



U.S. DOL Announces Final Salary Regulations for “White Collar” Overtime Exemption

The U.S. Department of Labor (DOL) released its final revised regulations governing the overtime exemption for “white collar” employees on May 18, 2016. The final rule is similar to the proposed rule released last year, but a notable difference is that the weekly salary threshold for executive, administrative and professional employees to qualify as exempt from overtime under the Fair Labor Standards Act (FLSA) will increase from the current \$455/week (\$23,660/year) to “only” \$913/week (\$47,476/year), rather than \$970/week (\$50,440/year) as initially proposed. The final rule does not make any change to the duties tests applicable to the “white collar” exemptions. The final rule is scheduled to go into effect on December 1, 2016.

What Are the Major Changes?

- The weekly salary level for executive, administrative and professional employees under the FLSA will increase to \$913/week on December 1, 2016. All salaried employees earning less than this amount as of December 1, 2016, will have to be paid overtime for all hours worked over 40 in a week.
- The salary threshold for the highly compensated employee (HCE) overtime exemption will increase from \$100,000/year to \$134,004/year.

- The salary level for the overtime exemptions will be automatically updated every three years starting on January 1, 2020. The DOL expects that the 2020 update will increase the salary level for executive, administrative and professional employees to \$51,168/year and for HCE employees to \$147,524/year.
- Up to 10% of non-discretionary bonuses, commissions and incentive pay may be used to satisfy the salary threshold for executive, administrative and professional employees, so long as these payments are made on at least a quarterly basis.

What Should Employers Do Before the Final Rule Takes Effect?

In advance of the final rule taking effect on December 1, 2016, employers should review all categories of employees that may be affected by the final rule and take whatever steps are necessary to remain in compliance with the FLSA’s overtime requirements. The options for employers include the following:

- Increase employees’ salaries to the new level so they can continue to be treated as exempt from overtime.
- Reclassify currently exempt employees as non-exempt and pay them an hourly wage and overtime, if worked.
- Reclassify currently exempt employees as non-exempt and continue to pay them on a salary basis, but cap their workweek at 40 hours by barring unauthorized overtime (remember that overtime must be paid, even if it is unauthorized).
- Reduce the number of employees or employees’ hours.



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- Consider whether the fluctuating workweek option for compensating employees might be available for newly-reclassified employees.
- Review and update policies regarding the reporting of hours worked and prohibiting overtime without a supervisor's authorization.
- Educate employees who are reclassified from exempt to non-exempt on timekeeping policies and procedures, as well as policies regarding obtaining a supervisor's approval to work overtime.

Now may also be a good time to review whether those employees currently classified as executive, administrative or professional truly meet the duties test for the claimed exemption, as both the salary level and duties test must be satisfied for an employee to qualify for those exemptions. Employers most often misapply the administrative exemption because it has the least precise parameters. To qualify for the administrative exemption, an employee's primary duty must be the performance of office or non-manual work directly

related to the management or general business operations of the employer or its customers, and such duty must include the exercise of discretion and independent judgment with respect to matters of significance. Positions that typically qualify for the administrative exemption include, among others, those in human resources, finance, accounting, labor relations, marketing and purchasing. Thus, employees who primarily perform clerical duties, or duties that only require the application of an established set of policies or procedures, do not qualify for the administrative exemption.

Additional Assistance

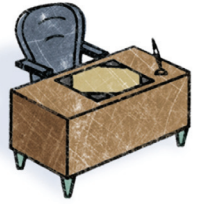
Should you have any questions regarding "white collar" overtime exemption, Phillips Lytle has the depth of experience and breadth of expertise to assist in any way needed. Please contact James R. Grasso at jgrasso@phillipslytle.com or (716) 847-5422, or any of the attorneys on our Labor & Employment Practice Team for more information. ■



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LABOR & EMPLOYMENT ATTORNEYS

James D. Donathen (716) 847-5476 jdonathen@phillipslytle.com
Christine L. Donovan (716) 847-8353 cdonovan@phillipslytle.com
Marc H. Goldberg (518) 472-1224 Ext. 1229 mgoldberg@phillipslytle.com
James R. Grasso (716) 847-5422; (212) 508-0475 jgrasso@phillipslytle.com
Amanda L. Lowe (716) 504-5747 alowe@phillipslytle.com
Kevin J. Mulvehill (585) 238-2095 kmulvehill@phillipslytle.com
Linda T. Prestegaard (585) 238-2029; (212) 508-0425 lprestegaard@phillipslytle.com



Albany Omni Plaza 30 South Pearl Street Albany, NY 12207-3425 (518) 472-1224
Buffalo One Canalside 125 Main Street Buffalo, NY 14203-2887 (716) 847-8400
Chautauqua 201 West Third Street Suite 205 Jamestown, NY 14701-4907 (716) 664-3906
Garden City 1205 Franklin Avenue Plaza Suite 390 Garden City, NY 11530-1629 (516) 742-5201
New York City The New York Times Building 620 Eighth Avenue 23rd Floor New York, NY 10018-1405 (212) 759-4888
Rochester 28 East Main Street Suite 1400 Rochester, NY 14614-1935 (585) 238-2000
Washington, DC 800 17th Street NW Suite 450 Washington, DC 20006-3962 (202) 617-2700
Canada The Communitel Hub 151 Charles Street West Suite 152 The Tannery Kitchener, Ontario N2G 1H6 Canada (519) 570-4800

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