

PUBLICATION

Top 10 Questions Employers Have About the Newly Proposed Overtime Regulations

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Last year, the U.S. Department of Labor (DOL) proposed changes to the wage and hour regulations to make it more difficult to qualify for exemption from overtime under the Fair Labor Standards Act (FLSA). The DOL seeks an increase in the salary threshold needed to qualify for "white collar" overtime exemptions to the 40th percentile of weekly earnings for all full-time salaried workers or \$50,440. On March 14, 2016, the DOL submitted their finalized rule to the Office of Management and Budget (OMB), this is the last step before the rule becomes finalized. The final regulation is expected to be expedited through the OMB's approval process and should be published any day.

The bottom line for employers is that any salaried "exempt" employee (i.e. ineligible for overtime pay) currently making less than \$24.25 per hour, \$970 per week, or \$50,440 annually will be eligible for overtime pay. The DOL estimates that employers will spend \$592.7 million to comply with the new rule. The following are FAQ by employers about this proposed change in the overtime law:

1. What is the difference between an "exempt" and "non-exempt" employee? Is this the same as salaried v. hourly?

Short Answer: An exempt employee is ineligible for overtime, a non-exempt employee is eligible. Exempt/non-exempt is not the same as salaried/hourly. The Fair Labor Standards Act (the federal law governing wage and hour - "FLSA") has three basic requirements: payment of the federal minimum wage (\$7.25/hour), overtime pay for time worked over 40 in a workweek, and record keeping.

The FLSA, however, "exempts" certain employees from the minimum wage and overtime pay requirements. There is a common misperception that paying an employee a salary means they are "exempt" from overtime. This is not true. Payment of a salary is only one of the requirements for exemption. To qualify for the exemption, employees must:

1. be paid on a **salary basis** (employers cannot reduce the salary because of quality/quantity of work or when employee works less than a full day);
2. be paid a certain **salary level** (right now it is \$455/week or \$23,660 annually); and,
3. meet a designated **job duties test**¹(that shows the employee primarily performs certain "white collar" duties).

These requirements are set forth in detail in the DOL overtime regulations. If all three of these requirements are not met, the employee is non-exempt. Job titles do not determine exempt status. Employers are required to pay non-exempt employees overtime and to maintain certain records of hours of work.

2. Under the proposed new rule, which employees will be exempt from overtime?

Short Answer: salaried employees who make at least \$50,440 annually and perform primarily "white collar" duties. The new proposed DOL overtime regulations increase the salary level (test #2 above) from \$455/week

(\$23,660 annually) to \$970/week (\$50,440 annually). To maintain the exemption the employees will still need to be paid on a salary basis and meet the job duties test (which, at this point, the DOL did not touch).

3. Do we need to have a certain number of employees for the overtime regulations to apply to us?

Short Answer: No. The test for coverage under the FLSA is not based upon the number of employees. Most civil rights statutes depend on the number of employees. For example, an employer is subject to Title VII when it has 15 or more employees. The FLSA is different. While the DOL has stated that the FLSA requires two or more employees (it is not in the statute), the FLSA applies only to employers whose annual volume of sales or business total at least \$500,000 OR businesses who are engaged in interstate commerce. In reality, the law covers nearly all workplaces. Courts have interpreted the term "interstate commerce" very broadly to include such activity as regularly use the U.S. mail to send or receive letters to and from other states, and placing or accepting interstate business call. The FLSA also automatically covers some employers, such as schools, hospitals, nursing homes, or other residential care facilities as well as all governmental entities (regardless of the level of government), no matter how big or small. Even if the business does not meet the coverage test, individual coverage applies to any employee whose work regularly involves them in interstate commerce.

4. Will commissions or bonuses be counted as part of the \$50,440/year salary level test?

Short Answer: Bonuses? probably (but to a limited extent). Commissions? doubtful. The DOL is "considering" whether to allow nondiscretionary bonuses that are tied to productivity, profitability and/or specified performance metrics to satisfy some portion of the salary level requirement. DOL suggests limiting bonus payments to satisfy only 10% of the weekly salary level and that "employees would need to receive the bonus payments monthly or more frequently."

At this point, the DOL is rejecting the idea of counting commissions toward the salary level requirement. The DOL is seeking comments on the appropriateness of including commissions as part of the nondiscretionary bonus and other incentives that could partially satisfy the salary level test. It also appears that the DOL is not considering counting any other paid benefits toward satisfaction of the salary level test.

