity ("white-collar exemptions"), as those terms are defined in the Department of Labor's regulations at 29 CFR part 541.
Q.2. What is "overtime"?
A.2. Unless specifically exempted, employees covered by the FLSA must receive pay for hours worked in excess of 40 in a workweek at a rate not less than one and one-half their regular rates of pay. This is referred to as "overtime" pay.
Q.3. What is a "workweek"?
A.3. An employer is free to determine what consecutive 168-hour/7-day period of time will be that particular employer's workweek, but once it is established, it cannot be changed.
Q.4. What determines if an employee falls within one of the white-collar exemptions?
A.4. To qualify for exemption, a white-collar employee generally must: <ol style="list-style-type: none">1. be salaried, meaning that they are paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test");2. be paid more than a specified weekly salary level, which is \$684 per week (the equivalent of \$35,568 annually for a full-year worker) under this Final Rule (the "salary level test"); and3. primarily perform executive, administrative, or professional duties, as defined in the DOL's regulations (the "duties test"). Certain employees are not subject to either the salary basis or salary level tests (for example, doctors and lawyers). The Department's regulations also provide an exemption for certain highly compensated employees ("HCEs") who earn above a higher total annual compensation level (\$107,432 under this final rule) and satisfy a minimal duties test.
Q.5. What are the significant changes to the overtime regulations for white-collar salaried workers?
A.5. The Rule sets the new standard salary level. The Rule increases the standard salary level from \$455 per week (\$23,660 for a full-year worker) to \$684 per week (\$35,568 for a full-year worker). It also raises the total annual compensation level for HCEs from the currently-enforced level of \$100,000 to \$107,432 per year. Employers will be able to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level, provided these payments are made on a quarterly or on a more frequent basis. This amounts to \$3,557 of the salaried amount being able to be paid through bonuses. It also revises the special salary levels for workers in the US territories and in the motion picture industry. Specifically: <ul style="list-style-type: none">• 455/week – special salary level for workers in Puerto Rico, U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands• \$380/week – special salary level for workers in American Samoa• \$1,043/week – "base rate" threshold for employees in the motion picture industry

WWW.DICKINSONWRIGHT.COM

DICKINSON WRIGHT

ARIZONA CALIFORNIA FLORIDA KENTUCKY MICHIGAN NEVADA OHIO TENNESSEE TEXAS WASHINGTON DC TORONTO

Q.6.a. How will employers implement the updated salary level requirement established in this Final Rule?

A.6.a. Employers have a range of options for responding to the updated standard salary level. For each affected employee newly entitled to overtime pay, employers may:

- **No Change**
- **Keep employee exempt and either**
 - Increase the salary of an employee who meets the duties test to at least the new salary level to retain his or her exempt status; or
 - Increase the salary with bonus via non-discretionary bonus payments, as discussed in Q.5.
- **Change employee to hourly employee and**
 - Pay an overtime premium of one and a half times the employee's regular rate of pay for any overtime hours worked;
 - Reduce or eliminate overtime hours;
 - Reorganize workloads;
 - Adjust schedules or spread hours
 - Use some combination of the above
- **Change to salaried, nonexempt and**
 - Pay overtime above a salary;
 - Reduce the amount of base salary (provided that the employee still earns at least the applicable hourly minimum wage) and add pay to account for overtime for hours worked over 40 in the workweek, to hold total weekly pay constant;
 - Fluctuating pay (halftime);
 - Pay by agreement

The circumstances of each affected employee will likely impact how employers respond to this Rule. For example, employers may be more likely to give raises to employees who regularly work overtime and earn slightly below the new standard salary level, in order to maintain their overtime-exempt status so that the employer does not have to pay the overtime premium. For employees who rarely or almost never work overtime hours, employers may simply choose to pay the overtime premium whenever necessary.

Nothing in the rule requires employers to change employees' pay to hourly from salaried, even if the employees' classification changes from exempt to overtime eligible.

Q.6.b. Must employees earning below the new level be converted to hourly pay?

A.6.b. No. Nothing in the FLSA or in the regulations governing the white-collar exemptions requires employers to pay overtime-eligible employees on an hourly basis. There are millions of salaried employees (white and blue collar alike) who are legally entitled to overtime pay under the current regulations.

Q.7. When will these changes take effect?

A.7. January 1, 2020. On that day, the new standard salary level (\$684 per week or \$35,568 per year) and HCE total compensation requirement (\$107,432 per year) will take effect.

Q.8. When do the updates begin?

