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## WAGE AND HOUR

# Employers Need to Assess Impact of DOL's Final Overtime Rule

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*Special to the Legal*

On Wednesday, the U.S. Department of Labor (DOL) formally announced its Final Rule that slightly more than doubles the minimum salary threshold for “executive,” “administrative” and “professional” employees to qualify as exempt from overtime pay under the Fair Labor Standards Act (FLSA) from \$455 per week (or \$23,660 per year) to \$913 per week (or \$47,476 per year). The Final Rule also provides that the salary level to remain exempt will be automatically updated every three years.

The DOL estimates that the Final Rule, which is set to become effective Dec. 1, will extend overtime pay eligibility to 4.2 million workers and result in \$1.2 billion a year in additional wages paid to employees. The



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DOL also estimates that this will make 35 percent of full-time salaried workers automatically entitled to overtime based on salary alone (up from what the White House estimates is 7 percent currently).

The announcement of the Final Rule follows a public comment period on the DOL's notice of proposed rulemaking on the FLSA's white-collar exemptions that was published in the Federal

Register on July 6, 2015. While the Final Rule is controversial, and potential congressional and legal challenges to the Final Rule remain on the horizon, employers should not delay their compliance efforts on this basis:

### KEY PROVISIONS OF THE FINAL RULE

- Increases the minimum salary threshold from \$455 per week (\$23,660 per year) to \$913 per week (\$47,476 per year) for employees to qualify as exempt from overtime under the executive, administrative or professional (EAP) exemptions. This is slightly less than \$3,000 below the level included in the proposed regulations and reflects the 40th percentile of weekly earnings for full-time salaried workers in the lowest-wage census region (currently the South).

As was the case previously, in order to qualify as exempt under these three exemptions, employees must continue to be paid on a salaried basis and must meet the duties tests of the exemption.

- Increases the total annual compensation requirement from \$100,000 to \$134,004 per year for highly compensated employees (HCE) to qualify as exempt, which

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is the 90th percentile of full-time salaried workers nationally. This number is nearly \$12,000 more than the figure included in the proposed regulations.

- Automatically updates the minimum salary threshold every three years, the first of which is set to take effect Jan. 1, 2020. The DOL will announce the new minimum salary level at least 150 days before its effective date. The current estimate of the salary level provided by the DOL in 2020 is \$51,168. As with the current increase, the automatic

updates will be keyed to the 40th percentile of full-time salaried workers in the lowest-wage census region at the time of updating.

- Nondiscretionary bonuses, incentive pay or commissions of up to 10 percent of the salary threshold paid on at least a quarterly basis (\$91.30 per week and \$4,747.60 per year) can be counted to meet the minimum salary requirement for EAP (but not HCE) employees. Employers also are permitted to make “catch-up” payments to employees in order to maintain the minimum salary requirement no later than the next pay period after the end of the quarter.

- The Final Rule does not include any changes to the EAP duties tests.

The Final Rule also applies to the computer professional exemption, raising the hourly rate to \$27.63 per hour. In addition, the new minimum salary threshold will be used to test whether employees are being paid a sufficient amount if they are being paid on a “fee basis.”

## **IMPLEMENTATION OF THE FINAL RULE**

As the DOL notes, “employers have a wide range of options for responding to the changes in the salary level,” and likely will employ many different strategies throughout their work-

forces to comply with the Final Rule. Employers should conduct comprehensive reviews of their workforces to assess the impact of the Final Rule not only on workers considered for reclassification, but more broadly analyze the impact of the regulations on the workplace generally. Such an analysis is similar in many respects to the process used to conduct a wage-and-hour audit. Employers should take care in how they communicate regarding their compliance efforts and consider conducting their review under the ambit of attorney-client privilege. Given the legal and business implications of the Final Rule, employers should bring together a cross-disciplinary team including finance, operations, legal and employee relations professionals to assess the impact of the Final Rule and make compliance recommendations.

- For EAP employees currently classified as exempt and earning close to the new salary threshold, employers may choose to increase the salary level to maintain exempt status (especially where employees work substantially more than 40 hours per week). Given the automatic updating of the salary level, however, employers providing raises in order to maintain exempt status should be aware that this is a three-year

and not a permanent solution. Also to the extent that employers increase salaries to comply with the regulations, the updated salary level in 2020 could be far higher than what the DOL currently is estimating (\$51,168).

- In contrast, employees making less than \$45,000 likely will be reclassified as nonexempt. For those employees, employers will need to assess how much (if any) overtime the newly reclassified employees likely will work and determine an hourly wage rate or salary for those employees taking into account those estimates.

- Consider changes to job duties of workers or broader restructuring of job classifications, including potential reduction in hours of newly reclassified employees and potential increase in hours of exempt employees.

- Given the ability to count up to 10 percent of nondiscretionary bonuses and commissions toward the salary requirement, employers should assess bonus and commission plans for affected employees and consider modifications as appropriate.

- Employers should consider the impact of employee reclassification on the benefits available to reclassified employees and assess whether to consider changes to benefit plans.

- If a significant number of employees will be reclassified, employers will need to consider how to track the time of this newly nonexempt group of employees. Employers also will need to consider what impact the reclassification will have on both the employees and the workplace (for example, will newly reclassified employees no longer be permitted to carry company-issued electronic devices; will they no longer be permitted to work remotely).

- Messaging to employees regarding any changes also will be important, especially to reclassified employees who may perceive the reclassification as a demotion.

- Consider conducting a detailed analysis of staffing patterns to find opportunities for efficiency.

- Revise financial forecasting/budgeting models to account for changes to staffing and potential increased overtime expenditures.

- Consider hiring additional workers to try to reduce the need for overtime hours by current employees.

- Although the duties tests were not modified by the Final Rule, this is a good time to consider changes to the exempt classification of certain positions that may not meet the duties' requirements (or bolstering the exempt status of certain positions

by reconfiguring job families or departments).

- Throughout the compliance analysis, keep in mind the requirements of more restrictive state and local law. The FLSA continues to remain a floor, not a ceiling.

For organizations that have a significant number of exempt employees currently earning less than \$913 per week, compliance with the Final Rule will potentially have ripple effects throughout the organization, impacting the work of both exempt and non-exempt employees. The Final Rule also may well have the unintended consequence of creating salary compression at the lowest rungs of the exempt workforce while at the same time creating an increased workload for the remaining exempt workforce. Employers should consider all of these issues when crafting a compliance plan. •