

What Employers Should Know About the New Overtime Regulations

The Department of Labor recently updated the regulations on overtime exempt status, a change employment lawyers have been anticipating for many months. The change was announced on May 18th, and the new regulations become effective December 1, 2016.

The first thing employers should know is that the new regulations are not dramatic. They are more along the line of tweaks that re-establish the significance of certain salary requirements in the existing law. The changes do not change the way overtime rules work, and the default rule remains the same: All employees must receive overtime (time and a half for each hour worked over 40 hours per week) unless they qualify for an exemption from overtime. There are dozens of exemptions to this rule, most of them industry specific, but the regulatory change affects the main “white collar” exemptions, which are the executive, administrative, and professional exemptions, and also encompasses computer employees.

The new regulations change two salary parameters embedded in qualifications for these exemptions:

1. Since 2004, to qualify for the executive, administrative, and professional exemptions, employers had to pay employees at least \$455 a week (\$23,660 per year, based on a 40 hour workweek). Now they must pay at least \$913 per week (\$47,476 per year) to qualify for that exemption.
2. Before the new regulations, employers could be fairly confident that employees performing non-manual office labor and making over \$100,000 (“highly compensated employees”) would be exempt from overtime requirements. The new regulations set the salary threshold for highly compensated employees at \$134,000.

Therefore, on its face, the regulatory change mainly affects the following employers:

1. Those with employees working under the executive, administrative, or professional exemptions, making a salary of more than \$23,660, but less than \$47,476 per year, and working more than 40 hours per week. These employees will be entitled to time and a half pay for all the hours they work over 40 hours in a week.
2. Those who employ office workers (or others performing nonmanual work) making at least \$100,000 but less than \$134,000 but failing to fully qualify under the executive, administrative, or professional exemptions. Some of these highly compensated employees will be entitled to closer scrutiny of their duties for technical compliance with the executive, administrative, or professional duties tests.

Some thoughts for employers about the new regulations:

- A. The substantive overtime exemption rules are unchanged. The change in minimum salary regulations may be good motivation for employers to comply with wage and hour laws generally.
- B. The minimum salary basis amount is no longer a fixed number awaiting regulatory revision. It is now updated every three years and indexed to the “40th percentile of weekly earnings of salaried workers in the lowest-wage Census Region,” based on data from the Bureau of Labor Statistics. (Currently, the lowest-wage Census Region is the South.) Note that the regulation now schedules updates that will make the bottom 40% of exempt workers nonexempt. Put another way, every three years, the minimum salary will always be

the 40% cutoff point established in the prior recalculation. This year, the bottom was \$455 per week, and the 40th percentile was \$913 per week; in 2019, the bottom salaried earner will make \$913 per week, and the minimum salary will be indexed at the 40th percentile of that pool of people; in 2022 the bottom earner will be at the 40th percentile of 2019; and so on. The effect will be vary somewhat across the various Census Regions, but will work in the same way. A significant percentage of exempt employees must be re-classified as overtime-eligible every three years.

- C. The new regulations also account for guaranteed bonuses or commissions in calculating an employee's salary. These additional incentives may constitute up to 10% of the minimum salary basis amount and have to be paid at least quarterly.
- D. The new regulations continue some of the special interests in the current rule. Exempt workers in American Samoa can still be paid less than everyone else (at a minimum of \$767 per week). Exempt motion picture industry employees, though, enjoy a minimum salary of \$1,397 per week. Why? The point is that these regulations are difficult to generalize, and full of counterintuitive and unexpected exceptions.
- E. "Computer employees" does not mean every employee working with a computer, or the IT department. It is meant to encompass technical personnel such as programmers and engineers.
- F. If somebody wants to interview you about your overtime practices, speak with your employment lawyer before you speak to the reporter! Don't be like the owner of a New York moving and storage company who was interviewed in a recent New York Times article. He said that he paid 50% of his employees a "salary," and was concerned about the effects of the new regulations. He was reluctant to move them to an hourly scale (meaning he's reluctant to comply with the new law), suggesting that his employees work better on a "salary" than hourly. I do not have any clients in the moving and storage industry, but I would be surprised if 50% of the employees of any company in that field were to qualify for bona fide overtime-exempt classification. The moving company owner also told the reporter that he would be inclined to hire freelancers and independent contractors so he wouldn't have to worry about overtime. Keep in mind that hiring independent contractors to do the same work as your employees is often considered an attempt to dodge employment taxes and the obligation to provide benefits. In short, this guy just invited the Department of Labor (or a plaintiff-side employment lawyer) to examine his wage and hour practices, and then invited the IRS to audit his employee classifications.
- G. The cost of complying with the new regulations will vary a great deal from employer to employer. The straight up cost of compliance is paying overtime. But since we're talking about wage and hour law, the cost of noncompliance is much greater than compliance. Wage and hour violations will cost the employer at least double the amount of wages owed (triple, for "willful" violations), plus attorney's fees.

Wage and hour rules are full of idiosyncratic details, and it is difficult to summarize whether these regulations affect your particular business. If you have any questions about your current wage and hour practices (or if a reporter has questions for you), a call to your employment lawyer is in order.