A.8. Unclear. The prior proposed rule would have had changes effective every three years, but this Rule did not contain any similar markers.

Q.9. Is the standard duties test for white-collar exemptions impacted or changed by the Rule?

A.9. No. The DOL did not make any changes to the standard duties test. The DOL believes that the increase to the standard salary level, coupled with automatic updating in the future, will address concerns that some workers who satisfy the standard duties test should be entitled to overtime pay because they are performing substantial amounts of overtime-eligible work (e.g., operating cash registers, stocking shelves, etc.).

Q.10. What if a State has its own overtime laws?

A.10. The FLSA provides minimum wage and hour standards, and does not prevent a state from establishing more protective standards. If a state establishes a more protective standard than the provisions of the FLSA, the higher standard applies in that state.

Policy Implications

Q.11. Will newly overtime-eligible employees have to record their hours on a daily basis or "punch a time clock"?

A.11. No. Overtime-eligible workers are not required to punch a time clock. The FLSA requires that employers keep certain records for each nonexempt worker. This is so workers can be sure that they get paid the wages that they earn and are owed. Employers have options for accounting for workers' hours - some of which are very low cost and burden. There is no particular form or order of records required and employers may choose how to record hours worked for overtime-eligible employees. For example, where an employee works a fixed schedule that rarely varies, the employer may simply keep a record of the schedule and then indicate the changes to the schedule that the worker actually worked when the worker's hours vary from the schedule ("exceptions reporting"). [See Fact Sheet 21: Recordkeeping Requirements under the Fair Labor Standards Act \(FLSA\).](#)

For employees with a flexible schedule, an employer does not need to require an employee to sign in each time she starts and stops work. The employer must keep an accurate record of the number of daily hours worked by the employee, not the specific start and end times. So, an employer could allow an employee to just provide the total number of hours she worked each day, including the number of overtime hours, by the end of each pay period.

Q.12. Doesn't having to punch a clock restrict the ability of an employee to work flexibly?

A.12. The FLSA does not require workers to punch a clock. Moreover, the recordkeeping requirements of the FLSA do not limit the flexibilities that an employer can afford to its workers. These recordkeeping requirements provide that an employer must keep an accurate record of the total number of hours worked for each day in a pay period to ensure that an employee is fully compensated for all hours worked. An employer does not need to require an employee to record what time they started or finished, only the total number of hours worked each day. There is no particular form or order of records required and employers may choose how to document or record hours worked for overtime-eligible employees. Employers can continue to permit their employees to work flexible hours as long as their total hours each day are accurately recorded.

For example, an overtime-eligible employee has a flexible schedule that does not require that the employee work particular hours but requires that the employee work at least 40 hours per week. In a particular week, the employee might leave early on Monday to go to a child's soccer game, finish some work from home late Monday night, stay late on Tuesday and Wednesday to catch up on a priority project, leave on Thursday midafternoon to attend a gym class and then return to work. The employer does not require the employee to "clock in or out" each time the employee comes to work or leaves. The employer must keep an accurate record of the number of daily hours worked by the employee. By the end of each pay period, the employee provides the employer with the total number of hours worked each day, including the number of her overtime hours.

Q.13. Does the FLSA allow for a flexible schedule for overtime eligible employees? Can employers still allow employees to work from home or have flexible schedules?

A.13. Yes. The FLSA does not require minimum or maximum hours for a shift, or prohibit split shifts. There is no requirement that a worker must have a predetermined schedule or restrictions on where the work is performed. There is also no restriction on when the work may be performed. [See Fact Sheet 22: Hours Worked Under the FLSA.](#)

Q.14. Won't this rule be difficult for employers because they will have to track workers' hours?

A.14. No. Almost every employer already has systems and policies in place for dealing with overtime eligible employees so the rule isn't introducing any new obligations for employers or requiring them to adopt new systems. These existing systems can be used for newly overtime-protected employees impacted by the Rule.

There is no requirement that employees "punch in" and "punch out." Employers and employees have flexibility in designing systems to make sure appropriate records are kept to track overtime hours. As long as records are complete and accurate as to the number of hours worked each day, employers may use any method they choose.

For an employee who works a fixed schedule, an employer need not track the employee's exact hours worked each day; rather, the employer and employee can agree to a default schedule that reflects daily and weekly hours, and indicate that the employee followed the agreed-upon schedule. Only when the employee deviates from the schedule is the employer required to record the changes to the hours worked.