The DOL has also proposed including a mechanism to automatically update the salary level annually using a fixed percentile of wages or the Consumer Price Index.

5. If this rule goes into effect, will we have to convert all of our salaried exempt employees making less than \$50,440/year to hourly employees?

Short Answer: No. Hourly is not the same as non-exempt. An employee can be non-exempt and still paid a salary. The FLSA does not require that nonexempt employees be paid hourly. When properly done, it is perfectly legal to have a salaried non-exempt employee. A non-exempt salaried arrangement is simply when an employer pays a non-exempt employee a fixed salary for the week instead of paying the employee by the hour (it is common to see the terms "hourly employee" and "non-exempt employee" used interchangeably, although they are not entirely synonymous).

The basic premise under the FLSA is that while you can pay non-exempt employees any way you want (i.e., hourly, piece rate, salary, commission), at the end of each work week, you must be able to show that the employees received at least the equivalent of minimum wage for every hour worked and received overtime pay for every hour worked over forty during the week. In other words, the employer still has to track employees' work hours every week regardless of the method of payment. Employees who are currently exempt and who make less than the new salary level of \$50,440 will have to track their hours and be paid overtime for all hours

worked in excess of 40 in a work week. The FLSA's record keeping requirements include keeping records of hours worked each day and total hours worked each workweek.

6. Can we limit the number of overtime hours these non-exempt employees work?

Short Answer: Definitely. No employer is required to guarantee overtime work. No employer is required to pay an employee more compensation as a non-exempt employee than what the employee was earning as an exempt employee. Employers should have an overtime policy stating when and if overtime is allowed (e.g., if an employee is required to get prior authorization of the overtime). If an employer knew or should have known an employee is working overtime, however, the employer may discipline the employee in accordance with the overtime policy but they will still owe the employee the overtime pay.

7. What is one of the most important considerations for employers when analyzing these proposed changes?

Short Answer: Hidden overtime. Most exempt employees do not track their hours. Therefore, many employers do not have adequate data on the number of hours their exempt employees are working. When these exempt employees are re-classified as non-exempt (because they no longer meet the salary level test), these hours will need to be tracked and any hours over 40 in a work week will be considered overtime. Many FLSA lawsuits allege employers failed to include time spent by non-exempt employees performing work activities outside of their normal shifts. Non-exempt employees may perform a variety of potentially compensable job-related activities during their "off-the-clock" time such as: taking work home, making/receiving job-related telephone calls at home, working through lunch, working before or after regular shifts, taking care of work-related equipment, or job-related "volunteer" work. This compensable time must be considered when re-classifying employees and working within the employer's payroll budget.

8. Are there positions or classifications that are unaffected by the proposed changes?

Short Answer: Yes. The new regulation does not change the exemption for Outside Sales or Learned Professionals (such as teachers, lawyers and doctors). Neither Outside Sales nor Learned Professionals are required to meet the salary threshold, i.e. how much they are paid is not relevant to whether they qualify for exemption. There is also no change to Computer Professionals being paid the hourly rate of \$27.63 per hour or more. The regulations concerned Retail Employees paid on a commission also remain unchanged.

9. When will this rule go into effect?

Short Answer: Any day now. Although we cannot definitively predict when the DOL will publish their final rule, we believe the final rule will be published in May 2015 with a minimum of a 60 day compliance period.

10. What should we do now?

Short Answer: Take advantage of the time before the final rule is issued. Now is the time to get your house in order. Employers should identify the affected employees and possible issues relating to the re-classification of those employees such as budgetary effects, workforce effects (job/compensation restructuring), employee morale, etc. Does your time keeping mechanism work with the additional employees? Is it possible to get the same work hours under the employer's current payroll budget? How is the information going to be communicated to employees and what is the potential effect on morale and work performance?

It is also beneficial to have your outside employment counsel conduct a **privileged** audit and analysis of how the proposed regulation will affect your workplace. An attorney can help walk you through your options

regarding re-classification within the scope of FLSA regulations and the organization's culture, concerns and budgetary issues. Right now is also a golden opportunity to analyze and correct *any* misclassification. The changes in the law are being reported in mainstream news. Employees will be expecting changes of some type. "The law made me do it."

¹ There are three primary "white collar" exemptions - Executive, Administrative, Professional - each has its own defined job duties test.