

LEGAL UPDATES

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# DOL Releases Final Rule Increasing Salary Threshold Levels for Overtime Exemptions

## Key points

The final rule increases the standard salary threshold from \$455 per week to \$684 per week (\$35,568 per year).

The final rule increases the HCE total annual compensation threshold (the level at which a relaxed duties test is applied) from \$100,000 to \$107,432 per year.

The final rule permits the use of non-discretionary bonuses and incentive payments to satisfy up to 10 percent of the standard and special salary thresholds under certain circumstances.

The final rule does not change the existing job duties tests for any exemption.

The final rule revises special salary levels for employees in the U.S. territories and the motion picture industry.

The final rule does not include a mechanism to automatically increase the EAP salary threshold every four years.

The final rule's effective date is January 1, 2020.

On September 24, 2019, the Department of Labor (DOL) issued its long-anticipated final rule regarding the Fair Labor Standards Act (FLSA) overtime exemptions, most notably increasing the standard salary threshold for the so-called "white collar" exemptions from \$455 per week to \$684 per week (\$35,568 per year). The final rule, which will take effect on January 1, 2020,

follows upon the DOL's March 2019 proposed rule, which we discussed here. The final rule does not adopt all of the proposed rule's revisions, implements more modest changes to the highly compensated employee (HCE) total annual compensation threshold, and makes no changes to the duties test for any exemption.

The overtime exemption rule had not been updated since 2004, and the Obama Administration's 2016 overtime rule (which set an even higher salary threshold) was invalidated by a Texas district court and then abandoned by the new administration. As a result, the new final rule updates the current salary threshold levels established in 2004 and formally rescinds the 2016 final rule.

### **Increased salary thresholds for overtime exemptions**

The DOL rule increases the minimum salary levels necessary to qualify for the executive, administrative and professional (EAP) exemption to \$684 per week from the current level of \$455 per week. The rule also modestly increased the highly compensated employee (HCE) threshold to \$107,432 per year (of which at least \$684 must be paid weekly on a salary or fee basis) from the current level of \$100,000 per year.

The DOL's final regulation emphasizes that minimum salary level thresholds function as just one screening mechanism for exempt employees and are to be used in conjunction with the job duties test. The DOL estimates that the 2019 final rule's updated salary thresholds will result in an increase of approximately 1.2 million workers eligible for overtime pay (assuming their base salaries are not increased to meet the new threshold).

### **Bonuses**

For the first time, the final rule authorizes employers to use non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard or special salary level for the exemptions. To qualify, the non-discretionary bonuses or incentive payments must be paid on an annual or more frequent basis.

The final rule also includes a mechanism for employers to make "catch up" payments if an employee's earnings are insufficient to retain the individual's exempt status. The employer is permitted to make a one-time "catch up" payment in an amount not greater than 10 percent of the total standard salary level for the preceding 52-week period. The "catch up" payment must be made within one pay period following the end of the 52-week period and shall be considered as a payment toward only the prior year's salary.

Payments for discretionary bonuses, employer benefit contributions or the value of boarding, lodging and facilities still cannot be used to satisfy a portion of the standard salary level test.

## **Future salary threshold updates**

Unlike the 2016 rule, the DOL declined to establish a mechanism to automatically update the minimum salary levels. Instead, the DOL stated its intent to update the standard salary and HCE total annual compensation thresholds more regularly in the future through its notice and comment rulemaking procedures.

## **Special salary levels for U.S. territories and the motion picture industry**

The final rule also established: a special salary level of \$455 per week for Puerto Rico, Guam, the U.S. Virgin Islands and the Commonwealth of the Northern Mariana Islands; a special salary level of \$380 per week for American Samoa; and a base rate of \$1,043 per week (or a proportionate amount based on the number of days worked) for employees in the motion picture industry.

## **What this means to you**

Employers must comply with the DOL's final rule by January 1, 2020. As a result, we recommend that employers take the following actions:

Review current employees' compensation to determine whether any exempt employees fall into the band of compensation between the old and the new thresholds.

Examine whether any current non-discretionary bonuses can be properly included to meet the salary test and consider whether a "catch up" payment is appropriate.

Use this time to review the duties of all exempt employees, particularly those whose compensation is now at the bottom of the exempt salary range, to confirm whether they are properly exempt.

Carefully strategize the conversion of any exempt employees who have fallen below the threshold to non-exempt, and consider tracking time and limiting work away from the office to minimize the financial impact of overtime.

If you have questions about the new DOL overtime exemption rule or would like assistance in performing a wage-and-hour audit to ensure compliance with the rule, contact Tom Godar, A.J. Weessler or your Husch Blackwell attorney.

*Tracey Oakes O'Brien was a contributing author of this content.*