DOL Overtime Rule Basics for Members

WORKING for YOU.

Big "I" member agencies and state associations, along with all other employers, have until January 1, 2020, to comply with the new overtime rule released earlier this month by the U.S. Department of Labor (DOL). The DOL estimates that 1.3 million employees will be affected by the new rule. This means additional employees in your agency may need to be paid overtime.

On September 24, 2019, the DOL released its final rule changing the salary threshold at which employees can qualify for "white collar" and "highly compensated employee" exemptions from overtime and minimum wage requirements. The new rule does not impact employees who are currently considered "non-exempt" (i.e., legally required to overtime and minimum wage pay).

The federal law that regulates employment issues for most employees is the Fair Labor Standards Act (FLSA). The FLSA establishes minimum wage (currently $7.25/ hour), overtime pay, recordkeeping, and youth employment standards covering employees in the private sector and in federal, state, and local governments. Overtime pay at one and one-half times the regular rate of pay is required after 40 hours of work in a workweek.

WHAT DO I NEED TO DO BEFORE JAN. 1, 2020?

Employee salaries and overtime eligibility status should be reviewed and adjusted, as needed, to comply with the new rule. Below you will find more details of the changes to the overtime rule.

Key Changes of the New Rule

1. The new regulation raises the annual salary threshold for which an employee can be considered exempt (i.e., overtime pay is not legally required) under the administrative, executive, professional, outside sales or computer "white collar" exemptions from $455 per week or $23,660 annual standard salary for a full-time employee to $684 per week or $35,568 annual standard salary for a full-time employee. The standard salary threshold only applies to an employee for which the employer wishes to claim, and who otherwise qualifies for, one of the above-named exemptions.
2. It allows nondiscretionary bonuses and incentive payments (including commissions) to be used to satisfy up to 10% of the $35,568 salary threshold, effective January 1, 2020. This 10% cap only applies to calculating the minimum salary threshold for the relevant "white collar" exemptions.
3. The rule raises the salary threshold for "highly compensated employees" (HCEs) from $100,000 to $107,432 without regard to the 10% cap on the payment of nondiscretionary bonuses and incentive payments as long as a weekly salary of $684 is paid.

WHAT IF THE RULE CONFLICTS WITH THE LABOR LAWS IN MY STATE?

Please be mindful that states also have their own employment laws that may impose additional or different requirements beyond the federal requirements, which are not covered in this document.

HOW ARE BONUSES AND COMMISSIONS TREATED UNDER THE RULE FOR WHITE COLLAR EXEMPTIONS?

The DOL permits employers to use nondiscretionary bonuses and incentive payments to satisfy up to 10 percent of the standard salary level. For employers to credit nondiscretionary bonuses and incentive payments toward a portion of the standard salary level test, they must make such payments on an annual or more frequent basis. Such bonuses include, for example, nondiscretionary incentive bonuses tied to productivity or profitability (e.g., a bonus based on the specified percentage of the profits generated by a business in the prior year).

WHAT IF BONUSES OR COMMISSIONS DO NOT PUSH AN EMPLOYEE PAST THE STANDARD SALARY THRESHOLD?

If an employee does not earn enough in nondiscretionary bonus or incentive payments in a given year (52-week period) to retain his or her exempt status, the rule permits the employer to make a "catch-up" payment within one pay period of the end of the 52-week period. This payment may be up to 10 percent of the total standard salary level for the preceding 52-week period. Any such catch-up payment will count only toward the prior year's salary amount and not toward the salary amount in the year in which it is paid.

DOES THE RULE CHANGE HOW EMPLOYERS MAY USE BONUSES FOR HCEs?

The DOL has not made changes to how employers may use bonuses to meet the salary level component of the HCE test. To claim the HCE exemption under the final rule, employers must pay workers at least the standard weekly salary level of $684 per week on a salary or fee basis, while the remainder of the total annual compensation may include commissions, nondiscretionary bonuses, and other nondiscretionary compensation.

ARE THERE ANY OVERTIME EXEMPTIONS FOR EMPLOYEES EARNING LESS THAN THE STANDARD SALARY?

No, except for outside sales employees, any employee who earns less than $35,568 annually cannot be classified as an exempt employee and must be paid overtime for all hours worked over a 40-hour workweek.

CAN AN EMPLOYEE WHO EARNS MORE THAN THE NEW STANDARD SALARY STILL BE ENTITLED TO OVERTIME?

If an employee earns a salary greater than $35,568 on an annual basis he or she is still legally entitled to receive paid overtime for all hours worked over a 40-hour workweek unless the employee qualifies for one of the "white collar" exemptions by satisfying the "duties test" for that individual exemption.

WHAT ARE THE "DUTIES TESTS" AND HOW DO I ENSURE THEY ARE MET?

The "duties tests" for executive, administrative and outside sales exemptions (those exemptions most common for insurance agencies) are outlined below. It is important to have clear job descriptions that are regularly reviewed against actual job duties for all employees for which the employer is claiming exempt status. The classification of any individual employee is on a case-by-case basis depending on that employee's specific job duties, state, and federal law. Employee classification is not determined by job title alone; it is a fact specific inquiry.

Exemptions

All the following tests must be met for each exemption to apply:

Executive

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $684 per week;
- 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.

Administrative

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $684 per week;
- 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.

Outside Sales

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

WHEN WOULD THE HCE EXEMPTION APPLY?

The HCE test combines a high compensation requirement with a less-stringent duties test. Highly compensated employees performing office or non-manual work and paid total annual compensation of $107,432 or more (which must include at least $684 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.