

INSIGHTS

Department of Labor Issues Final Rule Increasing Salary Threshold for Exempt Positions

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Following over 270,000 comments on its proposed rule, the Department of Labor (DOL) today issued the final rule revising the requirements for exemption from overtime pay for salaried workers. The DOL expects the rule to extend overtime pay protections to more than 4 million workers in 2017. The DOL final rule and numerous guidance documents are available [here](#).

1. Notable provisions in the final rule include:

- Effective Date: December 1, 2016
- Minimum standard salary level: \$47,476 annually / \$913 per week

The standard salary level is set at the 40th percentile of earnings for full-time salaried workers in the lowest-wage census region, currently the South. This amount is slightly lower than in the proposed rule, which was based on a percentage of national earnings.

Significantly, the rule allows non-discretionary bonuses, incentive payments, and commissions—paid at least quarterly—to count toward up to 10% of the standard salary level.

- Annual compensation requirement for highly compensated employees: \$134,004

The compensation requirement is set at the annual equivalent of the 90th percentile of overall earnings for full-time salaried workers nationally

- Automatic updates to minimum salary and compensation levels every 3 years

The final rule moves from an annual adjustment to the minimum standard salary level and compensation requirement to an automatic update of these minimum thresholds every three years. Future automatic updates will be effective beginning January 1, 2020, and at three-year intervals on January 1.

- No changes to the standard duties tests

The proposed rule requested comment regarding changes to the duties tests, including a potential percentage of time spent on certain duties requirement. The final rule makes no changes to the current duties tests.

2. Employers should take these actions to ensure compliance by the December 1 effective date:

- Determine whether employees making less than the minimum salary threshold (or the minimum compensation requirement) will remain exempt or be reclassified as non-exempt

For employees whose duties meet the exemption test, but who are not compensated at the minimum salary threshold, employers should determine whether to maintain their exempt status. To do so, the employer must increase the employee's salary to meet the minimum threshold. Alternatively, the employer may reclassify the employee as non-exempt and pay overtime as required by the FLSA. Where permitted under state law, this may include consideration of the fluctuating workweek method of compensation for salaried, non-exempt employees, where under certain circumstances, overtime may be paid at a half-time rate. Employers may also take steps to reduce or control overtime hours worked by these employees.

- Record hours worked of affected employees

Keeping track of their working time, and being on a less-flexible schedule, may be a significant change for employees who were previously compensated on an exempt salary basis. To ensure compliance with FLSA record-keeping requirements for previously exempt and now non-exempt employees, the employer must ensure that the newly-classified non-exempt employees comply with the employer's time-keeping requirements.

- Develop an action plan to address employees regarding changes to their exemption status or compensation level

An employer's message about exemption status and compensation changes sets the tone for employees who will be understandably interested in the effect on their position and pay. For many exempt employees, exempt status may be a source of pride. Others enjoy the more flexible work hours of exempt status. Developing a consistent message about changes and keeping employees informed is key to smooth implementation of changes required by the final rule.

- Train supervisors to appropriately answer employee questions

Supervisors will receive employee questions directly. Employers should create concise and accurate factsheets to provide to supervisors to assist in responding to common questions. This may be a good time for supervisors to receive additional training in wage-and-hour compliance matters, such as not asking employees to work "off the clock," not retaliating against employees for wage complaints, properly setting expectations about overtime work, and answering questions about time-keeping and pay errors.

- Ensure compliance with the National Labor Relations Act

The National Labor Relations Board has held that covered employees must be allowed to discuss their compensation under the National Labor Relations Act. Generally, employers may not tell employees that they cannot discuss their pay or exempt status or discipline them for doing so. There is an exception for employees who have access to compensation information as

part of their job duties—employers may require these employees to maintain the confidentiality of data to which they have access to perform their job duties. While the NLRA does not apply to managerial/supervisory employees, this rule has a broader application for federal contractors and subcontractors.

3. Addressing industry-specific concerns:

The Final Rule affects industries differently. Bracewell will provide additional information specific to the different industries in which our clients operate through webinars and additional client alerts. The DOL has issued several guidance documents for specific industries, including: [non-profits](#), [higher education](#), [state and local governments](#), and [small businesses](#).