

EMPLOYMENT ALERT

Department of Labor Increases Salary Level Test For Exempt Employees Under The Fair Labor Standards Act

February 2020

On January 1, 2020, a U.S. Department of Labor (DOL) Final Rule became effective, which raised the salary level test for employees to be exempt from premium pay for overtime hours under the Fair Labor Standards Act (FLSA). As a consequence, up to 1.3 million American employees are newly eligible to receive premium pay for overtime hours worked in a workweek.

Under the FLSA, employees are exempt from overtime premium pay if they can satisfy three tests:

1. the salary basis test – the employee is paid a fixed weekly salary or fee that does not fluctuate week to week;
2. the salary level test – the employee’s salary is above a certain threshold; and
3. the duties test – the employee’s primary duties are exempt because they are primarily executive, professional or administrative, as defined by DOL regulations.

An employee who does not satisfy all three tests is non-exempt and must be paid a premium rate for all hours above 40 worked in a given workweek.

The Final Rule impacts the salary level test only. In prior years, employees needed to earn a salary of at least \$455 per week (\$23,660 annually) to meet the salary level test; otherwise, the employee was non-exempt under the FLSA and entitled to receive overtime premium pay.

The Final Rule raised the salary level test to \$684 per week (\$35,568 per year) as of January 1, 2020. Accordingly, any employee earning a weekly salary of less than \$684 must receive premium pay for all overtime hours worked in a workweek, regardless of whether the employee's primary duties are exempt or not.

The Final Rule also raised the salary level test for eligibility for the "highly compensated" exemption under the FLSA. This exemption has a relaxed duties test for employees, as the DOL theorizes that it need not scrutinize the duties of high earners to the same extent as lower wage earners. Previously, the threshold to be eligible for the "highly compensated" exemption was at least \$100,000 in earnings annually. The Final Rule raised the salary level test for this exemption to \$107,432 in annual earnings.

Finally, the Final Rule relaxed the total amount of nondiscretionary bonuses and incentive payments, including commissions, that employers can use to meet the salary level tests. As of January 1, 2020, employers can satisfy the salary level test through nondiscretionary bonuses, commissions and other incentives of up to 10% of the standard salary level, including a final "catch-up" payment made within one pay period after the end of the 52-week year. This 10% rate applies to both the \$684 per week standard salary level test and the \$107,432 per year "highly compensated" exemption salary level test.

As a result of these changes to DOL regulations, employers should revisit their employee classification practices for certain employees. Any employees who were classified as exempt in prior years and earn a weekly salary of less than \$684 are now non-exempt and eligible for premium pay for overtime hours worked. In addition, employees who earn between \$100,000 and \$107,432 annually are now subject to a complete duties test, rather than a relaxed one. Employers may also consider whether they can utilize incentive pay, including bonuses and commissions, to meet the new salary level tests and thereby ensure employees remain exempt.

CONTACT

Please contact a member of our [Employment Law Practice](#) to discuss compliance with the FLSA and the new DOL regulations, as well as Massachusetts wage and hour laws.