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THE NEW FEDERAL OVERTIME REGULATIONS: ARE YOU READY?

By [Karen J. Kubin](#)

On May 18, 2016, the U.S. Department of Labor (DOL) issued its Final Rule updating its regulations to increase the salary threshold required to qualify for the federal Fair Labor Standards Act's "white collar" exemptions. The DOL estimates that the updated regulations, which more than double the minimum salary for a white collar exemption to apply, will cause 4.2 million currently exempt workers to be entitled to minimum wage and overtime protection, absent intervening action by their employers, at a cost of \$1.2 billion in additional overtime pay in the first year alone. Employers must be in compliance with the new regulations by December 1, 2016, when they become effective. For employers who have not yet begun to grapple with the myriad implications of the new regulations, there is no time to lose. Here's why.

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BACKGROUND OF THE NEW REGULATIONS

The Fair Labor Standards Act (FLSA) guarantees a minimum wage—currently \$7.25 per hour—for all hours an employee works during a workweek and overtime pay of not less than one and one-half times the employee’s regular rate of pay if the employee works more than 40 hours in a workweek. The protections apply to most workers, but there are exemptions from the minimum wage and overtime pay for executive, administrative, professional, outside sales, and computer employees—the so-called white collar exemptions. To be considered exempt under a white collar exemption, an employee must meet certain minimum requirements related to his or her primary job duties—the so-called duties test—and, in most instances, be paid on a salary basis at not less than the minimum amount specified in the regulations, currently \$455 per week, or \$23,660 per year for a full-time employee.

The DOL first issued regulations defining the scope of the white collar exemption in 1938. The DOL has updated the minimum salary level requirements for the exemption seven times since then, most recently in 2004. Observing that the salary threshold for the exemption had not kept up with inflation, President Obama signed a Presidential Memorandum on March 13, 2014, directing the DOL to update the regulations defining which white collar workers are protected by the FLSA’s minimum wage and overtime standards, with the goal to modernize and simplify the regulations while ensuring the FLSA’s intended overtime protections are fully implemented. Further to this mandate, the DOL published a proposal to update the regulations on July 6, 2015 and invited public comment. Over 270,000 comments were received, several revisions to the proposed rule were made, and the Final Rule was published last month.

WHAT DO THE NEW REGULATIONS DO?

The new regulations will affect exempt-employee status under the FLSA in the following key ways:

- The standard salary threshold for the white collar exemptions is increased by more than double, from \$455 per week, or \$23,660 per year, to \$913 per week, or \$47,476 annually for a full-year worker.

According to the DOL, this increased salary level is equal to the 40th percentile of the earnings of full-time salaried workers in the lowest Census Region, currently the South, based on data from the fourth quarter of 2015. The impact of this change will not be felt as strongly in California and New York, which currently have a higher minimum wage than that under federal law, but the change will nonetheless affect a substantial number of currently exempt employees in these states, absent employer action.

- The salary threshold for an exempt Highly Compensated Employee is increased by more than one-third, from \$100,000 to \$134,004 per year. According to the DOL, this requirement equals the annualized weekly earnings of the 90th percentile of full-time salaried workers nationally.
- The standard salary level and Highly Compensated Employee compensation requirements will be automatically updated every three years to maintain the earnings percentiles established in the Final Rule and thus prevent these thresholds from becoming outdated. The first update will take effect on January 1, 2020 and is projected to raise the new annual salary level of \$47,476 to \$51,168 and the new Highly Compensated Employee annual compensation requirement from \$134,004 to \$147,524. Subsequent updates will occur on January 1 of every third year thereafter.
- Employers for the first time are permitted to count nondiscretionary bonuses, incentives, and commissions toward up to ten percent of the required salary level for the standard exemption, so long as they pay these amounts on a quarterly or more frequent basis.

WHAT DO THE NEW REGULATIONS NOT DO?

Under current law, an exempt employee’s “primary duty” must be the performance of work that meets the test of the relevant exemption. The new regulations do not change this test. Thus, unlike in California, for example, where an employee must spend more than 50 percent of her or his time on exempt tasks to qualify for an exemption, the DOL opted to retain the current qualitative test rather than adopt a quantitative one.

WHAT DOES THIS MEAN FOR EMPLOYERS?

Employers must be in compliance with the new regulations as of December 1, 2016. At a minimum, employers should immediately review current salary levels for all exempt employees to determine whether the new salary levels are met. If not, decisions must be made as to how compliance will be achieved. Should non-compliant salaries of exempt employees be increased to the new threshold? What will be the cost of making these increases, currently and over time? Should exempt employees who do not meet the new salary threshold be converted to overtime-eligible, non-exempt status? At what rate of pay? With limits on hours worked? Should additional employees be hired so newly non-exempt workers do not work overtime? Obviously, these questions cannot be answered in a vacuum, but rather require a case-by-case, data-intensive analysis that takes into account the amount of time these non-timekeeping employees work, among myriad other factors.

As is obvious, the answers to these questions will raise public relations and employee morale issues that must be anticipated and provided for. Many exempt employees do not want to be classified as non-exempt, for example, and have to punch a time clock. Once determinations are made about the range of questions suggested above, a comprehension plan for rolling out changes must be developed. What will employees be

told about their changed salaries or exempt status? Who will tell them and how? What training materials will be needed with which to train managers and newly non-exempt employees on the new requirements of their jobs? Who will give the training and how will it be given? What new or modified written policies and procedures must be put in place?

Beyond these minimum steps, the new regulations present an excellent opportunity for employers to audit current employee classification and pay practices across their organizations and make any modifications they may conclude are necessary or appropriate.

As this Commentary goes to print, Senate Republicans introduced a disapproval resolution to block the new regulations from going into effect. Don't count on it. This disapproval resolution is a long shot, and rumblings are already being heard from the plaintiffs bar about all the litigation the regulations will spawn. Answering the questions suggested above—and myriad others like them—will take time. Lots of it. To the extent employers have not begun to do so already, they should start now.

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