

What you need to know about the new FLSA overtime rules

By Kraig Marton and Jeff Silence

The U.S. Department of Labor recently announced that there will be significant changes to its overtime rules under the Fair Labor Standards Act (“FLSA”). These new rules are expected to affect over 4.2 million employees and will become effective December 1, 2016. Before we discuss the changes, let’s take a step back and discuss the current rules, many of which will remain in effect even after December 1, 2016.

CURRENT RULES

Overtime protections were first put into place by the FLSA, which established that workers are to be paid time and a half for any hours worked over 40 hours in a work week. The FLSA applies to most workers. There are, however, a number of exemptions, including for employees that are classified as “executive,” “administrative,” “professional,” “outside sales,” and “computer employees.” These exemptions are frequently referred to as the “white-collar” exemptions.

If an employee is properly classified as exempt under one or more of these white-collar exemptions, they can be paid a set salary and are not entitled to be paid time and a half for overtime hours. However, each of these white-collar exemptions has very specific requirements, and it is the employer’s burden to prove that the employee satisfies each requirement.

For example, the “administrative” exemption requires that the employee perform office or non-manual work and that work must be directly related to the management of the business. An “administrative” worker must work at a job that involves the “exercise of independent judgment and discretion” about “matters of significance.”

The “professional” exemption applies to employees with “specialized intellectual knowledge and instruction” who generally have a license or advanced degree.

The “executive” exemption requires that the employee’s primary duties involve management, that the employee regularly supervise at least two employees, and that the employee provide genuine input into the management of other employees (i.e., hiring, firing, promotions, or assignments).

Under current rules, the employer must also pay a salary (not hourly pay) to the exempt employees, and that salary must be at least \$455 per week, which equates to an annual salary of \$23,660.

Another exemption from overtime involves “highly compensated” employees. To qualify as a highly compensated employee, the employer must prove the following:

- the employee earns a total annual compensation of \$100,000 or more, which includes at least \$455 per week paid on a salary basis;

- the employee’s primary duty includes performing office or non-manual work; and
- the employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

It is not always easy to determine whether a particular exemption applies, and employers are often accused of misclassifying employees as exempt when they are not. Employers need to be careful because they face serious consequences if they do not comply with the FLSA. An employee can recover twice the amount of any wages owed under the FLSA and a mandatory award of attorney fees. The mandatory award of fees means that there are many lawyers who will pursue these cases, even when the amount in controversy is only a few thousand dollars.

Now, let’s talk about the new rules.

NEW RULES

There are a number of changes to the current rules, each of which is discussed below.

1. Increasing minimum weekly pay

To qualify for the white-collar exemptions discussed above, beginning December 1, 2016, the employer must pay the employee at least \$913 per week, as opposed to the old rules which required employers to pay only \$455 per week. In other words, the minimum weekly is set to increase by more than 100%. On an annual basis, this means employers must now pay a minimum salary of \$47,476 per year versus \$23,660 under the old rules. Employers may now satisfy up to 10 percent of the salary requirement with nondiscretionary bonuses, incentive payments, and commissions, provided these forms of compensation are paid at least quarterly.

2. Minimum weekly pay automatically updated every three years

The minimum weekly pay will automatically be updated every three years to an amount that is equal to the 40th percentile of full-time salaried workers who are working in the lowest income region of the country. In other words, the now fixed \$913 per week minimum will increase every three years. Based on projections of wage growth, the minimum threshold is expected to rise to over \$51,000 when the first automatic update takes effect on January 1, 2020.

3. Increasing minimum salary requirement for “highly compensated” employees

To qualify for the “highly compensated” employee exemption, employers must pay their employees a minimum of \$134,004 per year as opposed to \$100,000 under the current rules. Employers may now satisfy up to 10 percent of the salary requirement with nondiscretionary bonuses, incentive payments, and commissions, provided these forms of compensation are paid at least quarterly.

CONCLUSION

These changes are significant, and employers need to be ready for them. Employers should, however, take note that many aspects of the current rules are NOT changing. For example, the new rules do not in any way re-define the various exemptions. For example, an employer can still demonstrate that one of their employees qualifies for the “professional” exemption by showing that the employee has specialized intellectual knowledge and instruction and has a license or advanced degree. The primary difference is that the employer will soon be required to pay that employee \$913 per week instead of \$455. The minimum weekly pay will also be updated every three years, so this amount is likely to continually increase.

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