

# 2016 FLSA White Collar Exemption Changes: What Employers Should Know About Changes to the Minimum Salary for Exempt Employees

In May 2016, the U.S. Department of Labor ("DOL") finalized an update to the Fair Labor Standards Act ("FLSA") regarding the executive, administrative, and professional ("white collar") exemptions. The new rule is effective December 1, 2016.

The primary change made by the rule involves the minimum salary for overtime exemptions. Under the existing rule, an employee making \$455 per week, or \$23,660 annually, could be exempt from the FLSA under the white collar exemptions. Under the new rule, an employee must make **\$913 per week, or \$47,476 annually** to be exempt.

**Moving Forward.** In light of these changes, an employer should: 1) reexamine its enterprise or individual coverage, that is, whether either the federal FLSA or state law governs its pay practices; 2) if covered, review its records and determine which currently exempt employees fall above the existing threshold of \$23,660, but below the new threshold \$47,476; and 3) if necessary, evaluate the options below to ensure continued compliance with the regulations.

## **A. RETAIN EXEMPTION; RAISE SALARIES TO AT LEAST \$47,476.**

An employer can simply raise the salaries of all salaried exempt employees to at least \$47,476. This method may be best for employees whose salaries are already close to the minimum salary threshold. Employers should keep in mind, however, that in 2020 and every three years thereafter, the minimum salary will increase at a rate decided by the DOL based upon general salary increases.

## **B. RETAIN EXEMPTION; USE NONDISCRETIONARY BONUSES TO FILL THE GAP.**

Employers are permitted to satisfy up to 10% of the minimum salary requirement with nondiscretionary bonuses, incentive payments, and commissions, if those forms of compensation are paid at least quarterly. This method may work well for employers with employees whose salaries are very close to the salary threshold, as this would allow the employer to "fill the gap" with bonuses.

## **C. CONVERT TO NON-EXEMPT; PAY SAME SALARY PLUS 1.5 OVERTIME.**

Employees that fall below the new salary threshold may be classified as "salaried non-exempt employees." Employers may pay salaried non-exempt employees the same salary, but provide them with overtime compensation for any hours worked over 40 per workweek. To adequately compensate such employees, employers must determine every

employee's regular rate of pay and pay overtime at a rate of 1.5 times that rate. Employers utilizing this method (and all the non-exempt methods below) are still required to closely track employees' overtime hours.

## **D. CONVERT TO NON-EXEMPT; PAY SAME SALARY PLUS .5 OVERTIME (WHERE PERMITTED)**

Employers in many states can use the "fluctuating workweek method," which permits employers to provide a weekly salary intended to compensate the employee for all hours worked regardless of how many actual hours

worked, provided the employer compensate the employee at a .5 overtime rate. Employers must meet strict requirements under federal law to qualify for this method. This is not permitted unless also permitted by state law, and Pennsylvania does not permit fluctuating workweek method of meeting overtime obligations.

#### **E. CONVERT TO NON-EXEMPT; MAINTAIN BASE HOURLY WAGE, PAY 1.5 OVERTIME.**

Employers can convert an employee from salaried exempt to hourly non-exempt and maintain the amount of an employee's base hourly earnings if they work full time, to create the same year-end base compensation, and in additional pay 1.5 overtime.

#### **F. CONVERT TO NON-EXEMPT; REDUCE EFFECTIVE BASE HOURLY WAGE, PAY 1.5 OVERTIME.**

Employers can convert an employee from salaried exempt to hourly non-exempt and reduce the amount of an employee's base hourly earnings to create the same year-end expected compensation after overtime is paid, based upon typical average hours worked. Employees must still be paid based on the hours actually worked during the workweek, so if there is any fluctuation in overtime, the employer must adjust the paycheck accordingly.

#### **G. CONVERT TO NON-EXEMPT; STRICTLY LIMIT EMPLOYEES' HOURS TO 40 PER WEEK.**

Another alternative is to eliminate overtime for employees and mandate that all employees work only 40 hours a week. This may impair productivity, and nonetheless leaves the employer exposed to "passive overtime" claims. Any hours over forty must nonetheless be compensated at an overtime premium, even if worked contrary to employer rules.

#### **H. RESTRUCTURE THE ORGANIZATION'S STAFFING OR SCHEDULING.**

Employers may decide to restructure the business or affected subsets of the business, including re-assigning job duties, combining jobs, or eliminating jobs. An employer may also hire additional employees on a seasonal or regular basis, increase the hours of part-time employees, or modify employees' schedules, in all cases ensuring that all remaining employees are paid in compliance with the FLSA and state law.

#### **I. ENSURE CONTINUED COMPLIANCE AS TO EMPLOYEES EXEMPT UNDER DOL "HIGHLY COMPENSATED" WHITE COLLAR EXEMPTION.**

Any employees currently classified as "highly compensated employees" must now meet the new minimum salary threshold of \$134,004 per year. Highly compensated employees must still meet one of the requirements under the "duties tests" for the executive, administrative, or professional exemptions to qualify.

#### **FOR MORE INFORMATION**

For more information regarding the FLSA's new salary threshold, or to review your business' compliance with the new regulation, please contact any of the following MMWR attorneys:

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