

United States Department of Labor

Wage and Hour Division

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1. Q. What is the purpose of the "Overtime" Final Rule?

This Final Rule updates the regulations for determining whether white collar salaried employees are exempt from the Fair Labor Standards Act's minimum wage and overtime pay protections. They are exempt if they are employed in a bona fide [executive, administrative, or professional](#) capacity, as those terms are defined in the Department of Labor's regulations at [29 CFR part 541](#). This exemption from the FLSA is sometimes referred to as the "white collar" or "EAP" exemption.

2. Q. What is "overtime"?

Unless specifically exempted, employees covered by the FLSA must receive pay for hours worked in excess of 40 in a workweek at a rate not less than one and one-half their regular rates of pay. This is referred to as "overtime" pay.

3. Q. What determines if an employee falls within one of the white collar exemptions?

To qualify for exemption, a white collar employee generally must:

1. be salaried, meaning that they are paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test");
2. be paid more than a specified weekly salary level, which is \$913 per week (the equivalent of \$47,476 annually for a full-year worker) under this Final Rule (the "salary level test"); and
3. primarily perform executive, administrative, or professional duties, as defined in the Department's regulations (the "duties test").

Certain employees are not subject to either the salary basis or salary level tests (for example, doctors, teachers, and lawyers). The Department's regulations also provide an exemption for certain highly compensated employees ("HCE") who earn above a higher total annual compensation level (\$134,004 under this Final Rule) and satisfy a minimal duties test.

4. Q. Why is the Department revising its overtime regulations for white collar workers now?

On March 13, 2014, President Obama signed a Presidential Memorandum directing the Department to update and modernize the regulations defining which white collar workers are protected by the FLSA's minimum wage and overtime standards. The salary level test is supposed to help identify salaried workers who are entitled to overtime pay when they work long hours. The current salary level is outdated and no longer does its job of helping to separate salaried white collar employees who should get overtime pay for working extra hours from those who should be exempt. Through this Final Rule, the Department is updating these regulations to ensure that the FLSA's intended overtime protections are fully implemented, and to simplify the identification of overtime-eligible workers, thus making the exemption easier for employers and workers to understand and apply. These revisions will also help ensure that in the future the regulations continue to appropriately separate workers who are entitled to overtime protections and those who may be exempt.

5. Q. When did the Department last revise its overtime regulations for white collar workers?

The Department last updated the white collar overtime regulations in 2004. That update set the standard salary level at \$455 per week (\$23,660 annually for a full-year worker).

6. Q. What are the significant changes to the overtime regulations for white collar salaried workers?

To restore the effectiveness of the salary level test, the Department is setting the new standard salary level equal to the 40th percentile of weekly earnings for full-time salaried workers in the lowest-wage Census Region, currently the South. The Final Rule increases the standard salary level from \$455 per week (\$23,660 for a full-year worker) to \$913 per week (\$47,476 for a full-year worker).

In order to prevent the salary level requirements from again becoming outdated and ineffective, the Department is establishing mechanisms for automatically updating the salary and compensation levels every three years to maintain them at the levels set in this rulemaking.

Finally, for the first time, employers will be able to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level, provided these payments are made on a quarterly or more frequent basis.

The Department is also setting the annual compensation level for certain [HCEs](#) equal to the annualized value of the 90th percentile of earnings for full-time salaried workers nationally (\$134,004).

7. Q. How does the final rule differ from the NPRM?

After considering the public comments, the Department made several key changes to the proposed rule.

- First, the Final Rule sets the standard salary level equal to the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, rather than based on national data as proposed. The Department modified the standard salary level in response to commenters' concerns that the proposed rule did not adequately account for the lower salaries paid in certain regions.
- Second, the Final Rule provides for automatic updates of the salary levels every three years rather than for annual updates as proposed. The Department made this change in response to commenters' concerns about the burdens associated with updating the salary level on an annual basis.
- Third, the Final Rule permits employers to count nondiscretionary bonuses, incentives, and commissions toward up to 10 percent of the required salary level for the standard exemption, so long as employers pay those amounts on a quarterly or more frequent basis. In the proposal, the Department said it was considering permitting nondiscretionary bonuses, incentives, and commissions to count toward 10 percent of the salary level, but only if employers paid them on a monthly or more frequent basis. The Final Rule also allows employers to make a "catch-up" payment at the end of each quarter.

