

LEGAL UPDATES

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## Service

Labor & Employment

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# Department of Labor Doubles Salary Level Test

On May 18, 2016, the Department of Labor (DOL) issued the long-awaited final version of its amendments to the overtime and exemption regulations of the Fair Labor Standards Act (FLSA). Although the final version differs in some ways from the proposed regulations, it will have significant administrative and budgetary impacts on most employers.

## Key Changes and Differences Between Proposed and Final Regulations

The new regulations:

Raise the salary level test for most exemptions to apply from \$455 per week (\$23,600 annually) to \$913 per week (\$47,476 annually). This new salary level is based on the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, currently the South. The proposed regulations had indicated that the salary level would rise to \$970 per week (\$50,440 annually).

Permit employers to meet 10 percent of the new salary threshold through bonus and incentive compensation. To take advantage of this option, the bonus or incentive compensation must be nondiscretionary, and employers must pay the bonuses on a quarterly or more frequent basis. Employers may use a “catch-up” payment for employees who fail to earn a high enough bonus to meet the threshold.

Raise the total annual compensation requirement for highly compensated employees (HCEs) from \$100,000 to \$134,004. This annual compensation

level is based on the 90th percentile of full-time salaried workers nationally. The proposed regulations had indicated that the total annual compensation requirement for HCEs would rise to \$122,148.

Establish a mechanism for automatically updating the salary and compensation levels every three years to maintain levels at the 40th and 90th percentiles and to ensure that they continue to provide useful and effective tests for exemption. The proposed regulations indicated that the automatic updates would occur annually. The first three-year automatic update will be effective on January 1, 2020.

### **No Changes to Primary Duties Tests**

The new regulations do not change the primary duties tests for any exemptions to apply. This is welcome, as DOL had hinted that it might amend these tests when it asked for comments on them, even though it included no changes in the proposed regulations in July 2015.

### **Specific Guidance for Private Employers, Nonprofits and Higher Education**

In addition to publishing the final rule, DOL issued several guidance documents intended to aid employers in understanding and complying with the new rule. One such document provides general guidance for private employers that addresses the exemptions generally and provides strategies for complying with the new salary threshold. A similar document provides guidance for nonprofits.

Likely as an acknowledgement of the diverse and unique employee classifications at institutions of higher education, DOL also issued two guidance documents specific to colleges and universities. These guidance documents can be found [here](#) and [here](#). In large part, these documents recite and synthesize previous DOL guidance regarding the employee classification and exemption status of various positions at colleges and universities (graduate research assistants, residential assistants, athletic coaches, etc.).

In each of the guidance documents, DOL offers options for responding to the changes to the salary level tests and ensuring compliance, including:

Raise salaries to maintain exemption

Pay current salaries, with overtime after 40 hours

Reorganize workloads, adjust schedules or spread work hours

Reallocate employee wages between regular wages and overtime so that the total amount paid remains largely the same.

## **What This Means to You**

The final regulations take effect December 1, 2016. This date provides some relief, as DOL previously had indicated that the effective date would be in September 2016.

Many employers have already started analyzing their FLSA compliance in anticipation of these amendments. Now that the new regulations have been finalized, it is time to ramp up those efforts; December will be here before you know it. Overarching steps that you should be taking include developing a compliance strategy and creating a plan for communicating the sweeping changes to your organization.

## **Contact Us**

For more information on how overtime and exemption regulations affect your organization, contact a member of Husch Blackwell's Labor & Employment or Higher Education teams.