

# Salary Threshold Issues

Presented by:

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## Final Rule

- Comment period ended November 7.
  - Find comments on Federal Register
- DoL will consider comments
  - How long – don't know, based on 2016 & 2019 proposals 8 to 10 months
- Final Rule will be published
  - Effective date at least 30 days from the publication date
- Likely industry groups will file lawsuits and implementation of the Final Rule will be stayed

## Final Rule

### What happened in 2016?

- Successful challenge
  - Rule was invalid
  - Increase so large it supplanted the duties tests. Increase was 40<sup>th</sup> percentile of earnings in lowest wage census and region
- Also automatic 3 year increase unlawful
- [proposed pending has saving provision, automatic increase can be taken out]**

continuation

- What happened in 2019?
  1. Change was not so drastic 20<sup>th</sup> percentile vs. 40<sup>th</sup> percentile in 2016
  2. Contained special salary level for the territories. Guam salary level test remained at \$455 wk. or \$23,660 per year
  3. Challenged in Court – DOL prevailed

# Salary Test Increases

- Raises the salary level requirement for Executive, Administrative and Professionals from the current rate of \$455 per week (\$23,660 per year) to **\$1,059 per week** (\$55,068 per year)

This represents the 40th percentile of weekly earnings of full-time salaried workers in the United States' lowest wage census region.

- Raises the salary level requirement for Highly Compensated Employees from the current rate of \$107,432 per year level to **\$143,988 per year**

This represents the 90th percentile of weekly earnings of full-time salaried workers nationally.

# Inclusion of Bonuses and Commissions

- The DOL will continue to allow nondiscretionary bonuses and incentive payments (including commissions) to count toward the salary level requirement for Executive, Administrative and Professionals
- Examples:
  - Retention bonuses
  - Commission payments based on a fixed formula

## Inclusion of Bonuses and Commissions cont.

- Can only count toward 10% of the standard weekly salary
- Must be paid at least quarterly
- Allows for a quarterly "catch-up" payment within one pay period of the end of a quarter
- This does not:
  - Allow discretionary bonuses to count toward the salary level requirement
  - Change the Highly Compensated Employees requirement to receive at least the salary level requirement each pay period

# Automatic Updates of Salary Threshold

- Salary and compensation thresholds will automatically update every 3 years
  - In 2016 this provision was not allowed by the Court. Proposed rule has a savings provision – this provision can be removed



# Not Changed

- Standard duties test
- No quantitative limitation on the performance of nonexempt work
- Permissible v. impermissible deductions (For example, deductions for personal, full-day absences for reasons other than sickness or disability, or disciplinary suspensions for infraction of *major* safety rules.)

# Compliance Steps

- Either:
  1. Increase pay for exempt workers to meet the new salary level requirement; OR
  2. Reclassify employees as nonexempt

# Suggested Steps

- Identify which employees the regulatory changes will affect
  - Pull your compensation data
  - Identify all exempt employees paid below \$1,059 per week
  - request employees or immediate supervisors to provide estimates of hours worked, or track time
- Assess employees' workloads
- Review organizational charts to see where affected employees fall in comparison to similar jobs in other departments

## Steps Cont.

- Consider operations and budget
  - Will you increase salaries to meet the new threshold?
  - Will you convert to hourly?
- What will be your estimated overtime wages?
- Will you hire additional employees to reduce overtime?
- Will you adjust employee workloads and/or transfer duties?
- Will you reduce equivalent hourly pay so employees' hourly wages plus overtime still equals their current salaries?

## Steps Cont.

- Consider whether employees will be subject to different fringe benefit plans as nonexempt employees
- Consider morale and ripple effects
  - Analyze impact across departments
  - Wage compression
  - Analyze pay differentials between affected employees and their superiors
- Consider whether changes could make you more vulnerable to union organizing

## Steps Cont.

- Communicate possible changes to employees
  - Designate a person to communicate the plan to employees
  - Plan out the communication/reasoning:
    - "This is required by law"
    - "This is not a demotion"
    - "This is the company's effort to maintain the employee's pay"
- Analyze your bonus/commission structures
  - Do you need to/want to adjust discretionary to nondiscretionary bonuses?
  - analyze nondiscretionary bonuses and commissions on a quarterly basis

## Steps Cont.

- Review, edit and disseminate employee handbooks and policies
  - Overtime
  - Off-the-clock work
  - Meal and rest breaks
  - Travel time
  - Mobile devices
  - Pre/post-shift activities
  - On-call policies
  - Guam limitations on shift work (must be completed within 14 hours)
- Ensure your timekeeping methods are up to date and you are accurately tracking hours

**OPTION 1: POSITION REMAINS EXEMPT. SALARY IS INCREASED TO \$1,059 PER WEEK OR MORE.**

Pros:

- This method is efficient when current salary is near \$1,059 per week.
- Likely no morale issues will arise with affected employees.
- There will be no loss of employee benefits eligibility.