For employees with a flexible schedule, an employer does not need to require an employee to sign in each time she starts and stops work. The employer must keep an accurate record of the number of daily hours worked by the employee. So, an employer could allow an employee to just provide the total number of hours she worked each day, including the number of overtime hours, by the end of each pay period.

Many employees, both exempt and non-exempt, who maintain flexible work schedules track their daily and weekly hours by simply recording their hours worked for the employer. [See Fact Sheet 21: Recordkeeping Requirements under the FLSA.](#)

Non-Discretionary Bonuses and Incentive Payments

Q.15. What are the new salary and compensation levels under this Final Rule?

A.15. When this Final Rule takes effect on January 1, 2020, the "standard" salary level will increase to \$684 per week (equivalent to \$35,568 annually for a full-year worker), up from \$455 per week (\$23,660 annually). The total annual compensation requirement for highly compensated employees will increase to \$107,432 per year, up from \$100,000 per year.

Q.16. May employers use bonuses to satisfy part of the new standard salary level test?

A.16. Yes. The DOL is changing the regulations to allow nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary test requirement. Such bonuses include, for example, nondiscretionary incentive bonuses tied to productivity or profitability (e.g. a bonus based on the specified percentage of the profits generated by a business in the prior quarter). For companies that pay significantly larger bonuses, the amount attributable toward the standard salary level is capped at 10 percent of the required salary amount.

For employers to credit nondiscretionary bonuses and incentive payments (including commissions) toward a portion of the standard salary level test, such payments must be paid on a quarterly or more frequent basis.

Q.17. What's the difference between a discretionary bonus and a nondiscretionary bonus?

A.17. Nondiscretionary bonuses and incentive payments (including commissions) are forms of compensation promised to employees to induce them to work more efficiently or to remain with the company. Examples include bonuses for meeting set production goals, retention bonuses, and commission payments based on a fixed formula.

By contrast, discretionary bonuses are those for which the decision to award the bonus and the payment amount is at the employer's sole discretion and not in accordance with any preannounced standards. An example would be an unannounced bonus or spontaneous reward for a specific act.

Q.18. May employers make a catch-up payment in the event that an employee doesn't receive enough in nondiscretionary bonuses and incentive payments (including commissions) in a given quarter to remain exempt?

A.18. Yes, if an employee does not earn enough in nondiscretionary bonuses and incentive payments (including commissions) in a given 52-week period to retain his or her exempt status, the DOL permits a "catch-up" payment at the end of the 52-week period. The employer has one pay period to make up for the shortfall (up to 10 percent of the standard salary level for the preceding 52-week period). Any such catch-up payment will count only toward the prior 52-week period's salary amount and not toward the salary amount in the 52-week period in which it was paid. If the employer chooses not to make the catch-up payment, the employee would be entitled to overtime pay for any overtime hours worked during the previous 52-week period.

Miscellaneous Questions

Q.19. Does the Final Rule change how employers may use bonuses to satisfy the salary level for highly compensated employees (HCEs)?

A.19. No, the DOL has not made changes to how employers may use bonuses to meet the salary level component of the HCE test. To claim the HCE exemption under the final rule, employers must pay workers at least the standard weekly salary level of \$684 per week on a salary or fee basis, while the remainder of the total annual compensation may include commissions, nondiscretionary bonuses, and other nondiscretionary compensation. Because employers may fulfill a majority of the HCE total annual compensation requirement with commissions, nondiscretionary bonuses, and other forms of nondiscretionary deferred compensation, the Department determined that it would not be appropriate to permit employers to also use nondiscretionary bonuses and incentive payments to satisfy the weekly standard salary amount.

Q.20. Can an employer use a Christmas bonus as part of the employee's salary in an effort to meet the new standard?

A.20. When the Final Rule takes effect on January 1, 2020, employers will be allowed to satisfy up to 10 percent of the standard salary level with nondiscretionary bonuses and incentive payments (including commissions). Nondiscretionary bonuses and incentive payments are forms of compensation promised to employees, for example, to induce them to work more efficiently or to remain with the company. By contrast, discretionary bonuses are those for which the decision to award the bonus and the payment amount is at the employer's sole discretion and not in accordance with any preannounced standards. An unannounced holiday bonus would qualify as a discretionary bonus, because the bonus is entirely at the discretion of the employer, and therefore could not satisfy any portion of the \$684 standard salary level.

Q.21. If an employer has a job that meets an exemption test, is that employer able to reclassify only those who are below the new minimum to nonexempt and allow those that are over to remain exempt? Or, does the entire classification need to be exempt or non-exempt?

