

LEGAL ADVISORY

FROM: Paul H. Pincus
TO: Clients and Friends
DATE: November 26, 2019
RE: U.S. Department of Labor Issues New Overtime Rule



On September 24, 2019 the United States Department of Labor (“DOL”) issued its new final rule for determining whether executive, administrative and professional employees are exempt from overtime pay under the Fair Labor Standards Act. The rule, which will take effect on January 1, 2020, will increase to \$684 per week (\$35,564 per year) the federal salary threshold that must be met to qualify for the so-called “white collar exemption.” The new salary threshold will not be indexed for inflation.

The rule does not change the “duties test” for the white collar exemption (one of the three tests noted below that must be met to qualify for the exemption) or the distinct \$27.63 per hour pay threshold for an employee paid on an hourly basis to be exempt as a “computer employee.”

The current federal \$455 per week salary threshold was established in 2004¹ at the 20th percentile of weekly earnings for full-time salaried workers in the lowest census region (then and now the South). The DOL has indicated that the share of all full-time workers who qualify for overtime pay based on their salaries has dropped to under 7% today. By increasing the salary threshold to \$684 per week, the DOL is re-establishing its salary threshold at the 20th percentile of weekly earnings for full-time salaried workers in the lowest census region. The DOL estimates that more than 1.3 million additional workers will qualify for overtime under the new salary threshold.

¹ The Obama Administration’s attempt to increase the federal overtime salary threshold to \$913 per week on December 1, 2016, and index it for inflation, was blocked nationwide by a Federal Judge in Texas and subsequently put on hold by the Trump Administration. This new overtime rule officially repeals the Obama Administration’s 2016 overtime rule.

White Collar Exemption Requirements

Under current federal law, an employee must meet three tests to qualify for the white collar exemption:

- The employee must be paid on a **salary basis** (that is, a guaranteed weekly amount), which is not subject to reduction based on the quality or quantity of work performed.
- The employee must be paid at a weekly **salary level** of at least \$455 (\$23,660 per year). Under current law, neither bonuses nor incentive compensation (including commissions) may be applied to meet the salary level test.
- The employee must primarily perform executive, administrative or professional **duties**,² regardless of his or her job title.

NOTE: Although the new rule substantially increases the salary level threshold for the white collar exemption, it now allows for non-discretionary bonuses and incentive compensation (**including commissions**) to satisfy up to 10% of an employee's weekly salary threshold³ (except for highly compensated employees – see footnote 2 below) if he or she is paid such bonuses or incentive comp on an annual or more frequent basis. Under the federal rule, any shortfall in an employee's receipt of \$35,564 for a 52-week period would have to be paid in the next pay period after that 52-week period for the salary threshold to be satisfied.

*** Be mindful that individual state or local laws may have stricter requirements or higher thresholds that will apply to employees who physically work in those states⁴ and you must meet the stricter requirements or higher thresholds, if applicable, to qualify for the exemption from overtime in those states and localities.*

Compliance Options

Companies should analyze their workforce now to determine (1) which of their employees, such as recruiters and possibly account managers of staffing firms, are exempt under the current salary threshold and will cease to be exempt on January 1, 2020 under the new \$684 per week salary threshold, (2) how close to the new salary threshold such employees are currently being paid, and (3) the number of hours per week such employees generally work. Companies can then decide

² A reduced "duties test" currently exists for certain highly compensated employees who are paid total annual compensation of at least \$100,000 and at least \$455 per week. Under the new rule, the salary threshold for such employees will be raised to \$107,432 per year (the 80th percentile of full-time salaried workers nationally) and at least \$684 per week (excluding non-discretionary bonuses or incentive payments (including commissions), although such payments will count toward the total annual compensation requirement). This new salary threshold will not be indexed for inflation.

³ An exempt employee could be paid a salary as low as \$616 per week (90% of \$684) under the new federal rule.

⁴ For example, as of December 31, 2019, New York State law will require that employees based in New York City be paid a salary of at least \$1,125.00 per week to satisfy the salary level test for exemption as an executive or administrative employee. In addition, New York State requires commissions to be paid at least once a month and no later than the last day of the month following the month in which they are earned.

whether to increase the employees' weekly salaries/draws for them to continue to be exempt, pay overtime for any hours such employees work in excess of 40 hours per week, or limit to 40 hours per week the number of hours such employees are permitted to work. If a decision is made to pay overtime rather than increase salaries/draws, appropriate timekeeping systems should be put in place to accurately track the weekly hours of the employees.

Companies should also decide if they wish to avail themselves of the opportunity to satisfy up to 10% of a non-highly compensated employee's \$684 weekly salary threshold by applying guaranteed bonuses or incentive compensation (including commissions).

This is an opportune time to review with legal counsel whether any employees who are currently being treated as exempt properly meet the requirements for the white collar exemption.*

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For more information about this Legal Advisory or assistance with compliance, please contact Paul Pincus at (212) 588-0022 or php@orllp.legal.

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