OVERTIME FOR SALARIED WORKERS

What Employers Need to Know

Contents

INTRODUCTION

More than four million white collar jobs may be transformed in 2017 as the U.S. Department of Labor's (DOL) annual salary threshold for overtime pay could double from $23,660 (current threshold) to $47,476.[1]

The rule was to go into effect December 1, 2016, but has been temporarily sidelined by an injunction brought on by a court in Texas.[2]

Whatever your reaction, it's hard to argue change is inevitable when it comes to staffing your business.

In 1975, more than 60 percent of salaried workers were eligible for overtime. Today, less than eight percent of full-time salaried workers are covered by the same regulations.[3]

This guide provides a general overview of the proposed changes.

To determine how the rules may or may not apply to your company, consult an employment law or human resources specialist.

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Key Provisions

There are three key provisions in the U.S. DOL's Final Rule. Specifically, the Final Rule:

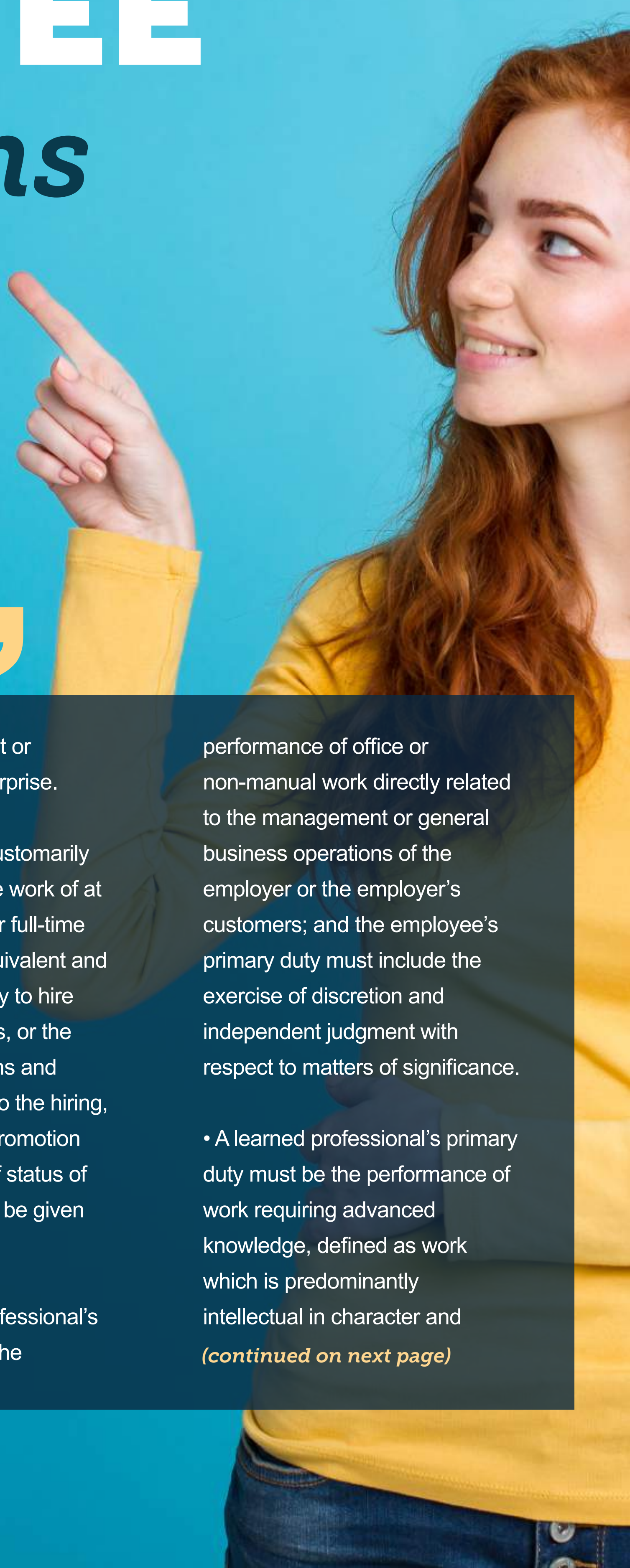
1. Sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, currently the South ($913 per week; $47,476 annually for a full-year worker).

