

Client Alert: DOL Proposed Updates to Salary Level Test of OT Regulations

3.14.2019

Barack Ferrazzano Client Alert

Action Items

- **Review all employee classifications**, not just those earning below the new proposed salary level. If the duties test is not met, reclassify employee as non-exempt.
- **Evaluate** possible alternatives of how to meet new salary level requirement, including compensation plans that pay non-discretionary bonuses.

After the changes to the salary level test for exempt status that were put on hold at the last minute in 2016, employers now have a new set of proposed rules to evaluate. On March 7, 2019 the U.S. Department of Labor ("DOL") released a proposed rule that scraps the DOL's 2016 Final Rule, which was held invalid by a federal court in late 2016. The Proposed Rule includes three fundamental changes that will be familiar to those who worked to comply with the 2016 Final Rule. A new final rule is expected in time for a January 2020 effective date.

The new salary requirement will make many employees eligible for overtime and requires every organization to review its critical determination of who is exempt and who is not.

Wage Hour Division Proposed Rule

The Proposed Rule requires employees who are to be treated as exempt from overtime and minimum wage requirements receive a **weekly salary** of at least \$679 (which equates to \$35,308 annually for a full-time employee). For the "highly compensated employee" exemption the annual salary is proposed at \$147,414.

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PRACTICE AREAS

Compensation & Employment

Financial Institutions

Non-discretionary bonuses, incentives, and commissions can be counted for the weekly salary test, but only **up to 10%** of the salary. To be counted, the non-discretionary bonus or incentive compensation must be paid at least annually. Employers can make “true-up” payments so long as those true-up payments are made no later than the next pay period after the end of the year (presumed to be the calendar year unless otherwise designated by the employer).

Automatic adjustments to salary level will be made every four years, with the first adjustment expected for January 1, 2024. The salary thresholds will be maintained at the 20th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South) and in the retail sector. For the “highly compensated employee” salary level the threshold will be maintained at the 90th percentile of annual compensation for full-time salaried workers nationally.

Three Tests For Exemption

To be exempt from overtime and minimum wage rules the following three tests must be met:

- **Salary Basis Test.** Requires the employee be paid a predetermined and fixed salary that is not subject to deductions because of variations in the quality of the work or quantity of work performed (such as hours); with limited exceptions for full days of absence and the first and last weeks of employment. The Proposed Rule does not change this test.
- **Salary Level Test.** Requires the amount of the salary paid meet a certain minimum. The Proposed Rule would change this test as described above.
- **Duties Test.** Requires the employee’s job duties primarily involve executive, administrative, or professional duties as defined in DOL regulations (last updated in 2004). The Proposed Rule does not change this test.

Reminders

- Being paid a salary is not sufficient to establish exempt status – the duties test also must be met.
- Being an officer does not automatically satisfy the duties test – titles are irrelevant to the duties test.
- The “highly compensated employee” exemption does not exist under Illinois’ Minimum Wage Law.

We Can Help You

Please call us if you would like to discuss any of these issues or if we can otherwise be of assistance.