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## Finally, The DOL's Final Rule Gives Employers Clarity On New Overtime Rules

*Legal Alert*

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May 19, 2016

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The wait for new overtime rules is over. Yesterday, the U.S. Department of Labor released its Final Rule, which goes into effect on December 1, 2016. Although the proposals leading up to these new rules garnered a lot of ink, the new rules make some changes that were not expected and maintain the status quo in areas that were expected to change.

### **What is new?**

Since 2004, federal law treated salaried workers who are paid at least \$455 per week (\$23,660 per year for a full-year worker) and meet certain "white collar exemption" requirements as exempt from overtime. Salaried employees who meet the white collar exemption need not be paid overtime, or even minimum wage, no matter how many hours they work. For employees to be exempt from overtime, they must meet both the salary and the duties test, which means workers who are not paid a base salary of at least \$455 per week do not qualify for the white collar exemption and must be paid both minimum wage and overtime, even if they are otherwise white collar workers.

Under the new Final Rule, the salary threshold more than doubles to \$913 per week (or \$47,476 annually for a full-year worker). This rate threshold is lower than the proposed threshold because it is based on the pay of the 40th percentile of earnings of full-time salaried workers in the lowest-wage U.S. census region, whereas the proposed rate was based on the pay of the 40th percentile of all full-time U.S. workers. Another important change is that, for the first time, the new rules permit employers to satisfy up to 10 percent of the standard salary requirement with nondiscretionary bonuses, incentive payments, and commissions, provided these forms of compensation are paid at least quarterly.

Employers should take note that, as of December 1, 2016, employees earning less than the threshold amount who were previously treated as exempt from overtime can no longer be treated as exempt.

Additionally, under the rule changes, those classified as "highly compensated employees" must earn at least \$134,004 (rather than the current \$100,000) in total annual compensation (and work in non-manual labor jobs) to be automatically exempt from overtime.

### **What is the same?**

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Although there was buzz that these rules would also alter the duties test for the white collar exemption along with the salary test, the Department of Labor did not alter any of the duties tests. The standard that employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations to qualify for the white collar exemption remains unchanged.

### **What is next?**

Although the current salary thresholds were in place from 2004-2016, the new Final Rule provides a mechanism for automatic updating every three years. Going forward, the base white collar exemption salary threshold will be updated automatically to match the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage census region. Similarly, for highly compensated employees, the threshold will also be updated every three years to match the 90th percentile of annual earnings of full-time salaried workers nationally. Based on current economic trends, that means employers should expect the thresholds to increase again in three years, though the increase will likely be much less dramatic.

### **What should employers do now?**

First, employers should identify any exempt employees with compensation under the new threshold salary level and either treat those employees as non-exempt after December 1 or increase their compensation. As part of this step, employers should analyze how to best structure their workforces and their compensation systems in light of the potential for increased labor costs due to the effect of the new overtime rules. For example, employers should weigh whether it makes more business sense to start paying more employees overtime or hire more staff or restructure certain aspects of their workforces. In addition, employers may want to consider increasing fixed salaries and decreasing bonuses, commissions or equity payments in order to meet the higher salary requirement.

Second, employers should take steps now to ensure they are properly using the white collar exemption even for employees with salaries above the threshold. Employers need to remember that a salary that meets the threshold does not in and of itself make an employee exempt from overtime. There are specific tests for executive, administrative, professional, computer, outside sales and highly compensated employee exemptions that depend on the duties these employees perform and recent court rulings have refined and narrowed the application of these tests. Even though the new Final Rule does not change these tests, job duties and the law evolve overtime and employers should take this opportunity to evaluate whether their employees are properly characterized, and use the change as an opportunity to roll out any needed reforms. Employers who have questions or concerns about compliance should consult with their counsel and consider a wage and hour audit to determine if they are currently in compliance with applicable federal and state laws regarding overtime pay. Flaster Greenberg's Labor and Employment lawyers are fully versed in the new overtime rule and stand ready to assist clients and potential clients.

Third, employers should be careful not to forget about compliance with applicable state wage laws, which differ from the federal law and will not automatically change, even if the federal law does.

In sum, employers should review their compensation structures for compliance with the Final Rule and include with that review an analysis of their overall compliance with wage and hour laws.

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To learn more about the information presented in this alert, we invite you to contact Adam Gersh, or any member of Flaster Greenberg's Labor and Employment Practice Group.

**ATTORNEYS MENTIONED**

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