

New Federal Overtime Rule Announced, To Become Effective on December 1st

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The **DOL** has released detailed [information](#) about the new overtime exemption rule, which is expected to be published tomorrow in the Federal Register. The new regulation will take effect December 1, 2016, not within 60 days as previously indicated. This gives employers nearly 200 days to comply with the minimum salary increase for exempt status, which, as anticipated, more than doubles the current minimum from \$455 a week to \$913 a week (\$47,476 per year).

The new rule also increases the threshold for exemption as a “highly compensated employee” (“HCE”) from \$100,000 to \$134,004 per year. This surpasses the proposed increase found in last year’s proposed rule, which suggested a more modest increase to \$122,148.

Another key change from the proposed regulations is that the DOL will update the salary threshold every three years, instead of annually. The first update will be January 1, 2020, with each update raising the standard threshold to the 40th percentile of full-time salaried workers in the lowest-wage Census region, estimated to be \$51,168 in 2020. The HCE threshold will increase to the 90th percentile of full-time salaried workers nationally, estimated to be \$147,524 in 2020. The DOL will post new salary levels 150 days in advance of their effective date, beginning August 1, 2019.

Of particular note, the final rule allows, for the first time, up to 10 percent of the salary threshold for non-HCE employees to be met by non-discretionary bonuses, incentive pay, or commissions. Such payments must be paid on a quarterly or more frequent basis to count towards the salary level test. If an employee does not earn enough of a nondiscretionary bonus or incentive payment in a given quarter to meet the standard salary level, an employer may make a “catch-up” payment no later than the next pay period after the end of the quarter. Any such “catch-up” payment counts only toward the prior quarter’s salary. Prior to this final rule, the DOL required the entire salary level to be paid in each work week.

As predicted, the final rule does not make any changes to the “duties test” that determines whether white collar salaried workers earning more than the salary threshold are ineligible for overtime pay.

The new rule, only the second in more than forty years, will have a wide spread impact, with entry

level managerial and professional jobs being among the most affected by the minimum salary increase. We are also likely to see an increase in litigation under the FLSA, similar to what occurred after the previous 2004 amendments. Employers who have not already done so should consider conducting a privileged audit of exempt workers to determine what portions of the workforce are affected by the new rule. Employers should be prepared to increase the salaries of exempt workers who earn less than \$47,476 per year, to reclassify those individuals to overtime-eligible, or to take other measures to address the increased costs.

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National Law Review, Volume VI, Number 139

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