



SIMMONS PERRINE
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The NEW White Collar Exemption Rule: How to Prepare

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The New White Collar Exemption Rules: How to Prepare

White Collar Exemptions

Exempt Employees from Overtime When:

- 1) Employee is Paid On A Salary Basis
- 2) Meets One of the Duties Tests

New White Collar Rule Released

- On May 17, 2016, the DOL released the FINAL rule on white collar exemptions.
- The New Rule Goes into Effect on **December 1, 2016.**

Major Changes and Key Provisions

- 1) Raises the Salary Level to \$913/week or \$47,476/year
- 2) Raises the compensation requirement for highly compensated employees to \$134,004/year
- 3) Establishes a mechanism for automatically updating the salary and compensation level every three years
- 4) Allows up to 10 percent of the new salary level to be a non-discretionary bonus

Key Provisions of the New Rule

Raise the Salary Level

- 1) Set the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers in the lowest-wage Census Region

\$913/week or \$47,476/annually

Key Provisions of the New Rule

Raise the Salary Level

CURRENT: \$455/week or \$23,650/annually

NEW: \$913/week or \$47,476 annually

Key Provisions of the New Rule

Increase the Highly Compensated Employee Salary Level

- 2) Increase the total annual compensation requirement needed to exempt highly compensated employees (HCEs) to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers

\$134,004/annually

Key Provisions of the New Rule

Increase the Highly Compensated Employee Level

CURRENT: \$100,000/annually

NEW: \$134,004/annually

Key Provisions of the New Rule

Automatic Updates of Salary Levels

- 3) **Every three years** beginning January 1, 2020, the standard salary and annual compensation levels will be automatically updated.
- At least 150 days before the effective date, the Secretary will publish a notice in the Federal Register of the updated salary and total annual compensation amounts that will be required.

Automatic Updates

- **Standard salary level** – updated to equal the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region.
- **Highly compensated employees** – updated to equal the 90th percentile of annualized earnings of full-time salaried workers nationally.

Key Provisions of the New Rule

Non-Discretionary Bonus Allowed as part of Salary Level

4) Allow Up To 10 percent of Salary to Be a Non-Discretionary Bonus or Commission

- Bonus or Commission Payment must be paid at least quarterly

Non-Discretionary Bonus Payment

What is a non-discretionary bonus?

Non-discretionary bonuses and incentive payments (including commissions) are forms of compensation promised in advance to employees (e.g. bonuses for meeting set production goals retention bonuses and commission payments based on a fixed formula).

- May be used to satisfy up to **10% of the standard salary level.**
 - Minimum of 90% (approx. \$822) of standard salary level must be paid as a weekly salary.
 - CANNOT be used for Highly Compensated Employees

Bonus Payment

- If an employee does not earn enough from the non-discretionary bonus, commission or incentive payment in a given quarter to meet the standard salary level – an employer may make a “catch-up” payment within one pay period of the end of the quarter.
- Any such “catch-up” payment will count only toward the prior quarter’s salary amount and not toward the salary amount in the quarter in which it is paid.

Bonus Payment

Example Year 2017

Qtr 1: Jan thru Mar - \$822/week + \$2000 bonus

Qtr 2: Apr thru Jun - \$822/week + \$600 bonus

Qtr 3: Jul thru Sep - \$822/week + \$2000 bonus

Qtr 4: Oct thru Dec - \$822/week + \$500 bonus

(+683 catch-up payment -1st pay period in January)

Highly Compensated Employees (HCE) and Bonus Payments

- HCEs must continue to receive at least the full standard salary level amount each pay period on a salary or fee basis without regard to the payment of non-discretionary bonuses and incentive payments.
- Non-discretionary bonuses and incentive payments (*including commissions*) may be counted towards the highly compensated employees' total annual compensation requirement.
- The HCE test does not allow employers to credit non-discretionary bonuses or incentive payments (*including commissions*) toward the standard salary level weekly requirement.