8. Q. How do the current regulations, proposed rule and final rule compare?

	Current regulations (2004 until effective date of Final Rule, 2016)	NPRM	Final Rule
Salary Level	\$455 weekly	\$970 weekly (if finalized as proposed) 40th percentile of full-time salaried workers nationally.	\$913 weekly 40th percentile of full-time salaried workers in the lowest-wage Census region (currently the South)
HCE Total Annual Compensation Level	\$100,000 annually	\$122,148 90th percentile of full-time salaried workers nationally	\$134,004 90th percentile of full-time salaried workers nationally
Automatic Adjusting	None	Annually, with requests for comment on a CPI or percentile basis	Every 3 years, maintaining the standard salary level at the 40th percentile of full-time salaried workers in the lowest-wage Census region, and the HCE total annual compensation level at the 90th percentile of full-time salaried workers nationally.
Bonuses	No provision to count nondiscretionary bonuses and commissions toward the standard salary level	Request for comment on counting nondiscretionary bonuses and commissions toward standard salary level	Up to 10% of standard salary level can come from non-discretionary bonuses, incentive payments, and commissions, paid at least quarterly.
Standard Duties Test	See WHD Fact Sheet #17A for a description of EAP duties.	No specific changes proposed to the standard duties test. Request for comment on whether the duties tests are working as intended.	No changes to the standard duties test.

9. Q. How will employers implement the updated salary level requirement established in this Final Rule?

Employers have a range of options for responding to the updated standard salary level. For each affected employee newly entitled to overtime pay, employers may:

- increase the salary of an employee who meets the duties test to at least the new salary level to retain his or her exempt status;
- pay an overtime premium of one and a half times the employee's regular rate of pay for any overtime hours worked;

- reduce or eliminate overtime hours;
- reduce the amount of pay allocated to base salary (provided that the employee still earns at least the applicable hourly minimum wage) and add pay to account for overtime for hours worked over 40 in the workweek, to hold total weekly pay constant; or
- use some combination of these responses.

The circumstances of each affected employee will likely impact how employers respond to this Final Rule. For example, employers may be more likely to give raises to employees who regularly work overtime and earn slightly below the new standard salary level, in order to maintain their overtime-exempt status so that the employer does not have to pay the overtime premium. For employees who rarely or almost never work overtime hours, employers may simply choose to pay the overtime premium whenever necessary. The Department accounted for these (and other) possible employer responses in estimating the likely costs, benefits, and transfers of the Final Rule.

Nothing in the rule requires employers to change employees' pay to hourly from salaried, even if the employees' classification changes from exempt to overtime eligible. Employers may choose options #2-#4 above while continuing to pay newly overtime eligible employees on a salaried basis.

10. Q. When will these changes take effect?

The effective date of this Final Rule is December 1, 2016. On that day, the new standard salary level (\$913 per week or \$47,476 per year) and HCE total compensation requirement (\$134,004 per year) will take effect. Future automatic updates to these thresholds will occur every three years, beginning on January 1, 2020.

11. Q. Is the Department making any adjustments to the standard duties tests?

The Department is not making any changes to the standard duties test. The Department believes that the increase to the standard salary level, coupled with automatic updating in the future, will address concerns that some workers who satisfy the standard duties test should be entitled to overtime pay because they are performing substantial amounts of overtime-eligible work (e.g., operating cash registers, stocking shelves, etc.). The Department also heard concerns from many employers, both in pre-rulemaking outreach and in comments on the proposal, that changes to the standard duties test would be disruptive to employers.

GENERAL

1. Q. Who is covered by the FLSA? Are employees of small businesses covered?

The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards covering employees in the private sector and in Federal, State, and local governments. Covered nonexempt workers are entitled to a federal minimum wage of not less than \$7.25 per hour currently. Overtime pay at a rate not less than one and one-half times the regular rate of pay is required after 40 hours of work in a workweek.

Generally, employees of enterprises that have an annual gross volume of sales made or business done of \$500,000 or more are covered by the FLSA. In addition, employees of certain entities are covered by the FLSA regardless of the amount of gross volume of sales or business done. These entities include: hospitals; businesses providing medical or nursing care for residents; schools (whether operated for profit or not for profit); and public agencies.

