

# 33rd Annual Tax Symposium

## **NEW SALARY BASIS RULE FOR EXEMPT EMPLOYEES AND HOW IT AFFECTS YOUR BUSINESS**

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### I. OVERVIEW

- A. Discussion of the FLSA Overtime Rule and Exempt versus Non-Exempt Classifications
- B. Explanation of the New Department of Labor Rule
- C. Best Practice for Compliance Moving Forward Text

### II. WHAT IS THE FLSA

- A. Establishes:
  - 1. Federal minimum wage
  - 2. Overtime requirements
  - 3. Record-keeping requirements
  - 4. Child labor standards
- B. These standards and requirements affect both full-time and part-time workers
- C. Administered by the Wage and Hour Division
- D. Applies to most public and private sector employees
- E. The FLSA does NOT require:
  - 1. Vacation, holiday, severance, or sick pay;

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2. Meal or rest periods;
3. Premium pay for weekend or holiday work;
4. Pay raises or fringe benefits; or
5. A discharge notice, reason for discharge, or immediate payment of final wages to terminated employees.

## III. EXEMPT VERSUS NON-EXEMPT

- A. Exempt employees are exempt from overtime pay.
- B. Most typical exempt employee – “E.A.P.” Employees
  1. Formula: salary basis + primary duty
  2. Salary basis = the employee must be compensated at a rate not less than the standard salary level required by the Department of Labor.
  3. Primary duty = the principal, main, major, or most important duty that the employee performs. A determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.
    - a. E = Executive:
      - i. Manage the enterprise, or manage a customarily recognized department or subdivision of the enterprise;
      - ii. The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and

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- iii. The employee must have authority to hire/fire other employees, or the employee's suggestions and recommendations as to hiring, firing, advancement, promotion or other changes of status of other employees must be given particular weight.
  
- b. A = Administrative:
  - i. Employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
  - ii. Employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.
  
- c. P = Professional:
  - i. **Learned**
    - (A) Primary duty is the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character which includes work requiring the consistent exercise of discretion and judgment;
    - (B) Advanced knowledge must be in a field of science or learning; and
    - (C) Advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

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## ii. **Creative**

- (A) Primary duty must be the performance of work requiring invention, imagination, or originality or talent in a recognized field of artistic or creative endeavor.

## C. Other Exempt Categories:

### 1. Computer Employee Exemption:

- a. Must be compensated either on a salary or fee basis OR, if compensated on an hourly basis, at a rate not less than the statutory amount \$27.63;
  - i. Note: this has not changed under the new rule.
- b. Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field performing the primary duties;
- c. Primary duties consist of:
  - i. Application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
  - ii. 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;

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- iii. The design, documentation, testing, creation, or modification of computer programs related to machine operating systems;  
OR
  - iv. A combination of the aforementioned duties, the performance of which requires the same level of skills.
2. Outside Sales Exemption:
- a. The employee's primary duty must be making sales (as defined in the FLSA), 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. The employee must be customarily and regularly engaged away from the employer's place or places of business.
- D. Other category affected by the new rule: Highly Compensated Employees
- 1. These are employees performing office or non-manual work and must meet the specific annual compensation threshold; AND
  - 2. They customarily and regularly perform at least one of the duties of an exempt executive, administrative, or professional employee.

## IV. THE NEW DOL RULE

- A. The Basics:
  - 1. Effective July 1, 2024
  - 2. Purpose: expand protections to lower-paid salary workers
  - 3. Updates the salary threshold for EAP Exemption

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4. Raises the salary threshold for Highly Compensated Employees Exemption
  5. Adds mechanism to regularly update the salary and compensation thresholds every three years.
- B. As of July 1, 2024:
1. The new salary threshold for the EAP Exemption is \$844/week (\$43,888/year).
  2. The new high-compensated employee threshold is \$132,964/year.
- C. **As of January 1, 2025**
1. The salary threshold for the EAP Exemption will become \$1,128/week (\$58,656/year).
  2. The new high-compensated employee threshold will become \$151,164/year.
- D. Beginning July 1, 2027, the thresholds will be updated every three years.
- E. What has NOT Changed:
1. The duties test
  2. Special salary levels for US territories
  3. The 10% rule for nondiscretionary bonuses and incentive payments
    - a. Consistent with current regulations, up to 10% of the standard salary level can be satisfied with nondiscretionary bonuses and incentive payments (including commissions).

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## V. BEST PRACTICES FOR COMPLIANCE MOVING FORWARD

- A. What are the Tax Implications?
  - 1. Increased tax liability – higher income can push an individual into a higher tax bracket, triggering a higher tax rate on the portion of income within that bracket.
  - 2. Extra earnings can be subject to other taxes, such as Social Security and Medicare taxes.
  - 3. Lawsuits regarding classification resulting in payment of overtime wages. These overtime payments must be taxed as wages.
- B. Review compensation amounts
  - 1. Salary increases may be necessary to continue to qualify for the exemptions.
- C. Review job descriptions
  - 1. Reclassification of some employees may be advisable or necessary.
- D. Provide training
  - 1. Employees who have been re-classified as non-exempt will need to be trained on accurately recording their time worked.