Some Additional Background

- Policy Objectives of Overtime Exemptions As Set Forth by the DOL
 - Spread employment by incentivizing employers to hire more employees
 - Reduce overwork and its effect on health and well-being
- Last Update to the Salary Level was 2004
- Concern about the common misconception that payment of a salary automatically disqualifies an employee from overtime, irrespective of the duties performed

Impact on Employees

- The Current Salary Level (\$455/week or \$23,660/annually) is below the 2014 poverty threshold for a family of four (\$24,008)
- Likely will lessen flexibility in the workplace for those shifting to non-exempt status

Impact on Employers

- DOL estimates that over 4 million workers will now be newly eligible for overtime protections
- COSTS to Employers: (1) Regulatory Familiarization Costs; (2) Adjustment Costs; and (3) Managerial Costs.
- DOL estimates that average annualized direct employer costs will total between \$239.6 and \$255.3 million per year.

Application of Salary Basis Test

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- If employer chooses to use non-discretionary bonuses and incentive payments to meet the standard salary level, the employee must be paid at least 90% of the standard salary level for any week in which the employee performs any work
- Need not be paid for any workweek when no work is performed

Deductions from Salary

- Any employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the business
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available

No Salary Requirements

- The salary level and salary basis tests do not apply to:
 - Outside Sales Employees
 - Doctors
 - Lawyers
 - Teachers
 - Employees in certain computer-related occupations paid at least \$27.63 per hour

Executive Exemption

An employee qualifies for the executive exemption if she/he:

- 1) Is compensated on a salary basis at a rate of not less than \$913 per week, or stated annually, \$47,476, for a full year worker, and not subject to reduction based on quality or quantity of work;
- 2) Has a **primary duty** of management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision;

Executive Exemption, *continued*

- 3) Customarily and regularly directs the work of two or more other employees; and
- 4) Has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight.

Administrative Exemption

An employee qualifies for the administrative exemption if she/he:

- 1) Is compensated on a salary basis at a rate of not less than \$913 per week, or stated annually, \$47,476, for a full year worker, and not subject to reduction based on quality or quantity of work;
- 2) Has a **primary duty** of performing office or non-manual work directly related to the **management or general business operations** of the employer or the employer's customers; and

Administrative Exemption, *continued*

- 3) Has a primary duty which includes the **exercise of discretion and independent judgment** with respect to **matters of significance**.

Learned Professional Exemption

An employee qualifies for the learned professional exemption if she/he:

- 1) Is compensated on a salary basis at a rate of not less than \$913 per week, or stated annually, \$47,476, for a full year worker, and not subject to reduction based on quality or quantity of work;
- 2) The employee's primary duty must be the performance of work requiring **advanced knowledge**, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

Learned Professional Exemption, *Continued*

An employee qualifies for the learned professional exemption if she/he:

- 3) The advanced knowledge must be in a field of **science or learning**; and
- 4) The advanced knowledge must be customarily acquired by a **prolonged course of specialized intellectual instruction**.

Creative Professional

The employee must be compensated on a salary basis:

- (1) Paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed and
- (2) The amount of salary paid must be \$913/week or \$47,476 annually;

Duties Requirement:

The employee's primary duty must be the performance of work requiring **invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.**

Computer-Related Occupations

- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:
 - 1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

Computer- Related Occupations, *Continued*

- The employee's primary duty must consist of:
 - 2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 - 3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - 4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

Outside Sales

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be **customarily and regularly engaged away from the employer's place or places of business.**

Inside Sales

- If a **retail or service employer** elects to use the Section 7(i) overtime exemption for commissioned employees, three conditions must be met:
 1. the employee must be employed by a retail or service establishment, and
 2. the employee's regular rate of pay must **exceed one and one-half times the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked**, and
 3. **more than half the employee's total earnings in a representative period must consist of commissions.**

Inside Sales, *Continued*

A “Retail or Service Employer” sell goods or services to the general public, serve the everyday needs of the community, are at the very end of the distribution stream and are not a part of the manufacturing process, and provide the general public its repair services and other services for the comfort and convenience of such public in the course of its daily living.

Highly Compensated

- Highly compensated employees performing office or non-manual work and paid total annual compensation of **\$134,004** are exempt from the FLSA if they customarily and regularly perform at **least one of the duties of an exempt executive, administrative or professional employee** identified in the standard tests for exemption.

