

THE FINAL RULE:

Navigating the New Salary Requirements From the U.S. Department of Labor

Frank T. McGuire, Esq.



Thomas E. Perez, Secretary of Labor



David Weil,
Wage and Hour Division Administrator

BASIC RULE:

Under the federal

FAIR LABOR STANDARDS ACT

employees who work over 40 hours per week must be paid overtime pay at 1.5 times the regular rate

“White Collar Exemption”

Executive, Administrative and Professional Employees performing non-manual work may be exempt from overtime if:

1. They meet the **DUTIES TEST**,
2. They are paid **ON A SALARY OR FEE BASIS**,
and
3. **The salary or fee is at the MINIMUM LEVEL.**

The New Rule Changes Only Salary Level!

DUTIES TEST

- Executive
- Administrative
- Learned Professional
- Creative Professional

SALARY BASIS TEST

- Full weekly pay for each week in which any work is performed
- Seven exceptions
- Does not apply to teachers, doctors or lawyers working in their fields

Duties Test for Executives

- To qualify for the executive employee exemption:
- The employee'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
- The employee 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.

Duties test for Administrative Persons

- The employee'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 includes the exercise of discretion and independent judgment with respect to matters of significance.

Duties Test for Professionals

- To qualify for the **learned professional employee exemption**:
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

- To qualify for the **creative professional employee exemption**:
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

OLD SALARY LEVEL:

- 1975:
- “Long” duties test salary minimum was \$155/week
- “Short” duties test salary minimum was \$250/week
- 2004 to NOW:
- Primary Duty test
- Salary minimum is \$455/week, or \$23,660 per year
- Or, highly compensated at \$100,000 per year for non-manual work

NEW SALARY LEVEL RULE

Announced May 18, 2016!

- **To \$913 per week**
- **Or \$47,476 per year**
- **Up to 10% may be as nondiscretionary bonuses paid quarterly or more often**
- **Highly compensated level is \$134,004 per year**

Effective December 1, 2016!

- **Level was set to equal the 40th percentile of salaries in the lowest-wage section of the U.S.**
- **To be recalculated every three (3) years**
- **Next in August, 2019 for January 1, 2020**

SO WHAT ARE AN EMPLOYER'S ALTERNATIVES?

- For currently exempt employees who are below \$913 per week, an employer may:
 - **Raise the salary to \$913/week,**
 - **Continue the current salary but pay overtime and track hours, or**
 - **Convert to hourly pay and track hours**

**WHAT ARE SOME
PROBLEMS AND PITFALLS
OF THOSE CHOICES?**

If you raise salary levels now:

- Does it compress wages above the base salary?
- Can you afford to do so every three years?
- If \$47,476 is the 40th percentile now, what will the 40th percentile be in three years after most salaries go above that level?

WHAT ARE SOME
PROBLEMS AND PITFALLS
OF THOSE CHOICES?

If you do not raise the salary, the exemption is lost. A weekly salary can still be paid, but overtime must be added at the “regular rate” for hours over 40.

- Simplest “regular rate” calculation: Divide all pay due by all hours worked.
- Then also pay $\frac{1}{2}$ the regular rate for all hours over 40

WHAT ARE SOME MORE
PROBLEMS AND PITFALLS
OF THOSE CHOICES?

Once the employee is non-exempt, all work hours must be recorded.

- Time spent working from home must be counted.
- Time spent checking company emails, texting on work matters, answering calls, or doing business on company smartphones or home computers must be counted

WHAT ARE OTHER
PROBLEMS AND PITFALLS
OF THOSE CHOICES?

**If you convert to hourly pay,
or nonexempt salary, how
do you control costs?**

- Use the time before December 1 to measure how many hours your exempt workers below \$47,476 actually work
- Cut hours on December 1?
- Set a new hourly rate so pay works out the same?

EXAMPLE:

- A salaried administrative person now earns \$36,000 per year (or \$692.31 per week) and works 45 hours per week.
- Effective hourly rate now is \$15.38 for 45 hrs.
- 5 hours OT = 7.5 hours pay.
- To pay the same on an hourly basis with overtime for the same work, the rate would be \$14.575. (47.5 hours x 14.575 = 692.31)

Do other changes come with changing workers from salaried to hourly?

- Morale?
- Sense of identity with management?
- Different benefit levels?
- Two categories performing the same job, one hourly and one salaried?
- Time tracking methods?
- Company smartphones and remote access?
- Overall pay structure impact?

Special situations: Education

- A special alternative minimum salary level is provided for certain academic administrative personnel in educational institutions
- It covers persons who run the institution or who meet with students outside the classroom (advisers, counselors, etc.)
- The minimum level is the entrance salary for teachers at their institution

Is Maine law also affected?

- Yes
- The Maine statutory overtime exemption is tied to the federal salary rate
- So even small employers not within the coverage of the Fair Labor Standards Act will also be affected by the salary level increase.

More information?

- See the USDOL website, www.dol.gov
- A well-funded public relations effort
- The DOL argues that this is good because
 - Either employers will raise salaries
 - Or have to pay for all overtime worked
 - Or cut hours and spread out the work which will create more jobs, and give each worker more free time

Please ask questions?

Thank you for your attention!

fmcguire@rudmanwinchell.com

207.992.4447 or 207.947.4501

RUDMAN • WINCHELL

COUNSELORS AT LAW