

# NEW EXEMPTION RULES FINALLY ARRIVE: EMPLOYERS SHOULD PREPARE FOR THE IMPACT

Insights  
May 18, 2016

The U.S. Labor Department (USDOL) has finally released the anxiously awaited revised regulations affecting certain kinds of employees who may be treated as exempt from the federal Fair Labor Standards Act's (FLSA) overtime and minimum-wage requirements. These will be published officially on May 23, 2016.

If you currently consider any of your employees to be exempt "white collar" employees, you might have to make some sweeping changes.

## Executive Summary

In brief, the following changes will be made in USDOL's definitions of executive, administrative, professional, computer-employee, and highly compensated exemptions under the FLSA's Section 13(a)(1):

- The minimum salary threshold is increasing to \$913 per week, which annualizes to \$47,476 (up from \$455 per week, or \$23,660 per year). USDOL says that this figure is set at the 40th percentile of data representing what it calls "earnings of full-time salaried workers" in the lowest-wage Census region (currently the South).

## Service Focus

### Wage and Hour

- This amount will now be “updated” every three years (meaning that it will likely increase with each “update”), beginning on January 1, 2020. USDOL will announce these changes 150 days in advance.
- Employers will be able to satisfy up to 10% of this new threshold through nondiscretionary bonuses and other incentive payments, including commissions, provided that the payments are made at least quarterly. This crediting will not be permitted as to the *salaries* paid to employees treated as exempt “highly compensated” ones.
- The total-annual-compensation threshold for the “highly compensated employee” exemption will increase from \$100,000 to \$134,004 (which will also be “updated” every three years). USDOL says that this figure is set at the 90th percentile of data representing what it calls “earnings of full-time salaried workers” nationally.

These rules will become effective on December 1, 2016, which is considerably later than had been thought. Unless this is postponed somehow, by that time you must have done what is necessary to continue to rely upon one or more of these exemptions (or another exemption) as to each affected employee, or you must forgo exempt status as to any employee who no longer satisfies all of the requirements.

## THE BOTTOM LINE

1. Essentially, USDOL is doubling the current salary threshold. This is likely intended to both reduce the proportion of exempt workers sharply while increasing the compensation of many who will remain exempt, rather than engaging in the fundamentally definitional process called for under the FLSA. As we have [said](#) previously, manipulating exemption requirements to “give employees a raise” has never been an authorized or legitimate pursuit.
2. For the first time in these exemptions’ more-than-75-year history, USDOL will publish what amounts to

an automatic “update” to the minimum salary threshold. This departs from the prior USDOL practice of engaging in what should instead ultimately be a qualitative evaluation that also takes into account a variety of non-numerical considerations.

3. USDOL did not change any of the exemptions’ requirements as they relate to the kinds or amounts of work necessary to sustain exempt status (commonly known as the “duties test”). Of course, USDOL had asked for comments directed to whether there should be a strict more-than-50% requirement for exempt work. The agency apparently decided that this was not necessary in light of the fact that “the number of workers for whom employers must apply the duties test is reduced” by virtue of the salary increase alone.

### **What Should You Do Now?**

Some in Congress are still considering action aimed at stopping these changes, and it is possible that lawsuits will be filed with the same goal. While one or more of these challenges may be successful, you should assume for the time being that the new requirements will take effect as scheduled.

Right now, you should be:

- analyzing whether the requirements for the “white collar” exemptions you have been relying upon are met;
- evaluating what might be changed about one or more jobs so that the incumbents may be treated as exempt in the future;
- considering the possible application of alternative FLSA exemptions; and
- developing FLSA-compliant pay plans for employees who have been treated as exempt but who no longer will be.

USDOL has provided extensive commentary explaining its rationale for the revised provisions. We are continuing to study the final regulations and accompanying discussion carefully and will offer further considered views on our [Wage And Hour Laws Blog](#) in the coming days and weeks.

If you have any questions about these new regulations or how they might affect your organization, or to obtain complimentary copies of materials designed to assist employers in the steps they should now be taking, please contact your Fisher Phillips attorney, or any member of our Wage & Hour Practice Group.

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*This Legal Alert provides an overview of new federal regulations. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*