



## Labor & Employment ADVISORY ■

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### New Overtime Regulations Set to Go into Effect on January 1, 2020

On September 24, 2019, the U.S. Department of Labor (DOL) announced the publication of a [final rule](#) amending the “white collar” exemptions from the minimum wage and overtime pay requirements of the Fair Labor Standards Act (FLSA). The new regulations go into effect on January 1, 2020, and employers should be taking steps now to prepare for compliance. The final rule increases the minimum salary threshold currently required to satisfy the FLSA’s white collar exemptions, but the increase is significantly less than the increase adopted by the [Obama Administration](#) but struck down in the courts. In addition, the final rule amends the salary-basis test to allow employers to use nondiscretionary bonuses and commissions to satisfy up to 10 percent of the new salary threshold. The rule also raises the salary threshold for the highly compensated employee exemption.

The FLSA requires most employers to pay their employees at least the minimum wage for each hour they work and to provide employees with overtime pay at a rate of one and one-half (“time-and-a-half”) times their regular rate of pay for any hours worked exceeding 40 per week. Employees who are paid on a salary basis and earn a certain minimum weekly salary, however, are exempt from the FLSA’s overtime requirements if they also satisfy the “duties test” of one of the white collar exemptions, which include the executive, administrative, professional, outside sales, and computer employee exemptions.<sup>1</sup> There is also a special rule for highly compensated workers – employees who earn a certain minimum amount each year, currently \$100,000.

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<sup>1</sup> Unlike many of the other white collar exemptions, the outside sales exemption does not require a minimum weekly salary because many outside sales employees are compensated by commission. The computer employee exemption permits payment on a salaried basis at the minimum salary threshold (which, like the other white collar exemptions, is increasing to \$913 per week) or at an hourly rate of at least \$27.63 per hour (which is not changing with the new regulations).

## What the Final Rule Does

The final rule amends the current white collar exemptions from the minimum wage and overtime pay requirements of the FLSA in the following ways:

- Increases the minimum salary threshold required to qualify for most of the white collar exemptions to \$684 a week, or \$35,568 annually.<sup>2</sup>
- Amends the salary-basis test to allow employers to use nondiscretionary bonuses, incentives, and commissions to satisfy up to 10 percent of the new salary threshold, as long as such amounts are paid on an annual or more frequent basis. The rule also allows for a “catch-up” payment if the sum of an employee’s salary plus nondiscretionary incentive payments for the year fail to meet the applicable threshold amount, but such payment must be made by the first pay period after the end of the applicable year.
- Increases the salary level for highly compensated employees from \$100,000 to \$107,432, which is a much smaller increase than had originally been suggested in the DOL’s proposed rule.

Unlike the proposed rule, the final rule does not contain any provisions about future updates to the rule, but the DOL did express an intent to update the regulations more frequently in the future.

Notably, the final rule does not change any of the duties tests associated with the white collar exemptions.

By increasing the minimum salary threshold for the white collar exemptions, the final rule will make an additional 1.3 million U.S. workers eligible for overtime pay, according to the DOL. To comply with the new rule, employers will be required either to begin paying overtime to currently exempt employees whose salaries are below the higher threshold or to increase salaries to meet the new threshold amount and keep the employees as exempt. In other words, exempt employees who no longer meet the minimum salary threshold under the new rule will have to be converted to nonexempt status or be paid higher salaries to remain overtime-exempt.

Inevitably, this will increase costs for employers and also require changes to policies and payroll practices. Reclassified employees will have to get used to punching a clock and paying attention to their hours each day, and their managers will have to be more active in managing their schedules and workloads. Moreover, with more employees being treated as nonexempt – and particularly those who have been treated as exempt until now and are accustomed to working however many hours are needed to get the job done – it is critical for employers to train nonexempt employees and their managers about the importance of recording all hours worked and avoiding any off-the-clock work. Employers should also consider implementing appropriate mechanisms to catch off-the-clock work and ensure that employees are properly paid.

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<sup>2</sup> In assessing the impact of the new salary threshold on their exemption determinations, employers should be mindful of states that have higher minimum salary thresholds than even the new federal threshold. For example, in California, the minimum salary level for the white collar exemptions in 2019 is \$49,920 for employers with 26 or more employees and \$45,760 for employers with 25 or fewer employees. These minimums increase to \$54,080 and \$49,920, respectively, for 2020. Similarly, in New York, the minimum salary threshold for 2019 ranges from \$43,264 to \$58,500, depending on the location of the worker in the state and the number of people employed by the employer, with this range increasing to \$46,020 to \$58,500 in 2020.

## Opportunities for Employers

Despite the challenges it will present for some employers, the final rule provides some opportunities for employers. First, now is an excellent time for employers to take a close look at their FLSA classifications to determine if they comply with current requirements – especially the duties tests – and the new rules. In the time leading up to the January 1, 2020, effective date of the final rule, employers should strongly consider working with counsel to conduct audits of their current FLSA compliance and to prepare for the upcoming changes. Further, to the extent that an employer's current FLSA classifications may not comply with present standards or the new standards, the impending rule changes provide an opportunity to explain to employees that changes in their compensation are being made to comply with the new rules, which may help to minimize employee questions about prior classification decisions.

Second, because the final rule was announced in advance of its effective date, employers have a window of time to consider the rule and their options for minimizing its impact on the bottom line. Employers have a variety of options for offsetting the additional costs associated with the final rule. For example, an employer could consider salary reductions for currently exempt employees so that their overall earnings remain nearly the same when they become overtime eligible and are due overtime wages. Employers can also consider converting salaried workers to hourly workers and setting a lawful hourly rate that would account for any additional overtime payments based on employees' typical work schedules, assuming the employees' work schedules are consistent from week to week. Employers could also restructure shifts by limiting certain workers to a 40-hour workweek and assigning additional work to other employees.

## Conclusion

Employers should take time to prepare for changes to their FLSA exemption classifications and related increases in labor costs as a result of the final rule. While the new rule does not change the white collar exemptions as drastically as the Obama-era rule, it will have a significant impact on employers. Understanding what the final rule does and does not do, as well as taking advantage of the time leading up to its January 1 effective date, may provide employers with opportunities to minimize the rule's impact on labor costs.

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