

## New DOL Overtime Rule Takes Effect on January 1, 2020



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On September 24 — more than five years after the Obama administration first proposed updating the overtime regulations of the Fair Labor Standards Act (FLSA) — the U.S. Department of Labor (DOL) released the final version (available at: [https://www.dol.gov/whd/overtime2019/overtime\\_FR.pdf](https://www.dol.gov/whd/overtime2019/overtime_FR.pdf)) of its long-anticipated rule expanding overtime eligibility for certain employees making less than \$35,568 per year. The final rule is largely unchanged from the proposed rule (available at: <https://www.pepperlaw.com/publications/complying-with-the-department-of-labors-proposed-overtime-regulations-2019-03-14/>) released in March 2019, and the dollar amounts for the exemptions are lower than those in the rule published by the Obama administration (available at: <https://www.pepperlaw.com/publications/dol-releases-final-revised-overtime-rules-2016-05-18/>) in May 2016 — a rule that was enjoined shortly before it was scheduled to go into effect.

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## **Background**

Unless specifically exempted by the FLSA, all employees must receive overtime pay for hours worked in excess of 40 hours in a workweek at a rate of not less than 1.5 times their regular rate of pay. Under current law, in order to be eligible for the most common “white collar” overtime exemptions (executive, administrative and professional), an employee must be paid a minimum weekly salary of \$455 (or \$23,660 per year). In addition to receiving a minimum weekly salary, to qualify for one of the white collar exemptions, an employee must receive the same salary every single workweek regardless of the number of hours worked by the employee *and* the employee must primarily perform exempt executive, administrative or professional duties as defined by the DOL and courts.

## **The Primary Changes**

Effective January 1, 2020, the following changes will go into effect:

- To qualify for one of the three white collar exemptions, an employee must earn a minimum weekly salary of \$684 (or \$35,568 per year). This means that most employees earning less than \$684 per week must be paid overtime for all hours worked in excess of 40 in a workweek.
- The salary threshold for the “highly compensated employee” exemption will be increased from \$100,000 per year to \$107,432 per year.
- Employers will be able to count certain nondiscretionary bonuses and incentive payments (including commissions) that are paid at least annually toward as much as 10 percent of the minimum salary threshold.

The duties tests outlining the types of work an individual must perform in order to be exempt *are not* changing.

## **Suggestions for Employers**

Initially, employers should identify all employees presently classified as exempt who are making less than the new salary threshold of \$35,568 per year. Options for addressing those employees include:

- **Raise salaries.** The simplest method for an employer to ensure that its exempt employees remain exempt is by raising the employees' annual salaries to \$35,568 or more per year. Unlike the earlier regulations proposed by the Obama administration, the annual salary threshold *is not* indexed to automatically increase without notice-and-comment rulemaking. However, the DOL has said that it intends to update the earnings thresholds more regularly in the future.
- **Pay overtime above a salary.** Another acceptable approach would be to continue to pay these employees on a salary basis, but to track their hours worked each week and to begin paying them 1.5 times their regular rate for any hours they work above 40 hours in a workweek.
- **Convert to hourly.** A third acceptable approach is to convert salaried employees to nonexempt hourly status, to then track their hours worked each week, and to ensure that they are compensated at 1.5 times their regular hourly rate for all hours worked over 40 in a workweek. If an employee is converted to hourly status, the employer should consider the following:
  - **Has anticipated overtime been taken into account when setting an employee's regular rate?** Keep in mind that simply dividing an employee's annual salary by 2,080 hours (*i.e.*, 40 hours/week multiplied by 52 weeks/year) to determine a base hourly rate could result in increased compensation costs if the employee works any significant amount of overtime. For that reason, when converting from salaried to hourly status, many employers reduce the base hourly rate to account for potential or expected overtime costs in an effort to keep overall annual compensation constant.
  - **Should duties be reassigned to minimize overtime?** Employers may want to take steps, such as restructuring positions, to ensure that employees are unlikely to work overtime.
  - **What impact will the changes have on employee morale?** Employees are likely to be upset when informed that they are being converted to nonexempt hourly status, that they are losing responsibilities, and that their base hourly rate is decreasing. Furthermore, based on our experience, many employees take pride in being salaried, exempt employees and may resent a perceived demotion and the new requirement to keep track of hours worked.

Employers must continue to be cognizant of and comply with state and local wage-and-hour laws. Most states and some municipalities have their own wage-and-hour standards. If an employer has operations in a state or municipality with stricter wage-and-hour laws, it is incumbent on the business to ensure that its pay practices meet those requirements.

Employers should also consider using the time period before the January 1 implementation date to **conduct a privileged review of the job duties** performed by employees making a salary in excess of the salary threshold to ensure that these employees are actually performing primarily exempt duties and are properly classified as exempt. Class and collective actions alleging that certain types of employees are improperly classified as exempt are costly and common across all industries.