New Overtime Rule Raises Salary Cutoff to $35,568

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Employees who make less than $35,568 are now eligible for overtime pay under a final rule issued today by the U.S. Department of Labor (DOL). The new rate will take effect Jan. 1, 2020.

To be exempt from overtime under the federal Fair Labor Standards Act (FLSA), employees must be paid a salary of at least the threshold amount and meet certain duties tests. If they are paid less or do not meet the tests, they must be paid 1 1/2 times their regular hourly rate for hours worked in excess of 40 in a workweek.

The new rule will raise the salary threshold to $684 a week ($35,568 annualized) from $455 a week ($23,660 annualized). A blocked Obama-era rule would have doubled the threshold, but a federal judge held that the DOL exceeded its authority by raising the rate too high.

The new rule is expected to prompt employers to reclassify more than a million currently exempt workers to nonexempt status and raise pay for others above the new threshold.

The Society for Human Resource Management (SHRM) is pleased that the DOL has finalized the overtime rule. "Employees and employers have been waiting for an overtime salary adjustment for over 10 years," said Nancy Hammer, SHRM's vice president of regulatory and judicial engagement. "Today's rule provides important clarity for the workplace on FLSA implementation," she said.

Here's what employers need to know about the new rule.

The Details

Under the new rule, nondiscretionary bonuses and incentive payments (including commissions) paid on an annual or more frequent basis may be used to satisfy up to 10 percent of the standard salary level.

In addition to raising the salary cutoff for exempt workers, the new rule raises the threshold for highly compensated employees from $100,000 a year to $107,432 (of which $684 must be paid weekly on a salary or fee basis). The increase is about $40,000 less than what the DOL initially proposed because it is based on the 80th percentile, rather than the 90th percentile, of all full-time salaried workers' earnings nationwide.

For the FLSA's executive, administrative and professional exemptions—the so-called white-collar exemptions—employees must perform certain duties and earn at least the salary threshold. But under a special rule, highly compensated employees are eligible for exempt status if they meet a reduced duties test as follows:

- The employee's primary duty must be office or nonmanual work.
- The employee must "customarily and regularly" perform at least one of the bona fide exempt duties of an executive, administrative or professional employee.

Employers should note that the rule doesn't make any changes to the duties tests.

Also, unlike the overtime rule that President Barack Obama's administration put forward in 2016, the new rule doesn't include automatic adjustments to the exempt salary threshold.

The Obama administration sought to automatically adjust the threshold every three years to represent the 40th percentile of earnings for full-time salaried workers in the lowest-wage census region.

Employers likely will be pleased that the new rule doesn't call for automatic adjustments to the salary threshold, as many believe the marketplace—rather than the federal government—should dictate appropriate salary levels, said Josh Woodard, an attorney with Snell & Wilmer in Phoenix.

However, the DOL "intends to update these thresholds more regularly in the future," according to the final rule.

Review Job Descriptions and Budgets

Employers should immediately pull data for exempt workers earning below the threshold, attorneys said.

"Review your budgets, consider what positions you might restructure, flag whom you might reclassify to nonexempt or give a salary increase, and think about when, practically speaking, you should implement changes," said Caroline Brown, an attorney with Fisher Phillips in Atlanta.

Román D. Hernández, an attorney with Troutman Sanders in Portland, Ore., said employers should forecast financial ramifications for changes in labor costs necessitated by changes in the rules.

Employers also should weigh the cost of raising employee salaries above the new threshold against the cost of reclassifying employees as nonexempt and paying overtime, he said. "That is an individual workforce determination that should be made in consultation with HR professionals and outside counsel to ensure compliance with the new rules."

Meeting the salary cutoff is just one requirement for classifying workers as exempt. Employers should also take the time to review workers' job duties to ensure that they satisfy the applicable exemption's criteria.

The white-collar exemptions each have slightly different duties tests:

- **Executive exemption.** The employee's primary duty must be managing the enterprise or a department or subdivision of the enterprise. The employee must customarily and regularly direct the work of at least two employees and have the authority to hire or fire workers (or the employee's suggestions and recommendations as to hiring, firing or changing the status of other employees must be given particular weight).
- **Administrative exemption.** The employee's primary duty must be office or nonmanual work that is directly related to the management or general business operations of the employer or the employer's customers. The employee's primary duty also must include the exercise of discretion and independent judgment with respect to matters of significance.
- **Professional exemption.** The employee's primary duty must be work requiring advanced knowledge in a field of science or learning that is customarily acquired by prolonged, specialized, intellectual instruction and study.

Although the changes to the overtime rule are all about salary, the upcoming adjustments provide a good opportunity for employers to look at the job duties for their lowest exempt pay bands and make sure they actually qualify, said Tammy McCutchen, an attorney with Littler in Washington, D.C. "It's a great time to correct errors on the job-duties side."

[SHRM members-only toolkit: Determining Overtime Eligibility in the United States]

Hernández noted that, in general, it's a good idea for employers to periodically review job descriptions and ensure that they are up-to-date and accurate.

Develop A Training and Communication Strategy

If employers decide to reclassify employees to nonexempt status, they will need to track affected workers' work time and pay overtime premiums for all hours worked beyond 40 in a workweek.

Employers will need to develop a communication strategy and make sure that reclassified employees know they are not being demoted, McCutchen said. Be clear that these changes are based on new government rules.

In addition, employees who will be required to track their hours for the first time—as well as their managers—will need training on time-keeping procedures, she added.

Employers should evaluate their systems for time-keeping, tracking overtime and paying bonuses, Hernández said. They should also develop plans and procedures to manage or limit overtime hours worked by newly nonexempt workers, he suggested.

Brown noted that taking some initial steps sooner rather than later can go a long way toward triaging potential issues and creating a smoother transition plan.