

# Employment & Labor Issue Alert

## Department of Labor Issues Long-Awaited Updates to Key Fair Labor Standards Act Overtime Exemptions

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After over two years of employers' collective waiting, guessing, and worrying, last week the Department of Labor ("DOL") issued its Final Rule amending the white-collar exemptions under the Fair Labor Standards Act ("FLSA"). These exemptions apply to employees working in bona-fide executive, administrative, and professional positions.

### Salary Increase

The foundation of the Final Rule is a significant increase to the minimum salary required for exempt status. Currently \$455 per week (\$23,660 annually), under the new regulations this will increase to \$913 per week (\$47,476 annually). DOL derived this figure through a nationwide survey of all salaried employees. DOL selected the 40th percentile salary figure from the lowest-wage Census Region, which for this survey was the South.

In addition, the minimum annual compensation for the Highly Compensated Employee ("HCE") exemption will increase from \$100,000 to \$134,004 (90th percentile from the salary survey). Employers using the HCE exemption must still provide a fixed salary each week that is at least the minimum salary level.

### Non-Discretionary Bonuses and Commissions

In an apparent accommodation for employer's interests, DOL incorporated a provision in the Final Rule that will allow employers to satisfy up to 10% of the required minimum salary (i.e. \$4,748) through non-discretionary bonuses, commissions, and other incentives that are paid at least quarterly. If an employee does not earn the requisite total bonus or incentive (\$1,187 for a 13-week quarter), the employer must provide a catch-up payment no later than the first pay period following the end of the quarter to satisfy the minimum salary. Of note, the catch-up payment must be credited to the recently completed quarter and not to the following quarter in which it is actually paid (i.e. no double-counting).

This provision will encompass most incentive payments that are announced to employees in advance, such as performance or attendance bonuses, sales commissions, or other similar payments. The provision will not include "spot" or other bonuses where the bonus is not announced in advance and the employer retains discretion whether to award a bonus and the bonus amount.

### Duties Test

Happily for most employers, DOL did not make any changes to the duties tests for these exemptions. The duties requirements remain in their current form, which varies based on the exemption at issue. Commentary to the Final Rule indicates that DOL remains concerned that some exempt employees are spending excessive amounts of time on non-exempt functions, but DOL did not institute any changes in that regard.

### Timing Issues and Updating

In another small reprieve for employers, rather than the typical 30- to 60-day notice period prior to implementation, DOL set December 1, 2016, as the effective date of the changes. Also, rather than the annual updates that were initially proposed, the Final Rule provides that the minimum salary levels will automatically update every three years, starting on January 1, 2020.

## To-Do Items

Now that the changes are known with certainty, employers should assess their workforce impact.

- Employees who have salaries below the new threshold will become non-exempt, and thus entitled to overtime on December 1st unless their salary is increased. Be sure to account for bonuses or other incentives in this analysis.
- Use the next six months to your advantage. This provides a significant period of time in which to assess the potential overtime impact. Consider requiring these employees to utilize timekeeping mechanisms so you develop an accurate picture of their actual working hours.
- You retain discretion in determining how your employees will be compensated. Converting a salaried employee to hourly does not mean that their hourly rate must be salary/2080 hours. It is lawful to consider the employee's expected working hours when developing an hourly rate. In this way, you may be able to use an hourly rate that generates total compensation, including expected overtime that is in-line with the employer's expectations. The more predictable an employee's overtime hours are, the more accurate these projections will be.
- Some salaried non-exempt compensation systems, such as the fluctuating workweek method (a/k/a "half-time overtime"), allow for more favorable overtime calculations, but these systems carry specific regulatory requirements for their use. Any employer using one of the systems should be certain that the requirements are satisfied.
- Timekeeping requirements will come into play. A threshold FLSA requirement is that the employer must maintain weekly records of its non-exempt employee's working hours. Employers have great discretion in how to accomplish this requirement, but it's critical that whatever system is used, it must accurately record all working hours and account for issues like remote work, meal breaks, and travel time.
- Off-the-clock claims are a legitimate concern for employers with non-exempt employees. These claims will be a big issue for the class of employees reclassifying to non-exempt because employers have not historically had to monitor these employees' working hours. Take steps to prevent off-the-clock work, and ensure managers are aware and looking out, so it can be identified and promptly addressed.

## For More Information

FLSA compliance can be confusing. If you have questions or want more information, you should contact your labor law counsel. If you do not have regular labor law counsel, the employment attorneys at Foulston Siefkin stand ready to assist and would love the opportunity to partner with you to help you meet your business's needs. You may contact **Forrest Rhodes** at [frhodes@foulston.com](mailto:frhodes@foulston.com) or 316.291.9555, or **Boyd Byers**, Foulston Siefkin's Employment and Labor Practice Group Leader, at [bbyers@foulston.com](mailto:bbyers@foulston.com) or 316.291.9716. For more information on the firm, please visit our website at [www.foulston.com](http://www.foulston.com).

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