

LABOR & EMPLOYMENT LAW LEGAL ALERT

It's Not Too Late: A One-Month Plan for Compliance with New FLSA Exempt Status Overtime Regulations

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The new Fair Labor Standards Act (FLSA) exempt status overtime regulations are effective in one month - December 1, 2016. The significant changes include, but are not limited to, an increase in the minimum salary threshold for exempt status, rising from \$455 per week (\$23,660 per year) to \$913 per week (\$47,476 per year). As a result, millions of workers who were once classified as exempt employees will soon be entitled to overtime for all hours worked over forty in a workweek. Thus, employers have one month to learn about the changes and prepare for compliance.

What has changed?

Generally, employees are exempt from being paid overtime if they meet certain tests regarding their job duties and are paid on a salary basis with salaries that meet a certain threshold and are not reduced due to quality or quantity of their work. If the salaries paid are high enough, the employees are considered "highly compensated," and their duties tests for exempt status are more relaxed. The new regulations do not modify the duties tests. However, they do significantly change the salary basis requirement:

- The new minimum salary threshold will be \$913 per week (\$47,476 per year). This is up from the current \$455 per week (\$23,660 per year). Thus, if your employees are not making at least \$913 per week, they cannot be classified as exempt and are entitled to overtime.
- The minimum salary threshold will be adjusted every three years, based on the 40th percentile of the lowest-wage census region of salaried employees. This indexing could result in the reclassification of employees every three years.
- The salary threshold for the highly compensated employee rule will be \$134,004. This is up from the current \$100,000 threshold. Thus, if your employees are not making at least \$134,004 per year, they must meet the more stringent duties tests to qualify for exemption.
- The salary threshold for highly compensated employees will be adjusted every three years, based on the 90th percentile of all U.S. salaried workers. This indexing could also result in the reclassification of highly compensated employees every three years.
- Up to 10 percent of the salary threshold can be satisfied by the payment of non-discretionary bonuses or incentive payments (including commissions) paid quarterly or more frequently.

What can employers do to prepare?

Employers subject to the FLSA only have one month left before the regulations take effect. However, it is not too late to prepare. In the next month, employers should do the following to ensure that they are ready for compliance on December 1, 2016:

1. Employers should review their current exempt positions and determine which positions will be reclassified as non-exempt under the new regulations.
2. For the positions requiring reclassification, employers should determine whether they want to maintain the exempt status and increase the position salary to meet the new threshold, or whether they will reclassify the position as non-exempt and pay the employee an hourly wage, subject to overtime rules. In order to make this decision, employers can track time for a certain period or request regular hour information from the employees in the vulnerable positions in order to identify appropriate hourly wages for the positions. Tracking time or reviewing regular hour information from these employees will help employers accurately budget for the new overtime obligations.
3. Bonus plans should be evaluated as the new regulations allow for a portion of non-discretionary bonuses or commissions to be factored into the employee's salary to meet the required threshold amount. Additionally, employers will need to determine whether the reclassification of former exempt-status employees will affect eligibility for bonuses.
4. Once any reclassification decisions have been made, employers should communicate with employees and explain why certain positions will no longer be exempt status in consideration of affected employees' possible morale issues.
5. Supervisors will need to be trained on the management of newly reclassified employees and other reclassification issues such as schedule management and timekeeping.
6. Newly reclassified non-exempt employees will need to be trained on timekeeping, overtime authorization rules, and working only during designated hours (e.g. no working during lunch periods or breaks and no off-the-clock working on smart phones, etc.).
7. Employers will need to determine whether reclassification will affect any current exempt-status employees subject to a collective bargaining agreement. Employers should advise union business representatives of reclassifications, understanding this may require re-opening of negotiations.

What are the penalties for noncompliance?

Given the far-reaching effects of the final overtime regulations, it is important for employers to take steps in the next month to mitigate their exposure to potential liability associated with misclassification and failure to pay overtime. The liability for misclassification of employees can be very expensive for employers, including back wages plus overtime pay on all hours worked over 40 hours per work week for each misclassified employee for a period of two years (or three years if the employer's mistake is found to have been willful), liquidated damages in an amount equal to the unpaid wages, and attorney fees and costs. If you multiply those costs by the number of employees who are misclassified, the total impact on an employer can be substantial. As a result, employers should consult their employment law counsel to help expedite the process during this final month and ensure compliance by December 1st.

For more information about preparing for the new FLSA overtime rules, please contact Janis Adams at jadams@shrr.com or Lindsay Raymond at lraymond@shrr.com.



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