

# Legal Update

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## DEPARTMENT OF LABOR ISSUES NEW OVERTIME RULE

By Jon Vegosen and Cecilia M. Suh

The U.S. Department of Labor (DOL) recently published its [Final Rule](#) updating the federal Fair Labor Standards Act (FLSA) regulations governing the exemption from minimum wage and overtime pay for executive, administrative, and professional (EAP) employees. The DOL estimates that 4.2 million currently exempt U.S. workers will be affected by the updates, and Illinois, California, Florida, New York, and Texas will have the largest numbers of affected workers. Consequently, employers will need to take steps to prepare for the new regulations, which go into effect on December 1, 2016.

### Overview of the FLSA

The FLSA guarantees a minimum wage for all hours worked and limits to 40 hours per week the number of hours an employee can work without overtime compensation. In addition to other exemptions, the FLSA excludes from these minimum wage and overtime pay protections employees who are employed in a bona fide executive, administrative, or professional capacity (EAP). The EAP exemption relies on the theory that these types of workers typically earn salaries well above the minimum wage and other employment benefits, setting them apart from those who should be entitled to overtime pay.

To qualify for an exemption from the FLSA's minimum wage and overtime pay requirements, an EAP employee generally must be salaried and paid at least a certain minimum weekly salary level (currently \$455 per week). The employee must also satisfy the DOL's job duties test, and the burden is on the employer to demonstrate that the employee primarily performs executive, administrative, or professional duties. Highly compensated employees (HCEs), or employees who earn more than a certain total annual compensation level (currently \$100,000 per year), only have to satisfy a very minimal duties test in order to be exempt. The FLSA also includes [exemptions](#) for certain other categories of employees such as teachers, outside sales employees, and computer professionals.

### Changes to the FLSA Effective December 1, 2016

The Final Rule increases the standard salary level for exempt EAPs to \$913 per week (\$47,476 per year). This new salary level is equal to the 40<sup>th</sup> percentile of weekly earnings for full-time non-hourly workers in the lowest-wage Census Region (currently the South). As a result, white collar employees who earn less than \$913 per week generally will no longer qualify for the EAP exemption and therefore will be eligible for overtime, irrespective of their job duties. The Final Rule also increases the annual compensation requirement for HCEs to \$134,004 per year (*i.e.*, the 90<sup>th</sup> percentile of full-time non-hourly workers nationally). The Final Rule includes mechanisms for automatically updating the standard salary and annual compensation levels based on these fixed percentiles every three years.

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In addition, the Final Rule now allows employers to count nondiscretionary bonuses, commissions, and incentive payments toward up to 10 percent of the new standard salary level, provided that these types of compensation are paid on a quarterly or more frequent basis. In other words, an employer must still pay an exempt EAP employee on a salary basis at least 90 percent of the standard salary level for each pay period. Notably, the Final Rule does not include any changes to the DOL’s job duties tests.

For ease of reference, a chart summarizing the new changes is included below:

### Chart Summarizing Major Changes under the DOL’s Final Rule

	Current DOL Regulations	New Rule Effective December 1, 2016
<b>Minimum Standard Salary Level to Qualify for Exempt EAP Status</b>	<b>\$455 per week</b> (\$23,660 per year for a full-year worker)	<b>\$913 per week</b> (\$47,476 per year for a full-year worker)
<b>Minimum Total Annual Compensation Level for Exempt HCE Status</b>	<b>\$100,000 per year</b>	<b>\$134,004 per year</b>
<b>Automatic Updates to the Minimum Standard Salary &amp; Annual Compensation Levels</b>	<b>None</b>	<b>Every 3 years</b> (beginning on January 1, 2020)
<b>Bonuses</b>	<b>Non-discretionary bonuses and commissions do not count toward the standard salary requirement</b>	<b>Up to 10% of the standard salary requirement can come from non-discretionary bonuses, incentive payments, and commissions, if they are paid at least quarterly</b>

### Suggestions for Employers

Employers should consider whether to increase the salaries of their currently exempt EAP employees to at least the new salary level to retain their exempt status or pay overtime to employees who will lose their exemptions on December 1, 2016. Employers may also need to create and adopt strategic plans to reduce overtime costs or increase staffing. Consequently, employers should:

1. compile a list of their currently exempt employees and their annual salaries;
2. identify those employees who already earn close to the new minimum salary (\$47,476 for EAPs and \$134,004 for HCEs);
3. assess whether any exempt employees will need to be reclassified and converted to non-exempt hourly employees who will become newly eligible for overtime, which employees may view as a “step down” and may negatively impact employee morale;
4. review their labor budgets to see if there is room: (a) for pay raises for exempt employees who already earn close to the new minimum salary in order to keep their exemptions, and (b) to cover new overtime payments to other employees who will lose their exempt status;
5. for exempt employees whose compensation packages exceed the new standard salary level, consider adjusting salaries or nondiscretionary bonuses pursuant to the new 10% bonus rule;



6. consider whether to lower employees' hourly rates or increase current staffing levels to reduce future overtime costs or to develop strategies for reducing or eliminating overtime hours;
7. consult with legal counsel regarding updates to policies and procedures regarding possible off-the-clock work that may trigger new claims for overtime pay (e.g., recordkeeping practices for hours worked and employee handbook policies governing access to employer email, documents, and electronic equipment; work-related travel; or telecommuting or working from home); and
8. prepare a communication plan in order to disseminate the right messaging about any changes that will need to be made.

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