Even if an employer is not covered on an enterprise-wide basis, employees may be individually covered by the FLSA if their work regularly involves them in commerce between States ("interstate commerce"). The FLSA covers individual workers who are "engaged in commerce or in the production of goods for commerce." For more information on enterprise and individual coverage under the FLSA, see [Fact Sheet 14: Coverage Under the Fair Labor Standards Act \(FLSA\)](#).

2. Q. Is there an exemption for non-profit organizations from either the FLSA or the Department's overtime regulations governing white collar workers?

Neither the FLSA nor the Department's regulations provide an exemption from overtime requirements for non-profit organizations. Thus, the Final Rule may impact non-profit organizations having an annual dollar volume of sales or business done of at least \$500,000, or those with employees individually covered by the FLSA. Non-profit charitable organizations are not covered enterprises under the FLSA unless they engage in ordinary commercial activities that result in a sufficient amount of sales made or business done, such as operating a gift shop or providing veterinary services for a fee. However, employees of employers that are not covered by the FLSA on an enterprise basis may still be entitled to its protections if they are individually engaged in interstate commerce. For more information on enterprise and individual coverage for non-profit organizations, see [Fact Sheet 14A: Non-Profit Organizations and the Fair Labor Standards Act \(FLSA\)](#).

3. Q. Is there an exemption for schools and institutions of higher education from either the FLSA or the Department's overtime regulations governing white collar workers?

Schools and institutions of higher education are generally covered by the FLSA's minimum wage and overtime provisions. Several provisions apply, however, to many employees at these institutions that exempt them from the Final Rule. Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing. "Teachers" include, for example, regular academic teachers, kindergarten or nursery school teachers, teachers of gifted or disabled children, professors, adjunct instructors, teachers of skilled and semi-skilled trades and occupations, home economics teachers, vocal or instrument music teachers, and under certain circumstances, athletic coaches and assistant coaches. Although a preschool may engage in some educational activities, preschool employees whose primary duty is to care for the physical needs of the facility's children would not meet the requirements for the exemption as a bona fide teacher. Generally, the Department views graduate and undergraduate students who are engaged in research under a faculty member's supervision in the course of obtaining a degree to be in an educational relationship and not an employment relationship with the school or with a grantor. As such, the Department will not assert such workers are entitled to overtime. In addition, the administrative personnel that help run higher education institutions and interact with students outside the classroom, such as department heads, academic counselors and advisors, intervention specialists and others with similar responsibilities are subject to a special salary threshold that does not apply to white-collar employees outside of higher education. Instead, they are not eligible for overtime if they are paid at least as much as the entrance salary for teachers at their institution. Finally, public universities or colleges that qualify as a "public agency" under the FLSA may compensate overtime-eligible employees through the use of compensatory time off in lieu of cash overtime premiums.

Postdoctoral researchers in the sciences are not covered by the teaching exemption. These employees are generally considered professional employees and are subject to the salary threshold for exemption from overtime. [DOL has been working closely with NIH](#) and NSF regarding their mutual interest in this area.

4. Q. Who is entitled to the minimum wage and overtime pay under the FLSA?

Most employees [covered](#) by the FLSA must be paid the minimum wage (currently \$7.25 per hour) and at least one and one-half times their regular rate of pay for any hours they work beyond 40 in a workweek. An employer who requires or permits an employee to work overtime is generally required to pay the employee premium pay for such overtime work.

The FLSA does, however, exempt certain kinds of covered employees from the minimum wage and overtime requirements, including bona fide executive, administrative, and professional employees who qualify for the so-called white collar (or "EAP") exemptions.

5. Q. How is overtime pay determined?

Unless covered by an exemption, employees covered by the FLSA must receive overtime pay for all hours worked over 40 in a workweek at a rate not less than one and one-half times their regular rate of pay.

6. Q. What is the interaction between overtime and compensatory time?

The FLSA provides that most covered employees must receive overtime pay for hours worked over 40 in a workweek at a rate not less than one and one-half times their regular rate of pay. The use of compensatory time ("comp time") instead of overtime pay is limited by the FLSA to a public agency that is a state, a political subdivision of a state, or an interstate governmental agency, under specific circumstances. Private employers cannot satisfy their overtime obligations by providing comp time and must pay overtime-eligible employees an overtime premium for hours over 40 in a workweek.

