



## **Department of Labor – FLSA Salaried Overtime Regulations Changes to go into effect December 1, 2016**

On June 30, 2015, the United States Department of Labor (DOL) released proposed regulations that would modify certain provisions of the Fair Labor Standards Act (FLSA). Specifically, the proposed regulations increase the minimum salary required to be earned by an employee in order for that employee to be exempt from the FLSA overtime requirements.

### **Background**

The FLSA generally requires covered employers to pay their employees at least the federal minimum wage (currently \$7.25 an hour) for all hours worked, and overtime premium pay of one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek. However, there are a number of exemptions from the FLSA's minimum wage and overtime requirements. Specifically the FLSA exempts from both minimum wage and overtime protection "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman." The FLSA does not define the terms "executive," "administrative," "professional," or "outside salesman." Since 1940, the regulations have generally required each of the following three tests to be met for the exemptions to apply: (1) the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test"); (2) the amount of salary paid must meet a minimum specified amount (the "salary level test"); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the "duties test").

On March 13, 2014, President Obama signed a Presidential Memorandum directing the DOL to update the regulations defining which white collar workers are protected by the FLSA's minimum wage and overtime standards.

#### **Salary Basis Test**

There were no proposed changes to the requirement that workers be paid on a salary basis – that is, a pre-determined amount that cannot be reduced because of variations in the quality or quantity of the employee's work in the proposed regulations.

#### **Salary Level Test**

Since 2004, the regulations stipulate that, in general, any employee earning less than \$455 per week (\$23,660 a year) is a "nonexempt" employee. Under the FLSA, a nonexempt employee is

entitled to overtime pay when working over 40 hours in a workweek regardless of whether the employee is paid on an hourly or salary basis. The DOL proposed to increase the standard salary level to qualify for exemption from the FLSA minimum wage and overtime requirements as an executive, administrative, or professional employee from \$455 a week (\$23,660 a year) to \$921 a week (\$47,892 a year), based on 2013 data. The regulations also proposed a mechanism for annually updating the minimum salary and the DOL is seeking comments on one of two proposed mechanisms. If one of the annual update mechanisms was implemented, the DOL anticipated that the annual salary requirement in 2016 would be \$970 a week, or \$50,440 a year. The DOL, in the preamble to the regulations, noted that the current salary level threshold for exemption of \$455 per week, or \$23,660 annually, is below the poverty threshold for a family of four.

**On May 18, 2016, President Obama and Secretary Perez announced that the Department of Labor's final rule will entitle most salaried white collar workers earning less than \$913 a week (\$47,476 a year) to overtime pay to go into effect December 1, 2016. The Department of Labor will also be automatically updating this salary threshold every three years, beginning January 1, 2020.**

In addition, the DOL stated in the proposed regulations that it is seeking comments on whether to permit nondiscretionary bonuses and incentive payments to count toward a portion of the standard salary level test for the executive, administrative, and professional exemptions. However, the DOL “is not considering expanding the salary level test calculation to include discretionary bonuses.”

### **Duties Test**

The proposed regulations released by the DOL on June 30 did not include any modifications to the duties requirements of Administrative, Executive, Professional or Outside Salesman that must be met in order for these individuals to be exempt from the FLSA overtime pay requirements. However, the DOL did state that it is seeking comments as to whether the duties tests should be updated. Currently the duties tests are as follows:

#### **Executive Employees**

- A primary duty of management of the enterprise in which the employee is employed or manages a customarily recognized department or subdivision thereof;
- Customarily and regularly direct the work of two or more other employees; and has
- Authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight.

#### **Administrative Employees**

- A primary duty of 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
- A primary duty must also include the exercise of discretion and independent judgment with respect to matters of significance.

## **Professional Employees\***

- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character. Advanced knowledge must be in a field of science or learning, and such knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.
- Work that is original and creative in a recognized field of artistic endeavor, or;
- Teaching in a school system or educational institution, or;
- Work as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.

For each of the categories above, the employee must perform work that requires the consistent exercise of discretion and judgment or "requiring invention, imagination, or talent in a recognized field of artistic endeavor."

## **Outside Sales Employees\***

- A primary duty of making sales of tangible or intangible items such as goods, insurance, stocks, bonds, or real estate or obtaining orders or contracts for services or the use of facilities; and
- Customarily and regularly work away from the employer's place of business in performing the employee's primary duty.

**IMPORTANT: If you have SALARIED employees that earn between \$23,660.00 and \$47,475.00 and they work more than 40 hours per week AND are not paid OVERTIME, and DO NOT meet the below Duties Tests of the Executive, Professional, or Administrative employees as outlined above the DOL FLSA regulations, you must determine whether to either increase their salary to \$47,476.00 or revert the employee(s) to hourly with paid overtime (hours worked over 40 hours in a work week) at their current rate of pay.**

- **Example 1:** Donald is a salaried, non-exempt employee, paid a salary of \$30,000.00 annually. His job title is that of Accounts Payable Clerk and he does not clock in/out, is not paid overtime, and does not supervise or manage other associates. He is not responsible for important management decisions of the company or significant matters of importance. In this case, Bob must be changed to an hourly employee at an hourly rate equal to that of his existing salary and paid the appropriate overtime rate of one and one half times hourly rate for any hours worked over 40 hours in a work week.
- **Example 2:** Hilary is a salaried, non-exempt employee, paid a salary of \$45,000.00 annually. Her job title is that of Manager of Accounts Payable. She directly manages five associates. In this example, Hilary must either be made an hourly employee and paid overtime, OR her salary must be increased to \$47,475.00 to comply with the new Department of Labor FLSA Overtime rules.

Below may be some examples of job duties of an Executive Employee:

- Interviewing, selecting, and training of employees
- Setting and adjusting their rates of pay and hours of work
- Directing the work of employees
- Maintaining production or sales records
- Efficiency for purpose of recommending promotions or other changes in status;
- Handling employee complaints and grievances
- Disciplining employees
- Planning the work
- Determining the techniques to be used;
- Apportioning work among the employees;
- Determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold;
- Controlling the flow and distribution of materials or merchandise and supplies;

Below may be some examples of types of work for Administrative Exemption:

- Tax
- Finance
- Accounting
- Budgeting
- Auditing Insurance
- Quality control
- Purchasing
- Procurement
- Advertising
- Marketing
- Research
- Safety and Health
- Personnel Management
- Human Resources
- Employee Benefits
- Labor Relations
- Public Relations
- Government Relations
- Computer Network
- Internet and Database Administration
- Legal and Regulatory Compliance

Payroll Solutions is not your human resources department or legal representative in the topics of your employment practices and how they follow the Department of Labor's FLSA rules and regulations. The above information serves only to prompt your organization to review, and if necessary, seek legal counsel on the employee classification of your employee population. Above are the changes to the exempt salaried changes that go into effect December 1, 2016.

Payroll Solutions would be happy to direct you to a team of professional HR Consultants and/or employment law professionals for more clarification on how this may affect your organization

Payroll Solutions does offer timekeeping services to assist in the tracking of hourly employees. If you would like further information on this service please contact your Payroll Specialist or visit our website at [solutionsforpayroll.com](http://solutionsforpayroll.com)