NEW DOL OVERTIME RULES ANNOUNCED
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The U.S. Department of Labor (DOL) has finally announced its long-awaited changes to the Fair Labor Standards Act overtime regulations. Based on the DOL's published proposed regulations, employers had been anticipating significant increases in the minimum salary which must be paid to employees classified as exempt under the FLSA's white collar exemptions, and material changes to the duties tests used in determining when employees qualify as exempt from overtime, among other changes. Employers feared the new rules would have retroactive or immediate effect.

In the end, the DOL opted to increase the salary threshold without modifying the duties tests. This is a win for employers as changes to the duties tests would have imposed significant cost and created uncertainty for employers. In connection with raising the minimum salary thresholds (which will now be updated every three years), the DOL will allow the salary requirement to be satisfied, in part, with non-discretionary payments of bonus, incentive pay, and/or commissions. For purposes of the salary basis test, no more than the equivalent of 10% of an exempt-classified employee's salary will count toward the minimum salary requirement, and such payments must be paid at least quarterly to count toward the salary threshold. The DOL will allow certain "catch up" payments when non-discretionary pay falls short.

The new rules will not have retroactive effect. Employers will have until December 1, 2016 to comply with the new rules, which should allow sufficient time to consider compliance strategies and make appropriate changes to pay practices compliant with the new rules.

The following chart summarizes key changes to the overtime rules announced by the DOL:

	Current Regulations (Through 11/30/16)	**Final Rule (Effective 12/1/16)**
Minimum Salary Required for Exemption	$455 weekly ($23,660 annually)	$913 weekly ($47,476 annually)
Highly Compensated Executive (HCE) Compensation	$100,000 annually	$134,004 annually
Automatic Adjusting of Minimum Salary Required for Exemption	None	Every 3 years, to maintain the standard exempt salary threshold at the 40th percentile of full-time salaried workers in the lowest-wage Census region, and the HCE total annual compensation level at the 90th percentile of full-time salaried workers nationally. First adjustment January 1, 2020.
Bonuses	Not counted toward salary threshold for most exemptions.	Equivalent of up to 10% of salary can come from **non-discretionary** bonuses, incentive payments, and commissions, if paid at least quarterly. The new regs allow for a quarterly "catch-up" if non-salary payments are not paid.
Standard Duties Test	See DOL WHD Fact Sheet #17A for a description of exempt duties.	No changes to the standard duties test.

WHAT SHOULD EMPLOYERS DO NOW?

1. **Review Exempt Employee Compensation.** In addition to performing qualifying duties, beginning December 1, 2016 exempt employees must be paid a fixed salary of at least $913 per week, with qualifying non-discretionary payments not in excess of 10% of salary counting toward that requirement. Employers should quickly identify which exempt employees

make less than the new minimum salary threshold and either increase compensation or convert employees to non-exempt.

2. **Consider Alternative Pay Arrangements.** In light of the new regulations, many employers will need to convert employees who make less than $913 per week to non-exempt and pay overtime wages. This can be done by simply setting an established hourly rate (above minimum wage) and paying overtime wages at the appropriate overtime rate for all hours worked in excess of 40 in each work week (or as otherwise required by applicable state or local wage laws). Alternatively, employees may consider other available pay arrangements that previously existed (and remain viable under the new regulations) that are designed to minimize the cost of overtime hours. For example, employers may still pay employees under "fixed salary for fluctuating hours" or ""Belo" arrangements under the new regulations, subject to compliance with the specific requirements associated with those methodologies under the FLSA and applicable regulations.

3. **Consider Non-Salary Pay Methodologies.** The new rules allow certain *non-discretionary* payments to count toward the salary basis requirement for exempt employees. To the extent an employer relies on such payments to meet the salary basis requirement, it is likely an employer's failure to pay (or an employee's failure to earn) the payments will destroy his/her exempt status. The new regulations will permit "catch-up" payments in such circumstances, but catch-up payments must be made within one pay period following the end of the applicable calendar quarter. This will require careful structuring of permissible non-discretionary pay methods and procedures to ensure compliance. Paying incorrectly would convert an employee to non-exempt for the preceding quarter, causing the employer to owe retroactive overtime pay for overtime hours worked during that time period.

4. **Review and Revise Timekeeping and Work Rules.** Because more employees will be classified as non-exempt under the new rules, and because employers should track time worked by employees who will qualify as salaried exempt based on payment of non-discretionary pay, employers will need to review their timekeeping policies and procedures, provide training to managers and payroll personnel regarding timekeeping and compensation issues, and uniformly enforce company policies.

This article is a summary of recent legal developments and is provided for informational and educational purposes only. It is not intended as legal advice or to create an attorney-client relationship. For more information or assistance contact:

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