
Final Overtime Rule Increases Exempt Salary Threshold to \$35,568 ... and More!

By Kaitlin A. Brown

Today, the Department of Labor announced its Final Overtime Rule, effective January 1, 2020, which will result in the following changes:

- Salary level threshold for exempt employees is increasing from \$455 to \$684 per week (\$35,568 annually), now with the ability to include nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of that threshold.
- Annual earnings for highly compensated employees must increase from \$100,000 to \$107,432 to maintain that exempt status.
- A special salary level for workers in Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands is established at \$455 per week; the special salary level for workers in American Samoa is \$380 per week.
- The base rate for workers in the motion picture industry is increasing from \$695 per week to \$1,043 per week (or a proportionate amount based on the number of days worked).

Many employers may cringe as they recall the plans made (and in some cases, implemented) in anticipation of the 2016 Final Overtime Rule, which was published with an effective date of December 2016, but never went into effect due to an injunction, and the rule was ultimately declared unlawful. Based on this past experience, we recommend that employers prepare to comply by January 1, 2020, but not well in advance of that date.

This is news to me – what does it mean?

Employees are generally classified as exempt or non-exempt from the requirements of overtime and minimum wage. Those employees who are not exempt from the requirement to pay overtime must be paid at a rate of at least 1.5 times their regular rate of pay for any work performed in excess of 40 hours in one

work week. To be classified as exempt from the overtime laws (not entitled to the premium overtime pay), employees must meet all of the following criteria:

1. **Paid on a salary basis:** Employees are paid on a salary basis if they receive “each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee’s compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.” There are limited exceptions when employers may make deductions from this salary without losing the exemption.
2. **The salary must meet a minimum threshold:** This is the requirement which has been amended by the 2019 Final Overtime Rule, as the \$455 weekly threshold had not been amended since 2004.
3. **Employees must perform certain job duties defined by the regulations:** These categories generally include executive, administrative, professional, computer, or outside sales responsibilities (described in more detail below, and unchanged by the 2019 Final Overtime Rule).

The Department of Labor considered more than 116,000 comments in the process of preparing this new rule. It predicts that 1.2 million currently exempt employees will become eligible for overtime unless employers increase their current salary above the new threshold or take other action to maintain the exemption. Approximately 101,800 additional highly compensated employees are similarly expected to be affected.

What will it take for employers to comply?

Employers will need to review the categories of employees who will be affected by the 2019 Final Overtime Rule and decide whether to reclassify employees as non-exempt or make changes necessary to maintain the exemption. These categories include the following:

1. **Exempt employees earning less than \$35,568 annually or \$685 per week**
 - Keep in mind that the salary level threshold must be met for executive employees. The salary level threshold on a fee basis (at a rate not less than the equivalent of \$684 per week) is required for

administrative employees and professional employees (with the general exception of teachers, attorneys, and physicians). Computer employees may be paid on a salary or fee basis, or an hourly basis of not less than \$27.63 per hour (this hourly basis threshold did not change). The salary level threshold does not apply to exempt outside sales employees.

2. Highly compensated employees earning less than \$107,432

3. Workers in Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa

4. Workers in the motion picture industry

For employees in the above categories, consider whether any nondiscretionary bonus or incentive payments (including commission) make up the difference (up to \$10% may count toward the salary level threshold). If not, employers must make a strategic business decision, taking into account whether the employee actually works overtime, the projected cost of overtime based on a typical schedule, the relative increase in salary required to maintain the exemption, the administrative time and expense associated with the transition, and the potential effect on employee morale.

If transitioning an exempt employee to a non-exempt status, a comparable hourly wage should be established, and record-keeping procedures must be respectively followed. Employees previously classified as exempt, and therefore not required to track their hours worked, may resist this change. Employers should prepare to engage in a dialogue explaining how this change was made to comply with wage and hour laws.

What should employers consider, even though not changed by the new rule?

When evaluating whether the salary threshold has been met (exclusive of any non-cash items of value that an employer may provide to an employee, such as board, lodging or other facilities), keep in mind that a separate requirement of being paid on a salary basis must also be met, along with exempt job duties required to support the exempt status.

The job duties required to maintain an exemption have not changed with the 2019 Final Overtime Rule. The regulations specifically define the categories of exempt employees as follows:

- **Executive Employees:** Those customarily and regularly direct the work of two or more employees and who either has authority hire/fire other employees or otherwise whose suggestions/recommendation of hiring, firing, advancement, or promotion of other employees is given significant weight.
- **Administrative Employees:** Those whose primary duty is performance of office or non-manual work directly related to the management or general business operations of the employer/customers and who may exercise discretion and independent judgement with respect to matters of significance.
- **Professional Employees:** Those whose primary duty is the performance of work either (a) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or (b) requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
- **Computer Employees:** Those whose primary duty consists of: (a) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; (b) the design, development documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (c) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or a combination of the aforementioned duties, the performance of which requires the same level of skills.
- **Outside Sales Employees:** Those whose primary duty is (a) either making sales within the meaning of section 3(k) of the act, or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and (b) who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

Maddin Hauser's employment law team is ready to assist in audits of current classification and payroll systems, and to advise employers in making business decisions with regard to compliance under the 2019 Final Overtime Rule.

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