

INSIGHTS

Department of Labor Higher Salary Thresholds Effective December 1, 2016

November 15, 2016

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As an important reminder, the Department of Labor (DOL) minimum salary levels for the white-collar exemptions increase effective December 1, 2016.

While a group of 21 states and some 50 business groups filed a lawsuit on September 20, 2016, in the Eastern District of Texas challenging the DOL regulations, Judge Amos Mazzant, III, has not yet ruled on the pending emergency injunction motions by both the State Plaintiffs and the Business Plaintiffs. Judge Mazzant has set a hearing on the motions on November 16, 2016. Bracewell will continue to monitor this case, *State of Nevada, et. al v Thomas Perez, et. al.*, Civ. Action No. 4:16-cv-00731. The complaint filed by State Plaintiffs is [here](#) and the complaint filed by the Business Plaintiffs is [here](#).

Employers should proceed in the next two weeks assuming that the regulations will be effective December 1, 2016. The DOL final rule and numerous guidance documents are available [here](#).

I. Notable provisions in the final rule include:

- Effective Date: December 1, 2016
- Minimum standard salary level: \$47,476 annually / \$913 weekly
- Non-discretionary bonuses, incentive payments, and commissions paid at least quarterly may account for up to 10% of the standard salary level for that quarter, e.g., 10% of \$11,869/quarter.
- Annual compensation requirement for highly compensated employees: \$134,004
- As in the past, employers may pay non-discretionary bonuses to highly compensated employees to “catch-up” to meet the \$134,004 threshold. The 10% per quarter limitation above is not applicable to highly compensated employees.
- Automatic updates to minimum salary and compensation levels will occur every 3 years. Future automatic updates will be effective beginning January 1, 2020, and at three-year intervals on January 1.

II. Employers should carefully evaluate and communicate the consequences of any change to affected employees:

- If the employee's salary is increased to the new salary threshold to maintain the employee's exempt status, while a positive communication, there may still be consequences that employers should consider communicating, such as whether the increase will affect future increases or bonuses.
- If the employee's FLSA classification is changed from exempt to hourly non-exempt, employers should emphasize the employee's new time-keeping responsibilities, consistent with the principle that all hours worked will be paid.
- If the employee's FLSA status is changed to salaried, non-exempt status under the fluctuating workweek ("half-time") method of compensation, in addition to the communication of time-keeping responsibilities, employers should ensure that employees understand this methodology, preferably with a written acknowledgement. While this methodology has a number of benefits, employers must confirm that all of the requirements are implemented properly and that payment of half-time overtime to salaried, non-exempt employees is permissible under state law.
- In all cases when changing a previously exempt employee to non-exempt, employers should be sensitive to those employees who consider exempt status to be a privilege, emphasizing that the change is based upon the DOL's increase in salary requirements and **not** as a result of the nature of their duties and responsibilities. Employers should also communicate benefit changes, if any, resulting from a change to non-exempt status.

III. As December 1, 2016 quickly approaches, employers should evaluate their plan of action and ensure that:

- All exempt positions below the new salary threshold have been properly evaluated and the appropriate FLSA classification for the future has been identified.
- Thoughtful talking points have been prepared to communicate and explain any changes to affected employees.
- Supervisors and managers have been trained to properly respond to any questions.
- Changes are implemented in a respectful and risk-adverse manner.
- Hours of work and timekeeping policies are expanded to cover the newly classified non-exempt employees.