7. Q. What are the white collar exemptions to the FLSA?

The FLSA's white collar exemptions exclude "bona fide" executive, administrative, and professional employees from federal minimum wage and overtime requirements. Certain computer professionals and outside sales employees are also included in the exemption and therefore excluded from the minimum wage and overtime requirements.

8. Q. I'm paid a salary. Am I exempt from overtime pay?

The fact that an employee is paid on a salary basis is not alone sufficient to exempt that employee from the FLSA's minimum wage and overtime requirements. For the EAP exemption to apply, a white collar employee's specific job duties and salary must meet all of the applicable requirements provided in the Department's regulations. Accordingly, the duties test must be met even if the employee's salary exceeds the standard salary level. See [Fact Sheet 17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act \(FLSA\)](#).

9. Q. My job title is manager. Am I exempt from overtime pay?

The fact that an employee is paid on a salary basis is not alone sufficient to exempt that employee from the FLSA's minimum wage and overtime requirements. For the EAP exemption to apply, a white collar employee's specific job duties and salary must meet all of the applicable requirements provided in the Department's regulations. Accordingly, the duties test must be met even if the employee's salary exceeds the standard salary level. See [Fact Sheet 17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act \(FLSA\)](#).

10. Q. Must employees earning below the new level be converted to hourly pay?

No. Nothing in the FLSA or in the regulations governing the white collar exemptions requires employers to pay overtime-eligible employees on an hourly basis. There are millions of salaried employees (white and blue collar alike) who are legally entitled to overtime pay under the current regulations.

11. Q. Will newly overtime-eligible employees have to record their hours on a daily basis or "punch a time clock"?

No. Overtime-eligible workers are not required to punch a time clock. The FLSA requires that employers keep certain records for each nonexempt worker. That's so workers can be sure that they get paid the wages that they earn and are owed. Employers have options for accounting for workers' hours - some of which are very low cost and burden. There is no particular form or order of records required and employers may choose how to record hours worked for overtime-

eligible employees. For example, where an employee works a fixed schedule that rarely varies, the employer may simply keep a record of the schedule and then indicate the changes to the schedule that the worker actually worked when the worker's hours vary from the schedule ("exceptions reporting"). See [Fact Sheet 21: Recordkeeping Requirements under the Fair Labor Standards Act \(FLSA\)](#).

For employees with a flexible schedule, an employer does not need to require an employee to sign in each time she starts and stops work. The employer must keep an accurate record of the number of daily hours worked by the employee, not the specific start and end times. So an employer could allow an employee to just provide the total number of hours she worked each day, including the number of overtime hours, by the end of each pay period.

The Department has material available to help employers figure out what method of recording hours works best for their workforce.

12. Q. Does the FLSA allow for a flexible schedule for overtime eligible employees? Can employers still allow employees to work from home or have flexible schedules?

Yes. The FLSA does not require minimum or maximum hours for a shift, or prohibit split shifts. There is no requirement that a worker must have a predetermined schedule or restrictions on where the work is performed. There is also no restriction on when the work may be performed. See [Fact Sheet 22: Hours Worked Under the FLSA](#).

13. Q. Doesn't having to punch a clock restrict the ability of an employee to work flexibly?

The FLSA does not require workers to punch a clock. Moreover, the recordkeeping requirements of the FLSA do not limit the flexibilities that an employer can afford to its workers. These recordkeeping requirements provide that an employer must keep an accurate record of the total number of hours worked for each day in a pay period to ensure that an employee is fully compensated for all hours worked. An employer does not need to require an employee to record what time they started or finished, only the total number of hours worked each day. There is no particular form or order of records required and employers may choose how to document or record hours worked for overtime-eligible employees. Employers can continue to permit their employees to work flexible hours as long as their total hours each day are accurately recorded.

For example, an overtime eligible employee has a flexible schedule that does not require that the employee work particular hours but requires that she work at least 40 hours per week. In a particular week, the employee might leave early on Monday to go to her daughter's soccer game, finish some work from home late Monday night, stay late on Tuesday and Wednesday to catch up on a priority project, leave on Thursday midafternoon to attend a gym class and then return to work. Her employer does not require her to "clock in or out" each time she comes to work or leaves. The employer must keep an accurate record of the number of daily hours worked by the employee. By the end of each pay period, the employee provides her employer with the total number of hours she worked each day, including the number of her overtime hours.