A.21. The "white-collar" exemptions require an employee to be paid on a salary basis, paid above a certain salary level, and meet the respective duties test. If an employee meets the duties test of an executive, administrative, or professional employee, meets the salary basis requirement, and meets or exceeds the salary level requirement, that employee would meet the requirements for the exemption. If they fail to meet any part of the criteria, they would not meet the exemption and would therefore be non-exempt. The exemption is applied on an employee by employee basis, not to a particular classification. Keep in mind the salary level and salary basis requirements do not apply to outside sales employees, licensed or certified doctors, lawyers and teachers. Employees in these occupations who meet the duties test are exempt regardless of their salary.

Q.22. Are part-time salaried employees impacted by the Final Rule?

A.22. Whether a worker is full-time or part-time, the standard salary level to qualify for exemption will be \$684 per week. But remember, an employee would not be eligible for overtime until they reach over 40 hours in a workweek.

Q.23. If an employer pays its employees every 2 weeks, will it need to change its pay periods and pay weekly? Monthly?

A.23. No. Employers may still pay their employees on a biweekly basis. An employer's overtime pay obligation is determined on a week-by-week basis, but they may pay their employees on a biweekly basis.

Q.24. Are employers in compliance if they follow the annualized amounts? (Or do they have to make sure they are always in compliance each week?)

A.24. An employee's exempt status – and, if nonexempt, the employee's right to overtime pay – is determined on a weekly basis. Generally, to retain exempt status, an employee must satisfy the duties test and earn at least \$684 per week.

Q.25. Can an employer classify someone as Salary Nonexempt and pay them less than the required amount but pay them overtime?

A.25. Yes, an employer is permitted to pay a nonexempt employee on salary basis which is less than the required \$684 per week (New Overtime Final Rule), as long as the employee is not paid less than the federal minimum wage rate of for all hours worked and is paid overtime for all hour worked in excess 40 per week. *See Fact Sheet 23: Overtime Pay Requirements of the FLSA.*

Q.26. If the employee is being paid hourly but all the duties are applicable should the employee be paid salary instead? If this employee wants to stay being paid hourly should it be documented and signed by the employee?

A.26. Employees paid on an hourly basis are generally entitled to overtime pay, even if they satisfy the duties requirements for exemption. Employers are not required to pay employees who satisfy the duties test on a salary basis unless the employer intends to assert the exemption and not pay overtime.

Q.27. Does an "assistant manager" who makes \$48,000 fit into an exempt category?

A.27. Workers who do not pass the standard duties test, including a lot of assistant managers (as numerous courts have determined) do not qualify for exemption and will be entitled to overtime pay.

Q.28. If our management team meets the test for the executive duties, does this exempt them from the overtime pay if they make under the newly required \$648/per week rate?

A.28. An exempt executive, administrative, and professional employee must meet the duties test in addition to being paid on a salary basis and at the required salary level. Therefore, if an employee only meets the duties test and not the required salary level, they would not meet the criteria necessary to be considered exempt and would be entitled to overtime in any week they work more than 40 hours.

Q.29. What happens if an employee quits before payment of the non-discretionary bonus is due? Does the employer have to bonus out the employee for that quarter so that the employee earned at least \$638/week for the time they were actually employed?

A.29. When the Final Rule takes effect on January 1, 2020, employers will newly be allowed to satisfy up to 10 percent of the standard salary level with nondiscretionary bonuses and incentive payments (including commissions). Nondiscretionary bonuses and incentive payments are forms of compensation promised to employees, for example, to induce them to work more efficiently or to remain with the company. By contrast, discretionary bonuses are those for which the decision to award the bonus and the payment amount is at the employer's sole discretion and not in accordance with any preannounced standards.

For an employee who qualifies for the "white-collar" exemption, the employee must be paid \$684 per week. An employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment. As stated in the regulations at 29 CFR 541.602(b)(6).

Q.30. Is the amount/week calculated before or after taxes?

A.30. The DOL looks at an employee's gross wage amount before taxes.

CLIENT ALERT

This client alert is published by Dickinson Wright PLLC to inform our clients and friends of important developments in the field of Labor and Employment law. The content is informational only and does not constitute legal or professional advice. We encourage you to consult a Dickinson Wright attorney if you have specific questions or concerns relating to any of the topics covered in here.



Sara H. Jodka, CIPP-US is a Member in Dickinson Wright's Columbus office. She can be reached at 614.744.2943 or sjodka@dickinsonwright.com.