

TIGHT AROUND THE WHITE COLLAR: THE NEW OVERTIME RULE IS HERE

FREQUENTLY ASKED QUESTIONS

Q: What would qualify an employee as being exempt from the FLSA's minimum wage and overtime requirements?

A: To determine if a position is exempt (not subject to overtime), the position must satisfy three criteria:

- 1. Salary or Fee Basis:** The employee must be paid on a "salary or fee basis." A salary basis means that the employee is paid a predetermined and fixed amount of pay for each pay period regardless of the quality or quantity of work performed. A fee basis means an employee is paid an agreed sum for a single job, regardless of the time required for its completion.
- 2. Salary Level/Threshold:** The DOL sets a minimum salary threshold to qualify for exemption (currently it is \$684 per week). For employees paid on a fee basis, the fee payment must also satisfy the minimum salary level requirement, meaning the fee payment must be at a rate that would amount to the salary threshold per week if the employee worked 40 hours.
- 3. Job Duties:** Each category of white-collar or EAP exemption, i.e., the executive, administrative, and professional exemptions, has its own criteria relating to the primary job duties the employee performs. In addition to being paid on a salary basis at the mandated salary threshold, the employee must satisfy every job duty requirement for one of the EAP categories to qualify for exemption.

Q: Can employers use bonuses or other compensation to satisfy the new salary threshold?

A: Yes. The final rule still allows employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to ten percent of the salary threshold requirement. An employer must pay the exempt executive, administrative, or professional employee on a salary basis, at least 90 percent of the standard salary level, in each pay period. The remaining portion of the required salary level (up to ten percent) may be fulfilled through the payment of nondiscretionary bonuses or incentive payments so long as the payments are paid at least annually. In addition, employers may use nondiscretionary bonuses and incentive payments earned during a 52-week period to satisfy the HCE total annual compensation threshold, but such bonuses and incentive payments cannot be used to satisfy the weekly standard salary level portion of the HCE test.

Q: Does this impact the Outside Sales exemption?

A: No. The Outside Sales exemption does not have a salary threshold requirement.

Q: Can exempt and nonexempt employees coexist in the same job title?

A: Yes. If the position satisfies the job duties test and employees are paid on a salary/fee basis, those meeting the salary threshold can remain exempt while employees who are paid under the salary threshold become nonexempt without affecting the exempt status of the former group.

Q: Can salaries be increased to meet the new threshold to maintain the exemption?

A: Yes. Employers can choose to raise salaries to maintain exempt status for employees (this is assuming that the employee is paid on a salary basis and meets the job duties requirements of an exemption). An employer may also decide to increase the salary for some positions to keep them exempt while not increasing the salary in a different position and allowing that position to become nonexempt.

Q: What are some key things an employer should consider?

A: Morale and possible resistance from exempt employees to becoming nonexempt. Sometimes employees view becoming nonexempt as a demotion and will resist clocking in and documenting their time when they are used to being paid for time working as an exempt employee. Communication is key as well as training and monitoring to ensure newly classified nonexempt employees understand what “compensable time” is and if they are properly recording that time.

Q: Do employees have to be paid hourly if they are becoming nonexempt?

A: No. You can have a salaried nonexempt employee, but the employee must still track their hours and is entitled to overtime for all hours worked in excess of 40 in a workweek. Please consult your employment counsel to assist you in reclassifying an exempt employee to a salaried nonexempt employee.