

Department of Labor Issues Final Changes to the Overtime Law

By [Alicia J. Samolis](#) and [Michael A. Gamboli](#)

After announcing preliminary proposed rulings in June of 2015, and then receiving over 270,000 comments, the Department announced its Final Rule and final revisions to the Act on May 18, 2016 .

Most importantly:

- The revisions go into effect on December 1, 2016.
- The minimum salary needed to qualify for a White Collar Exemption (the salary basis test) increases to \$913 per week (\$47,476 annually).
- Employers for the first time will be allowed to include both non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the salary basis test.
- The annual compensation level for the highly-compensated employee exemption increases to \$134,004 per year.
- The salary basis test and the highly compensated employee compensation level will each automatically adjust every 3 years starting in January of 2020.

Options for responding to the new standard salary level include increasing salaries to retain exempt status; reducing or eliminating overtime hours; adjusting base salary in order to account for overtime pay and hold total weekly pay constant; or some combination of the above.

We provided guidance in November of 2015 on how to plan for these changes and explore which of the various options available make the most business sense depending upon your particular situation. You are encouraged to [review these guidelines again](#) now that the enforcement deadline is looming.

Brief Background

The FLSA generally requires that all employees be paid at an overtime rate (1.5x their regular rate) for each hour worked in excess of 40 hours per week.

The FLSA exempts certain groups of employees from this overtime pay requirement. For example, there are the executive, administrative, and professional exemptions (known collectively as the “White Collar” exemptions). There is also an exemption for “highly compensated employees” (“HCEs”). Finally, computer professionals and outside salespeople are also exempted from the overtime law. Each of these groups must pass a “test” consisting generally of a “salary” test and a “duties” test to qualify for the exemption. The Final Rule revises the test for both the White Collar and HCE exemptions.

White Collar Exemptions

In order for employees to fall within one of the White Collar exemptions, each of the following must be true:

(1) the employee must be paid a minimum salary. A “salary” means a predetermined amount that is not subject to reduction because of variations in the quality or quantity of work performed (*this is not changing*). The amount of salary paid must meet or exceed a minimum threshold (*this amount is being increased and is the most significant change in the law*); and

(2) the employee’s job must primarily involve executive, administrative, or professional duties, as defined by the

regulations (these “duties tests”, which are different for each exemption, are also not changing).

The Department last updated these regulations in 2004, when it set the weekly salary level at \$455 (\$23,660 annually) and combined the then-existing “short” and “long” duties tests into a single test.

The Department has indicated that the Final Rule is intended to simplify the identification of overtime-protected employees, and results in extending overtime pay to over 4 million workers who are currently exempt but will, under the new rules, become non-exempt. According to the Department, the Final Rule also protects almost 9 million additional workers who are entitled to overtime and who will now automatically (because of their salary level) be entitled to overtime without having to rely upon the duties test to disqualify them from one of the exemptions.

The current minimum salary level of \$455 per week (\$23,660 annually) is increasing to \$913 per week (\$47,476 annually). This figure is technically set at the standard salary level at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region, currently the South. It is actually a bit lower than the \$970 per week (\$50,440) that was in the original proposed Final Rule.

For the record, American Samoa still has its own special salary test and the motion picture industry still has its own special salary rules.

Highly Compensated Employees

Similar to the White Collar exemption, the HCE exemption requires passing a two-part test involving compensation and duties. And like the White Collar exemptions, the duties part of the test does not change. The compensation part of the test requires both a standard salary amount (which as we know is increasing to \$913 per week) and an overall annual compensation level. The Final Rule increases the total annual compensation requirement from \$100,000 to \$134,004 annually. The new threshold was designed to be set to the annualized value of the 90th percentile of earnings for full-time salaried workers, and is a bit higher than the \$122,148 figure originally proposed.

Automatic Adjustments

As indicated, the standard salary level is set at a threshold equal to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region, and the HCE compensation figure is set to the threshold equal to the 90th percentile of annual earnings of full-time salaried workers nationally. Both of these figures will be automatically adjusted every three years. The first adjustment is scheduled for January of 2020. The Department has indicated that it will publish the new figures at least 150 days before their effective date.

Inclusion of Nondiscretionary Bonuses and Incentive Payments

Good news for employers. For the first time, employers will be able to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. In other words, you can use some bonuses to count towards the \$913 per week. These payments include nondiscretionary incentive bonuses tied to productivity and profitability. To qualify, these payments must be made on a quarterly or more frequent basis, though the employer is permitted to make certain “catch-up” payments.

Bad news for employers. Employers’ use of bonuses to satisfy the salary requirements for HCE does not change. Employers are already allowed to apply certain nondiscretionary bonuses and incentive payments (including commissions) toward the total annual compensation requirement portion of the HCE test. And since, after doing a little math, it is apparent that employer can actually use eligible bonuses for almost 65% of the \$134,004 threshold, the Department decided that allowing use of these bonuses and incentives to also satisfy

the \$913 per week test was unnecessary.

In summary:

- The revisions go into effect on December 1, 2016
- The new minimum salary increases from \$455 to \$913 per week (\$47,476 annually)
- Employers may use non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the \$913 per week minimum
- HCE's must make at least \$134,004 per year to maintain their exemption; and
- These numbers will automatically adjust in January of 2020

For employers that clock continues to tick, but for those procrastinators the deadline is finally real. Get moving. We again suggest reading the [November 2015 guidance](#) on planning for these changes.

Good luck!

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