14. Q. Won't this rule be difficult for employers because they will have to track workers' hours?

No. Almost every employer already has systems and policies in place for dealing with overtime eligible employees so the rule isn't introducing any new obligations for employers or requiring them to adopt new systems. These existing systems can be used for newly overtime-protected employees impacted by the Final Rule.

There is no requirement that employees "punch in" and "punch out." Employers and employees have flexibility in designing systems to make sure appropriate records are kept to track overtime hours. As long as records are complete and accurate as to the number of hours worked each day, employers may use any method they choose.

For an employee who works a fixed schedule, an employer need not track the employee's exact hours worked each day; rather, the employer and employee can agree to a default schedule that reflects daily and weekly hours, and indicate that the employee followed the agreed-upon schedule. Only when the employee deviates from the schedule is the

employer required to record the changes to the hours worked.

For employees with a flexible schedule, an employer does not need to require an employee to sign in each time she starts and stops work. The employer must keep an accurate record of the number of daily hours worked by the employee. So an employer could allow an employee to just provide the total number of hours she worked each day, including the number of overtime hours, by the end of each pay period.

Many employees, both exempt and non-exempt, who maintain flexible work schedules track their daily and weekly hours by simply recording their hours worked for the employer. Wage and Hour has material available to help employers figure out what system works best for them and their employees. See [Fact Sheet 21: Recordkeeping Requirements under the Fair Labor Standards Act \(FLSA\)](#).

15. Q. What if a State has its own overtime laws?

The FLSA provides minimum wage and hour standards, and does not prevent a state from establishing more protective standards. If a State establishes a more protective standard than the provisions of the FLSA, the higher standard applies in that State.

16. Q. How many white collar workers will become overtime-eligible as a result of this Final Rule?

Absent employer action, an estimated 4.2 million white collar workers will become newly entitled to overtime protection because of the increase in the salary level. As a result, many of these workers will be able to work fewer hours, will receive additional compensation when they work overtime, or will receive a salary increase to remain exempt.

17. Q. How does the Final Rule help workers who already are entitled to overtime - and their employers?

The Final Rule will clarify the overtime requirements for 8.9 million currently overtime-eligible salaried employees-5.7 million salaried white collar employees and 3.2 million salaried blue collar employees-because their pay will fall below the new threshold and no assessment of their duties, which can result in misclassification, will be necessary. An estimated 732,000 white collar, salaried workers making between \$455 and \$913 do not meet the duties test and are already overtime, eligible but their employers do not recognize them as such.

18. Q. Where can I review comments submitted in response to the Department's Notice of Proposed Rulemaking (NPRM)?

On July 6, 2015, the Department published an NPRM proposing changes to the regulations governing the FLSA's exemption for white collar workers. We received over 270,000 comments from the public before the comment period closed on September 4, 2015. Those comments are viewable at www.regulations.gov under docket ID WHD-2015-0001.

SALARY LEVEL

1. Q. What are the new salary and compensation levels under this Final Rule?

When this Final Rule takes effect on December 1, 2016, the "standard" salary level will increase to \$913 per week (equivalent to \$47,476 annually for a full-year worker), up from \$455 per week (\$23,660 annually). The total annual compensation requirement for highly compensated employees will increase to \$134,004 per year, up from \$100,000 per year. These levels will update automatically every three years, beginning on January 1, 2020, to maintain the earnings percentiles set in this Final Rule.

2. Q. Why does the 2004 standard salary level need to be increased?

The Department has concluded that the standard salary level of \$455 weekly (\$23,660 annually for a full-year employee) set in 2004 was too low to adequately account for the elimination of the former "long" duties test that ensured that employers could not avoid paying overtime by assigning lower-paid employees a minimal amount of exempt work. Furthermore, the real value of the salary level has fallen significantly since it was set 12 years ago. Today, the annualized equivalent of the standard salary level is below the 2015 poverty threshold for a family of four, making it inconsistent with Congress' intent to exempt only "bona fide" EAP workers, who typically earn salaries well above those of workers they supervise and presumably enjoy other privileges of employment such as above average fringe benefits, greater job security, and better opportunities for advancement.

