

New 2020 Overtime Rule Means Employers Must Reevaluate Which Employees Are Overtime Eligible

Legal Alert

October 1, 2019

Adam E. Gersh

Cherry Hill, NJ

The wait for new overtime rules is over. As you may recall, the U.S. Department of Labor released a Final Rule which was to go into effect on December 1, 2016, but, due to a court-issued injunction, followed by change of administration, it never did. Now, we have an updated version that goes into effect on January 1, 2020. 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. The DOL says the increase in salary thresholds will boost wages for 1.3 million U.S. workers.

What is new?

Since 2004, federal law has 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. For employees to be exempt from overtime, they must meet both the salary and a duties test, which means workers who are not paid a base salary of at least \$455 per week do not qualify for a white collar exemption and must be paid both minimum wage and overtime, even if they pass a duties test. Salaried employees who satisfy both the salary and duties prongs of a white collar exemption need not be paid overtime, no matter how many hours they work.

Under the new Final Rule, the salary threshold jumps to \$684 per week (or \$35,568 annually for a full-year worker). 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 those forms of compensation are paid at least quarterly. NOTE: Since bonuses, incentive payments and commissions are typically tied to the employee meeting certain criteria, if an employee fails to meet the criteria and, therefore, fails to earn the bonus, incentive payment, or commission, which, in turn, results in the employee being paid less than the threshold amount, the employer might have to pay overtime retroactively to that employee.

Employers should take note that, as of January 1, 2020, employees earning less than the new threshold amount who were previously treated as exempt from overtime can no longer be treated as exempt.

Additionally, under the rule changes, workers classified as “highly compensated employees” must earn at least \$107,432 (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?

Although there was speculation that the new rules would also alter the duties test for the white collar exemptions along with the salary test, DOL did not alter any of the duties tests. The standard that an 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?

Unlike the Final Rule released in 2016, this version does not provide for automatic updates. The current salary thresholds had been in place since 2004, and the 2016 rule included a mechanism for an automatic update. No such mechanism is included in the new rules, so the 2020 thresholds will remain in place indefinitely.

What should employers do now?

First, employers should identify any exempt employees with compensation below the new threshold salary level and either start treating those employees as non-exempt after January 1 or increase their compensation to the new threshold amount. 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 will cost them more to start paying more employees overtime, increase salaries to meet the new threshold, or hire more staff or restructure certain aspects of their workforces to avoid overtime. 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, including 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. Separate and apart from the Final Rule, there are specific tests for executive, administrative, professional, computer, outside sales and highly compensated employee exemptions that depend on the duties those employees perform. Those tests have evolved over time, and recent court rulings have refined and narrowed their application. Also, employees' job duties are constantly changing, and courts will be asked in the future to examine new fact scenarios to determine whether employees have been properly characterized. Even though the new Final Rule does not change those compliance tests, employers would be well-advised to take this opportunity to evaluate whether their employees are properly characterized under the current versions of the compliance tests and use this 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.

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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. For example, salary thresholds to treat employees as exempt from overtime in California and New York are greater for employers with a certain minimum number of employees than those established by the Final Rule.

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.

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

Adam Gersh