

Writer's Direct Dial:

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FLSA Law Change Convening
Location - Chapman Cultural Center

Re: Tips for Addressing the DOL's New Overtime Expansion

Dear Participant:

The U.S. Department of Labor's (DOL) recent amendments to the "white collar" exemption tests for executive, administrative, and professional employees under the federal Fair Labor Standards Act (FLSA) will have a significant impact on most employers because it potentially could make millions more employees eligible for overtime compensation. Employers should be prepared to ensure compliance with the amendments before December 1, 2016, which is the date they are scheduled to take effect. Below are important tips to assist you in analyzing and complying with the DOL's new overtime regulations.

What Changes Did the Regulation Make?

Salary Basis Test. The most significant change made by the amendments is an increase in the minimum salary an employee must make to be considered exempt. Since 2004, for employees to be eligible for the white collar exemptions, they must have been paid a salary of at least \$455 per week (\$23,660 annually), and must have performed delineated exempt duties. The new regulations increase this salary threshold to **\$913 per week (\$47,476 annually)**, by tying the required salary level to the 40th percentile of earnings for full-time salaried workers in the lowest-wage census region, which currently is the South region. The amendments did not, however, change the current duties test.

Inclusion of Non-discretionary Bonuses and Incentive Payments. For the first time, employers will be able to use non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the amount of the salary employees must receive to be eligible for the exemptions. Such payments may include non-discretionary incentive bonuses tied to productivity and profitability. However, such payments must be paid on a quarterly or more frequent basis in order to be applied to satisfy up to 10 percent of the new \$913 per week (\$47,476 annually) threshold.

Highly Compensated Exemption. The DOL's regulations contain a special rule for "highly compensated" workers, which previously provided that such employees are exempt if they earn a salary of at least \$455 per week, are compensated more than \$100,000 annually (which can include commissions and non-discretionary bonuses earned during the year), primarily perform office or non-manual work, and customarily and regularly perform at least one of the exempt duties of an exempt executive, administrative or professional employee. The Final Rule increases the salary threshold to **\$134,004 annually**, based upon the 90th percentile of full-time

salaried workers nationally. Highly compensated employees must still receive at least the minimum salary per pay period (now \$913 per week), exclusive of non-discretionary bonuses and incentive payments. However, as under prior regulations, non-discretionary bonuses and incentive payments may be used to count towards the total annual compensation requirement.

Automatic Updating Every Three Years. The Final Rule provides automatic updates every three years, beginning on January 1, 2020. The updated salary basis threshold will be based upon the 40th percentile of weekly earnings for full-time salaried workers in the lowest-wage census region. The DOL will publish the updated rates in the Federal Register at least 150 days before their effective date. Based on current estimates and wage growth projections, the minimum salary threshold could rise to \$51,000 or higher by 2020.

How Does This Impact Non-Profit Organizations?

Only certain employers are required to comply with the FLSA: (1) employers with annual sales or business of at least \$500,000 (Enterprise Coverage), and (2) where the individual employee is engaged in interstate commerce or the production of goods in interstate commerce (Individual Coverage). If a non-profit does not meet either of these tests, it is not covered by the FLSA and not required to comply with the new overtime regulations. If a non-profit satisfies either test, it must comply with the FLSA and the new overtime regulations.

Enterprise Coverage Test. Many non-profit organizations will not satisfy the Enterprise Coverage test. The \$500,000 does not include the organization's charitable activities that are not in substantial competition with other businesses. Income from contributions, membership fees, many dues, and donations used for charitable activities are not counted toward the \$500,000 threshold. However, it would apply to activities performed for a business purpose (such as operating a gift shop or providing services for a fee).

Individual Coverage Test. Many non-profit employees will satisfy the Individual Coverage test and therefore must comply with the FLSA. If the particular employee in question is engaged in interstate commerce or in the production of goods in interstate commerce, then the FLSA applies to that employee. Examples of being engaged in interstate commerce include, making or receiving interstate telephone calls, shipping materials to another state, or transporting persons or property to another state. This test applies to any activities (even charitable) of the non-profit organization. Please note that this is an individual employee coverage test. Therefore, an organization could have some employees who are protected by the FLSA and some who are not.

Volunteers. A non-profit organization may use volunteer services that do not need to comply with the FLSA minimum wage and overtime requirements. However, an employee of the organization cannot volunteer the same type of work for which they are employed.

What Should Employers Do?

Review Exempt Classifications

First, employers must decide what to do with employees who are currently classified as exempt but fall below the new salary threshold. In some instances, increasing pay above the threshold may make sense. However, employers must be mindful that giving these employees an automatic increase may not sit well with comparable employees who are paid more because of objective factors such as strong performance or longevity. If the employer determines that increasing salaries above the new threshold will not work because of cost or other factors, there are many options other than simply paying employees on an hourly basis. For some employers, compensating non-exempt employees on a piece rate, day rate, or fluctuating work week basis may be a better alternative. Also, few employers are aware that they can compensate nonexempt employees on a salary based upon a work week in excess of 40 hours, so only half time would be owed for certain overtime hours.

Another problem employers face is they typically have not tracked the work hours of exempt employees. Thus, if an employee is no longer exempt on December 1, the employer needs to know exactly how much time the employee is actually working to be able to determine potential costs of overtime eligibility.

Implement a Training Program

Determining whether to reclassify any exempt employees as eligible for overtime is just the start for employers. Employers must also consider all the added requirements that come with nonexempt workers to make sure they are complying with the FLSA. Ultimately, supervisors and employees will need to be trained on how to properly record hours and what is considered work time. For example, employees who have previously been exempt from overtime may be accustomed to checking emails or returning calls after hours or working at home. For employees converted to non-exempt status, that time will suddenly become compensable. Employees who travel may also be entitled to additional compensation.

Communication

Being converted to non-exempt status and being forced to record hours will be unpalatable to certain employees. Employers need to be prepared to properly communicate changes and address morale issues. Employers also need to prepare new written pay plans so employees clearly understand how they will be compensated on a going-forward basis.

It is Time for a Compliance Audit

While the new regulations did not change the duties tests, this is a golden opportunity for employers to correct any lingering problems or misclassifications. Now is the time for employers to either hire an outside expert or appoint experienced internal personnel to audit company-wide pay practices. Employers who conduct these types of audits may reap the added benefit of being able to assert a reliance defense if they face wage and hour litigation.

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Please contact me if your organization needs additional assistance in analyzing or complying with the FLSA or any other employment laws.

Sincerely,



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