3. Q. How did the Department determine the new standard salary level?

The Department considered several alternatives for setting the standard salary level to determine which method would work most effectively with the current duties test to effectively distinguish between overtime-eligible white collar employees and those who are bona fide EAP employees. Because the Department decided not to revise the current standard duties test, it set a salary threshold at a level reflective of employees who historically have received overtime protections from those who have not. Specifically, because the current standard duties test is substantially similar to the former "short" duties test, which before 2004 had been associated with a higher salary threshold, the Department looked at the historical ratios between the short and long test salary levels in order to assure that we restored the historical relationship between having a less rigorous duties test and an appropriately high salary threshold. The Department set the standard salary level at the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage Census Region (currently the South), because it was at the low end of the historical range of short test salary ratios and would be appropriate across all areas and industries. The new salary amount will be \$913 per week (which is \$47,476 annually for a full-year worker) when this Final Rule takes effect on December 1, 2016.

4. Q. Why is the Department setting the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers in the lowest wage Census Region and not on national data as proposed?

The Department has concluded that the 40th percentile of weekly earnings for full-time salaried workers in the lowest wage Census Region represents the most appropriate line of demarcation between exempt and overtime-eligible white collar employees. This amount effectively distinguishes between employees who are overtime-protected and those who may meet the duties requirements of the white collar exemption, without necessitating a return to a more rigorous duties test, such as the pre-2004 "long" duties test that imposed a cap on nonexempt work. In the absence of a return to a more rigorous duties test, the salary level needed to be set higher (resulting in the exclusion of more employees performing EAP duties) in order to perform more of the screening function previously performed by the long duties test. Accordingly the salary level set in this Final Rule corrects for the mismatch in the 2004 Final Rule between a low salary level and a less rigorous duties test. In addition, switching to the lowest wage Census region addresses concerns raised by commenters that setting the salary level based on national data, as under the proposed rule, would unduly impact certain industries or certain parts of the country.

5. Q. Why didn't the Department set the salary threshold at a lower amount?

The Department believes that the standard salary level set in this Final Rule effectively distinguishes between employees who are overtime eligible and those who may be bona fide executive, administrative, or professional employees, without necessitating a return to a duties test that sets specific limits on the performance of nonexempt work, like the more detailed "long" duties test that existed before 2004. Setting a salary level significantly below the level proposed by the Department would have required a more rigorous duties test than the current standard duties test. The Department modified the proposed salary level to account for the fact that salaries are lower in some regions than others. By adjusting the Final Rule salary level to focus on the lowest-wage Census Region instead of a national level, we have removed the effect of the three higher earnings Census Regions on the salary level, ensuring the salary level is not driven by earnings in high- or even middle-wage regions of the country. This lower final salary level will also provide relief for employers in low-wage industries.

6. Q. How did the Department determine which Census Region is the lowest wage Census Region?

Census Regions are groupings of states and the District of Columbia that subdivide the United States for the presentation of data by the United States Census Bureau. The current Census Regions are: the Northeast, the Midwest, the South, and the West. The Department determined the "lowest-wage Census Region" by examining the 40th percentile of weekly earnings of full-time salaried workers based on data in each region. The "40th percentile" means that, according to the Census Bureau and Bureau of Labor Statistics' figures, 40 percent of the full-time salaried workers in that region earn at or below that amount.

The lowest wage Census region currently is the South. Based on the fourth quarter of 2015 Current Population Survey data, the 40th percentile for the South Census Region is \$913 per week.

7. Q. How did the Department determine the new total annual compensation requirement for highly compensated employees (HCEs)?

Under this Final Rule, the Department is setting the HCE annual compensation level equal to the annual equivalent of the 90th percentile of earnings for full-time salaried workers nationally (\$134,004). To be exempt as an HCE, an employee must also receive at least the standard salary amount of \$913 per week on a salary or fee basis. Like the new standard salary level, the new HCE total annual compensation level will take effect on December 1, 2016 and will update automatically every three years, beginning on January 1, 2020.

NONDISCRETIONARY BONUSES AND INCENTIVE PAYMENTS**1. Q. May employers use bonuses to satisfy part of the new standard salary level test?**

Yes. The Department is changing the regulations to allow nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary test requirement. 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 quarter). The Department recognizes that some businesses pay significantly larger bonuses; where larger bonuses are paid, however, the amount attributable toward the EAP standard salary level is capped at 10 percent of the required salary amount.

