



New FLSA Overtime Rule: What Will It Mean for New England Employers?

April 5, 2019

Overview

On March 7, 2019, the U.S. Department of Labor released a long-awaited proposal to update the federal regulations governing overtime exemptions for certain salaried professionals (aka “white collar” exemptions).

A Brief History of the New “White Collar” Exemption Rules

- May 18, 2016: DOL publishes final rule.
- December 1, 2016: Effective date of final rule.
- On November 22, 2016, federal judge issued a preliminary injunction blocking the new overtime rules from taking effect
- Trump administration elected to revise the rule and sought public comment in July 2017
- Comment period closed September 2017
- On March 7, 2019, DOL issued a Notice of Proposed Rulemaking setting forth a new proposed rule
 - 60-day public comment period
 - Final rule not expected until late summer or fall, with an effective date likely in 2020

“White Collar” Exemptions

- Executives
- Administrators
- Professionals

All exemptions require the employer to meet a “salary basis” test and a duties test.

Salary Basis

- An employee is paid on a salary basis if he or she regularly receives each pay period a predetermined amount constituting all or part of the employee's compensation.
- Salaried exempt employees must receive the full amount of their salary in any week they perform work, regardless of the quantity or quality of work performed and the number of days or hours actually worked.
- There are allowable deductions for certain specific reasons, but in general, the employee must receive the same salary each week.

Salary Basis (cont.)

- To qualify for a white collar exemption, federal law requires that the amount of the salary be at least \$455 each workweek (\$23,660 annually).
- Maine state law requires that the minimum salary be at least 3,000 times the minimum hourly wage (\$11.00), currently \$33,000 annually (\$679 per workweek).
 - In January 2020, minimum wage will increase to \$12.00 and minimum salary will increase to \$36,000 (\$692.31).
- N.H. and Mass. both use federal salary threshold.

Duties Test - Executives

- The employee's primary duty is managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee customarily and regularly directs the work of at least two or more other full-time employees or their equivalent; and
- The employee has the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Duties Test - “Learned” Professionals

- The employee’s primary duty consists of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Duties Test - Administrators

- The employee's primary consists of 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
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

“Highly Compensated Employees”

- If an employee is paid on a salary basis at a rate of at least \$100,000 per year, the employee may qualify for exemption under a less stringent duties test.
 - 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 of an executive, administrative, or professional employee.
 - E.g. The HCE regularly directs the work of 2 or more full-time employees but does not have hiring and firing authority.

Core Changes under the New Rule

- Under the new rule, the salary required for “white collar” overtime exemption will increase from \$455 per week (\$23,660 annually) to \$679 per week (\$35,308 annually).
 - In Maine, this represents a relatively modest increase from \$635 per week (\$33,000 annually).
- The “highly compensated employee” threshold will increase from \$100,000 to \$147,414.
- Qualifying non-discretionary bonuses and commissions can count for up to 10% of salary.
 - Employer must pay a salary of at least \$611.10 per week.

Use of Bonuses and Commissions as Salary

- Under the new rule, qualifying non-discretionary bonuses and commissions can count for up to 10% of the threshold salary.
- Nondiscretionary bonuses and incentive payments (including commissions) are forms of compensation promised to employees to induce them to work more efficiently or to remain with the company. Examples include bonuses for meeting set production goals, retention bonuses, and commission payments based on a fixed formula.
- Such payments must be paid on an annual or more frequent basis.
- If an employee does not earn enough in nondiscretionary bonuses and incentive payments (including commissions) in a given year (52-week period) to retain their exempt status, the rules permit a "catch-up" payment at the end of the period. The employer has one pay period to make up for the shortfall (up to 10 percent of the standard salary level for the preceding 52-week period).

Comparing the Current Rule, the Obama Administration Rule, and the Proposed New Rule

	Current regulations (2004 until effective date of New Rule)	Obama Administration Rule	Proposed New Rule
Salary Level	<p>\$455 weekly (\$23,660 annually)</p> <p>\$635 weekly in Maine (\$33,000 annually)</p>	<p>\$913 weekly (\$47,476 annually)</p> <p>40th percentile of full-time salaried workers in the lowest-wage Census region (currently the South)</p>	<p>\$679 weekly (\$35,308 annually)</p> <p>20th percentile of full-time salaried workers in the lowest-wage Census region (currently the South)</p>
HCE Total Annual Compensation Level	\$100,000 annually	<p>\$134,004</p> <p>90th percentile of full-time salaried workers nationally</p>	<p>\$147,414</p> <p>90th percentile of full-time salaried workers nationally</p>
Automatic Adjusting	None	Every 3 years, maintaining the standard salary level at the 40th percentile of full-time salaried workers in the lowest-wage Census region, and the HCE total annual compensation level at the 90th percentile of full-time salaried workers nationally.	None
Bonuses	No provision to count nondiscretionary bonuses and commissions toward the standard salary level	Up to 10% of standard salary level can come from non-discretionary bonuses, incentive payments, and commissions, paid at least quarterly .	Up to 10% of standard salary level can come from non-discretionary bonuses, incentive payments, and commissions, paid at least annually .
Standard Duties Test	Separate duties tests for each exemption: executive, administrative, and learned professional	No changes	No changes

What Does This Mean for You?

- Currently this is not a final rule, so the rule is subject to adjustment after 60-day public comment period.
- We do not expect a final rule for several months, with an effective date likely in 2020.
- Now is still a good time for employers to begin auditing their workforce and planning for changes.

Employer Compliance Options

Employers have several options in response to the new minimum salary requirements, including:

- Increase the salary of an employee who meets the duties test to meet the new salary threshold and retain exempt status;
 - May result from base salary increase or the addition of non-discretionary bonus income for up to 10% of salary
- Convert the employee to non-exempt and pay overtime;
 - May remain on salary or convert to hourly
- Reallocate work to reduce or eliminate overtime hours;
- Establish a new salary or hourly rate so that, when the employee is converted to non-exempt, total compensation with overtime remains the same as the employee's former salary;
or
- Some combination of the above.

Factors in Choosing Between Compliance Options

- How many hours does the employee typically work?
- How will converting to nonexempt “fit” with the actual work and work schedule? Travel time? Off-the-clock activity? Make sure you count all “hours worked” in your analysis....
- How will you record hours worked?
- How big is the gap? How close to the new salary threshold is the employee’s current salary?
- How will changes impact other jobs? Work reallocation? Wage push?
- How will changes impact employee morale? Recruiting? Retention?

Presenter

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