

The Fair Labor Standards Act: What you need to know before December 1, 2016

Historic changes to the Fair Labor Standards Act's ("FLSA") white collar exemptions take effect December 1, 2016, and are estimated to affect 4.2 million workers immediately. It is crucial employers are prepared for these changes.

The FLSA requires overtime pay at a rate of one and one-half for hours worked in excess of forty per week. Some white collar employees are exempt from the FLSA's overtime requirement, receiving the same pay regardless of the number of hours worked. However, in 2014, President Obama instructed the United States Secretary of Labor to suggest revisions to the definitions of the white collar exemptions. The rulemaking process has taken about two years, and employers must comply with significant changes starting December 1, 2016, or risk noncompliance and possible wage and hour litigation.

FLSA's white collar exemption exempts executive, administrative, professional, outside sales, and computer system employees from the FLSA's minimum wage and overtime requirements. These employees generally receive more monetary and non-monetary benefits than blue collar and lower level office workers and are less likely to need the FLSA's minimum wage and overtime protections.

To qualify for the white collar exemption, employers must show an exempt employee satisfies three tests:

- The salary basis test: An employee meets the salary basis test if he receives predetermined, fixed pay not subject to deviation because of variations in the quality or quantity of the employee's work.
- The salary level test: The salary level test is straightforward and met if the employee receives a salary no less than a minimum specified amount. The new rules significantly increase the minimum salary level requirement.
- The duties test: The employee's primary job duties must involve executive, administrative, or professional duties, as defined in the regulations.

Since 2004, exempt white collar employees received at least a weekly salary of \$455, or a \$23,660 annual salary.

Today, that annual salary is below the poverty line for a family of four. The new FLSA overtime rules modernize the regulations and significantly increase the salary threshold. Beginning December 1, 2016, the new minimum salary level for white collar employees will be \$913 per week, or \$47,476 annually. Additionally, the new regulations provide for automatic updates to the salary level every three years.

The new rule allows employers to satisfy a portion of the salary level with remuneration from earnings other than ordinary wages. Employers:

- Can satisfy up to ten percent of the standard salary level with nondiscretionary bonuses, incentive payments, and commissions. However, employers must make such payments to employees at least every quarter.
- May make a "catch-up" payment to account for a salary shortfall if a white collar employee fails to earn sufficient nondiscretionary bonuses, incentive payments, or commissions in a quarter to retain the exemption. Employers have one pay period to make the "catch-up" payment. If the employer chooses not to make a catch-up payment, the employee loses the exemption and is entitled to receive overtime pay for overtime hours worked during the quarter.

Employers who have white collar employees must be cognizant of these important changes and their options come December 1.



Kellen Scott is a senior associate in the firm's Labor and Employment section. Mr. Scott represents employers before state and federal administrative agencies and courts. Additionally, Mr. Scott also advises clients on a variety of pre-dispute employment issues, including internal investigations, policies, handbooks, employee classification, and restrictive covenants.

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