



Seismic Change in DOL Regulation Affecting “White Collar” Overtime Exemptions

On December 1, 2016, new regulation goes into effect that will change how employers determine “White Collar” employees that are exempt from overtime, potentially making an additional 4.6 million employees eligible for overtime pay. In this 5 part mini-series, The Noble Law Firm helps employers navigate the new rule changes and offers executives strategies for remaining in compliance.

Part 1 of 5: More of your employees may be eligible for overtime pay

On May 18, 2016, President Obama and the Department of Labor announced the final rule change in the regulations affecting the so-called “white collar” overtime exempt categories of executive, administrative, and professional employees. The rule goes into effect December 1, 2016.

The biggest change is that the salary level above which certain “white collar” workers may be exempt from overtime pay is raised from its previous amount of \$455 per week (the equivalent of \$23,600 per year) to a new level of \$913 per week (the equivalent of \$47,476 per year).

This means that even salaried white collar employees are generally going to be entitled to overtime pay if they earn less than \$47,476 annually.

Not surprisingly, there is much controversy surrounding the DOL rule change. Business groups have largely opposed the rule change as being an authorized exercise of executive power. In fact, the attorneys general of Texas and Nevada filed the lawsuit in U.S. District Court for the Eastern District of Texas, calling the overtime regulations “illegal” because they are set to ratchet up the threshold for eligibility automatically every three years without valid congressional authorization. Many industry analysts predict that the rule would lead employers to cut wages, strip workers of benefits and limit flexibility in the workplace.

On the other hand, supporters of the change note that the current salary threshold of \$23,660 has not kept up with current wages and cost of living. Further, they point out that many middle managers, like those managing pharmacies or



supermarkets, are working 50-60 hours at salaries in the \$40,000 range without overtime pay. These advocates conclude that this practice is simply not equitable in today's economy.

In Part II, we address in more detail how to determine if an employee may be exempt from overtime.

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On December 1, 2016, The Department of Labor (DOL) rule goes into effect that will require employers to change how they determine whether “white collar” employees are exempt from overtime. The DOL estimates that an additional 4.6 million employees will be eligible for overtime pay based on the new rule. In this 5 part mini-series, The Noble Law Firm helps employers navigate the new rule changes and offers strategies for remaining in compliance with the new rule.

Part 2 of 5: Determining new exemption limits

For most employers, a determination about whether an employee is exempt from overtime or nonexempt (i.e. receive overtime) depends on (a) **how much the employee is paid**, (b) **how the employee is paid**, and (c) **what kind of work the employee does (duties test)**. Some jobs are classified as exempt by definition. For example, “outside sales” employees are exempt (“inside sales” employees are nonexempt).

Under the current rule (with few exceptions) to be exempt from overtime pay an employee must:

- Be paid at least **\$23,600** per year (**\$455** per week)
- Be paid on a salary basis
- Perform certain exempt job duties

For the most part, employees must meet **all three** “tests” to be exempt. For example, an employer who pays a salary of \$430 per week to a payroll specialist will need to pay that employee overtime for any hours worked over 40. In other words, just paying an employee a salary is not sufficient to exempt that employee from overtime pay; the salary has to be over the threshold amount and it has to truly be paid as a “salary”. Paid on a “salary basis” means that the employee received a “predetermined amount” of compensation not subject to reduction because of variations in the quality or quantity of the work performed. For example, an employer cannot reduce a salaried employee’s pay because no work is currently available for the salaried employee (29 CFR §541.600(a))

Under the new rule:



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- The white collar salary threshold increase to **\$913 per week** or **\$47,476 annually**, meaning that employees earning salary lower than \$47,476 would likely receive overtime pay;
- The total annual compensation threshold of highly compensated employees (HCEs) is increased to is increased to \$134,004 annually; and
- The salary and compensation levels will be updated automatically every three years going forward.

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Part 3 of 5: Understanding the legal implications

The rule will take effect **December 1, 2016** and is expected to have an enormous impact on employee wages. DOL estimates that 4.6 million workers exempt under the current regulations would, under the new regulation, become entitled to overtime. Additionally, the DOL estimates that the average annualized direct employer costs will total between \$239.6 and \$255.3 million per year.

It is imperative that employers take all necessary steps to comply with the provisions of the FLSA and its accompanying regulations. Employers that fail to make proper overtime payments are liable to employees for their unpaid overtime compensation and an equal amount as liquidated damages plus attorneys’ fees and costs. A 2-year statute of limitations applies to the recovery of back pay, unless the aggrieved employee can show a willful violation, in which case a 3-year statute of limitation applies. Additionally, an employee may be able to bring an action against an individual manager in his or her personal capacity (that is, not shielded by the company) for violations of the FLSA.

In the next installment, we will discuss the employer’s options for compliance.

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Part 4 of 5: Employer Options

According to the Department of Labor, employers have a range of options for responding to the updated standard salary level. For each affected employee newly entitled to overtime pay, employers may:

1. Increase the salary of an employee who meets the duties test to at least the new salary level (\$47,476) to retain his or her exempt status;
2. Pay an overtime premium of one and a half times the employee's regular rate of pay for any overtime hours worked;
3. Reduce or eliminate overtime hours;
4. Reduce the amount of pay allocated to base salary (provided that the employee still earns at least the applicable hourly minimum wage) and add pay to account for overtime for hours worked over 40 in the workweek, to hold total weekly pay constant; or
5. Use some combination of these responses.

Nothing in the rule requires employers to change employees' pay to hourly from salaried, even if the employees' classification changes from exempt to overtime eligible. However, employers must be mindful that they need to track the hours of the newly *non-exempt* employees in order to appropriately pay overtime compensation.

In the next installment we discuss strategies to avoid overtime pay violations.



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Part 5 of 5: Executive Strategies to Avoid Liability

What are some strategies to avoid liability in general?

- **Do not allow employees to “waive” overtime**

Overtime may not be waived by agreement between the employer and employees. Likewise, an agreement that only 8 hours a day or only 40 hours a week will be counted as working time is also a violation of the FLSA.

- **Do not have a “no payment policy” if employees fail to provide advance notice of OT**

An employer cannot avoid its overtime pay obligations even if it has a stated policy that overtime must be authorized in advance. An employer can take disciplinary actions against an employee who violates the notice requirement but it still must pay the worker for the overtime work performed.

- **Do not allow compensatory time in lieu of overtime to non-exempt employees**

Although this is a popular management concept perhaps carried over from the public sector, there is no support for it under the FLSA. If a non-exempt employee works 60 hours in a work week, she is entitled to 20 hours of overtime pay and an employer cannot ask her to relinquish that pay for the “benefit” of 20 hours less of work the following week.



- **Take industry standards with a grain of salt**

The DOL and courts are not persuaded by the argument that this is the way “everyone else is doing it.” Employers need to accurately assess their FLSA obligations based upon the provisions of the law not common wisdom among industry groups.

- **Err on the side of caution**

Broadly speaking, the FLSA default is that most employees are entitled to overtime. If there is doubt, the most prudent course of action is to classify the employee as non-exempt. A wiser course would be to have an employment attorney review your classifications.

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