Cons:

- There may be budget constraints, including increased benefits costs to employer, such as life insurance premiums, long-term disability, etc.
- This method may cause salary compression issues.
- There may be morale issues with employees who do not receive an increase.



**OPTION 2: POSITION CONVERTS TO NONEXEMPT, AND OVERTIME IS PAID.  
FEDERAL AND STATE MINIMUM-WAGE RATES MUST BE MET.**

**Strategy 1: Compute hourly rate on a 40-hour workweek by dividing current total annual compensation by 2080.** This rate pays the equivalent of the current salary when only 40 hours are regularly worked per week (40 hours x 52 weeks = 2080 hours). If your standard workweek is less than 40 hours, multiply your workweek hours by 52.

**Pros:**

- If little or no overtime is worked, this method maintains prior salary amount with a slight potential increase in pay due to overtime.
- Employee pay is not reduced.
- Salary compression is not an issue.

**Cons:**

- Frequent overtime will increase pay by possible more than if the position remained exempt and the salary was increased.
- There would be a possible loss of benefits eligibility due to nonexempt status.

...continuation

**Strategy 2: Compute hourly rate on total hours worked per week, including overtime.** Divide the current total annual compensation by the total annual hours worked, counting each overtime hour as 1.5 hours (total compensation / (2080 + (annual overtime hours x 1.5))). This rate pays the equivalent of the current salary when all expected overtime is worked, less than the current salary if less overtime is worked, and more than the current salary if more than expected overtime is worked

### Pros:

- If expected overtime is worked, this method maintains the prior salary amount, including overtime worked.
- Even if overtime is increased, pay may be less than the employee would earn if the position remained exempt and the salary was increased.

### Cons:

- If less than expected overtime is worked, pay will be less than the employee's prior salary.
- Morale issues may develop as affected employees realize they need to work overtime or receive less pay.
- There may be loss of benefits eligibility due to nonexempt status.

**Strategy 3: Pay a salary plus overtime.** A nonexempt employee's pay may be expressed as a weekly salary, but hours must be tracked and overtime must still be paid at 1.5 times the equivalent hourly rate. Because of this, errors in pay may be more likely, and in some cases, deductions for absences may not be allowed.

Options include:

- **Pay the same as the current salary.** This is the same concept and has the same pros and cons as Strategy 1.
- **Pay less than the current salary to account for overtime.** This is the same concept and has the same pros and cons as Strategy 2.

# Example

- Joe is an exempt administrator who is paid an annual salary of \$30,000 per year (Guam \$576.92 per week).
- On average, Joe works 45 hours a week (2340/year).
- Joe's Calculation:
  - If Joe's salary is raised to meet the new minimum threshold of \$1,059 per week (\$55,068/year) the employer will have an additional cost of \$482.02/week, or \$25,068.16/year.

## Joe cont.

- If Joe is converted to hourly:
  - Joe's employer will be required to pay 260 OT hours
  - If Joe is converted to hourly at a rate of \$13.00, employer will pay:  
\$5,070 in overtime wages per year ((5 hr x \$19.50) x 52 weeks),  
\$27,040 in regular wages ((40 hr x \$13.00) x 52 weeks)
- Total Wages = \$32,110/year (\$617.50/week)
- Additional cost to employer: \$2,110/year (\$40.58/week)

## Example 2

- Jane is an exempt professional who is paid an annual salary of \$45,000 per year (\$865.38 per week).
- On average, Jane works 50 hours a week.
- Jane's Calculation:
  - If Jane's salary is raised to meet the minimum threshold to \$1,059 per week (\$55,068/year) the employer will have an additional cost of \$194/week, or \$10,088/year

## Jane Cont.

- Jane's Calculation:
  - If Jane is converted to hourly at \$21.18: \$44,054.40 in regular wages ((40 hrs x \$21.18) x 52 weeks), \$13,260 in overtime wages per year ((10 hrs x \$31.77) x 52 weeks)
- Total wages = \$57,314.40/year (\$1,102.20/week)
- Additional cost to employer: \$8,694.40/year
- (\$167.20/week)

# Consider using this as an opportunity...

Review the standard duties of affected employees. The duties tests remain unchanged under the Final Rule.

Excellent resources to help you work through this process are:  
[www.shrm.org](http://www.shrm.org)., and [www.dol.gov /whd](http://www.dol.gov/whd)



**Questions or comments?**

Thank you for your interest and attention!