2. Sets the total annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally ($134,004).

3. Establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles, and to ensure they continue to provide useful and effective tests for exemption.

4. The definition of overtime remains set by the Fair Labor Standards Act (FLSA): Unless exempt, employees covered by the FLSA must receive overtime pay for all hours worked over 40 in a workweek at a rate not less than one and one-half times their regular rates of pay.

EMPLOYEE exemptions



Deciding who exactly is affected by the overtime law can be tricky because there are plenty of exemptions.

Deciding who exactly is affected by the new overtime law can be tricky because there are plenty of exemptions.

Many executive, administrative, professional and outside sales employees are exempt, for example. In order to maintain an exemption, the employee must be compensated on a salary or fee basis at a rate that exceeds $913 per week.

Beyond that:

• An executive's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise.

The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent and must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

• An administrative professional's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and the employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

• A learned professional's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and

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EMPLOYEE exemptions (Cont.)

which includes work requiring the consistent exercise of discretion and judgment.

This advanced knowledge must be in a field of science or learning and must be customarily acquired by a prolonged course of specialized intellectual instruction.

• A creative professional's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

An outside sales professional does not need to be paid the new $913/week base salary (in fact, no set salary is required for this exemption), but does need to meet this duties test: The individual's primary duty must be making sales (as defined by the FLSA) or obtaining orders or contracts for services or for the use of facilities.

The employee must also be customarily and regularly engaged away from the employer's place or places of business when doing so.

Computer professionals may also be exempt, as long as they are:

• Compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than $913 per week or the equivalent hourly basis.

• Employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing such duties as:

1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications.

2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications.

3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems.

4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

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THE TRACKING MYTH

Since word broke of these changes, many employers have been stressing over how they may affect teleworkers and those with flex schedules. On that front, the news is good.

“The FLSA is a nimble law,” says Dr. David Weil, the administrator of the DOL’s Wage and Hour Division.

“Employers have flexibility to choose the options that work best for their workplace, including how to keep track of hours. There’s nothing that says workers have to punch time clocks.

There’s nothing that says workers have to work specific hours or in specific places.”[5]

Caroline Valentine of ValentineHR agrees the changes do not mean “punching a time card” is the wave of the future for more employees.

“I can assure you there are payroll and HRIS systems that can track time and handle payroll and many probably integrate into the systems you already have,” she explains.

“You needn’t fear tracking employee time under new DOL rules…You may find that, instead of getting a lot harder, incorporating these systems into your operations makes life a whole lot easier.

Some of them let all the managers know when an employee logged in and whether they’re on task, for example. And many can be managed just using your phone.”[6]

Your Options

Amy Beckstead, a partner at Beckstead Terry PLLC in Austin, explains there are two main options for employers who have people on staff affected by the overtime updates.

1. Consider reclassifying the employee.
For the individuals who are not currently at a $913/week salary level, this is a great time to review whether the person should really be classified in a non-exempt position.

2. Consider bonuses.
One welcomed addition to the new salary rules is nondiscretionary bonuses and incentive payments (including commissions) may be used to satisfy up to 10 percent of the standard $913/week salary level. To count toward the standard salary level, however, these nondiscretionary bonuses must be paid quarterly or more frequently.[7]

Weil adds, however, those who do not make these types of changes will be left with the options to:

3. Raise the employee's salary and keep them exempt from overtime.
This option works for employees who have salaries close to the new salary level and regularly work overtime.

4. Pay overtime in addition to the employee's current salary when necessary.
This approach works for employees who work 40 hours or fewer in a typical workweek with only occasional overtime.

5. Evaluate and realign hours & staff workload.
This may be a good opportunity to consider hiring additional workers.[8]

Beckstead points out that every three years the standard salary and annual compensation levels will be automatically updated. Keep this date in mind, she cautions, because employers may be given as little as 150 days before a change is made.

Based on wage growth projections, the Society for Human Resource Management (SHRM) reports the threshold is expected to rise to more than $51,000 with the first update.[9]

Note: This guide is for informational purposes only. *Consult your business attorney to find out how the changes may affect your organization and for guidance on addressing those issues.*

Sources

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