How to Prepare for New Regulations

- 1) Identify Exempt Employees
- 2) Review Job Descriptions and Functions of Exempt Employees
 - Do the duties of that job meet one of the white collar duties tests?
- 3) Identify Salary Paid to Exempt Employees Who Perform Duties Meeting One of the White Collar Exemptions

How to Prepare for New Regulations

- 4) Identify The Salary Paid to Exempt Employees Who Perform Duties Meeting One of the White Collar Exemptions.
 - Is the Employee Paid Less Than \$913/week or \$47,476/year?

How to Prepare: Identify Currently Exempt Making Less than \$913/week or \$47,476/year

- 1) Monitor Hours for Those Identified Employees
- 2) Do the Employees Work More Than 40 hours a week? How often?

How to Prepare: Assess Financial Impact

- 1) Pay the required overtime premium for the current number of overtime hours based on current implicit regular rate of pay
- 2) Reduce the regular rate of pay so total weekly earnings and hours do not change after overtime is paid
- 3) Eliminate overtime hours
- 4) Increase employee salaries to new salary basis requirement

How to Prepare: *Assess Financial Impact, Continued*

- 5) Hire an additional employee to cover overtime
- 6) Consider implementing fluctuating workweek
- 7) Some combination of above

How To Keep Wage Rates Stable

Basic Summary (your Company may have additional factors to consider)

1. Employees that regularly work 40 hours/week (or less):
 - Regular Rate = Weekly Salary ÷ Hours Worked
2. Employees that regularly work more than 40 hours a week:
 - Regular Rate = Weekly Salary ÷ (40 + (OT hours x 1.5))

How To Keep Wage Rates Stable

Basic Summary (your Company may have additional factors to consider)

Example: A currently exempt employee that makes \$600/week or \$31,200/year

Employee Currently is Exempt and Works 40 hours/week or less:

Regular Rate = $\$600 \div 40 = \15.00 / hour

Overtime Rate = \$22.50 /hour

Employee Currently is Exempt and Regularly Works 50 hours a week:

Regular Rate = $\$600 \div (40 + 10 \times 1.5) = \10.91 / hour

Overtime Rate = \$16.37 /hour

Issues with Keeping Wage Rates Stable

- DOL and media publication of new rule and implication that wages rates will automatically raise
- Employees will be paid the same, but will loose the flexibility of being a salary employee
- How accurate are your current time records and estimates?

How to Prepare: Implementing Changes

- After you've set forward a plan, how will you roll out your plan?
 - Impact of losing the flexibility/ status of exempt
 - Impact of tracking hours
 - Training on tracking hours and training of supervisors who previously only supervised exempt workers
- Assess budgeting impact of regular increases in salary basis level
- Whatever you do, don't change your employees to independent contractors

Tips and Strategies for Avoiding Risk

- Audit the exempt classifications of the workforce periodically.
- Employers can always do more than the law requires.
- Employers should use job descriptions and performance evaluations to their advantage
- Evaluate job titles.
- Audit payroll practices periodically to ensure that time is tracked and paid correctly.

Tips and Strategies for Avoiding Risk

- Implement a safe harbor policy.
- Ensure that record-keeping policies are in place.
- Train management-level and supervisory employees regarding compensable off-the-clock activities.
- When terminating an employee, make sure the employee is paid properly for all time worked.

Implementation Deadline

December 1, 2016

But really?

The Senate Labor Committee Chairman Lamar Alexander (R-Tenn.) and the Senate Homeland Security and Governmental Affairs committee chairman Ron Johnson (R-Wis.), along with 44 other Republican Senators, introduced a measure on June 7 aimed at blocking implementation of the Department of Labor's controversial new overtime regulations.

Brought under the Congressional Review Act, the legislation would nullify the DOL's final rule and prohibit the administration from issuing a substantially similar rule absent congressional approval.

Questions?

Please allow 48 hours for a response.

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Next Webinar: Wednesday, June 22 | 12 – 1 PM

By: Attorney, Lynn Hartman and Financial Advisor, Toby Lawrence

**Structures, Due Diligence and Best Practices Regarding
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