For employers to credit nondiscretionary bonuses and incentive payments (including commissions) toward a portion of the standard salary level test, such payments must be paid on a quarterly or more frequent basis.

2. Q. What's the difference between a discretionary bonus and a nondiscretionary bonus?

Nondiscretionary bonuses and incentive payments (including commissions) are forms of compensation promised to employees to induce them to work more efficiently or to remain with the company. Examples include bonuses for meeting set production goals, retention bonuses, and commission payments based on a fixed formula.

By contrast, discretionary bonuses are those for which the decision to award the bonus and the payment amount is at the employer's sole discretion and not in accordance with any preannounced standards. An example would be an unannounced bonus or spontaneous reward for a specific act.

3. Q. May employers make a catch-up payment in the event that an employee doesn't receive enough in nondiscretionary bonuses and incentive payments (including commissions) in a given quarter to remain exempt?

Yes, if an employee does not earn enough in nondiscretionary bonuses and incentive payments (including commissions) in a given quarter to retain their exempt status the Department permits a "catch-up" payment at the end of the quarter. The employer has one pay period to make up for the shortfall (up to 10 percent of the standard salary level for the preceding 13 week period). Any such catch-up payment will count only toward the prior quarter's salary amount and not toward the salary amount in the quarter in which it was paid. If the employer chooses not to make the catch-up payment, the employee would be entitled to overtime pay for any overtime hours worked during the quarter.

4. Q. Does the Final Rule change how employers may use bonuses to satisfy the salary level for highly compensated employees (HCEs)?

No, the Department 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 \$913 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. Because employers may fulfill almost two-thirds of the HCE total annual compensation requirement with commissions, nondiscretionary bonuses, and other forms of nondiscretionary deferred compensation, the Department determined that it would not be appropriate to permit employers to also use nondiscretionary bonuses and incentive payments to satisfy the standard salary amount.

AUTOMATIC UPDATING

1. Q. Why is the Department changing the regulations to automatically update the salary level and HCE total annual compensation level?

The Department is establishing mechanisms to automatically update the standard salary and HCE total annual compensation requirements to ensure that they remain meaningful tests for distinguishing between bona fide executive, administrative, and professional and overtime-protected white collar workers and to provide predictability and incremental salary changes for employers. Experience has shown that the salary level test is a strong measure of overtime-eligibility only if it is up to date. Left unchanged, a fixed salary level becomes substantially less effective at distinguishing between exempt and nonexempt workers as wages for overtime-protected workers increase over time. Automatically updating the salary level and HCE total annual compensation requirement using the most recent data will ensure that these tests continue to accurately reflect current economic conditions, while also making increases more predictable and gradual.

2. Q. How often will the Department update the standard salary level and HCE total annual compensation requirements?

The Department will update the standard salary and HCE total annual compensation requirements every three years, with the first update taking effect on January 1, 2020. Future automatic updates will take effect on January 1 of 2023, 2026, etc. The Department will publish a notice of the new updated thresholds in the Federal Register at least 150 days before those updated amounts take effect, and also publish these updated rates on the Wage and Hour Division's website.

3. Q. How will the Department automatically update the standard salary level and HCE total annual compensation requirement?

The Department will automatically update the standard salary and HCE total annual compensation levels by applying the exact same method used to set those levels in this Final Rule. Specifically, the Department will update the standard salary level to maintain it at the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage Census Region, and the Department will update the HCE total annual compensation level to maintain it at the annual equivalent of the 90th percentile of earnings of full-time salaried workers nationwide.

ECONOMICS

1. Q. What are the costs and benefits of the Final Rule?

This Final Rule will transfer income from employers to employees in the form of higher earnings, whether in the form of overtime premium payments for newly overtime-eligible workers or raises for some workers to maintain their exempt status. Average transfers are estimated to be approximately \$1.2 billion per year over the first ten years.

The Department estimates that average annualized direct employer costs will total approximately \$295 million per year over the first ten years, including regulatory familiarization costs, adjustment costs, and managerial costs. Regulatory familiarization costs are the costs incurred to read and become familiar with the requirements of the rule. Adjustment costs are the costs accrued to determine workers' new exemption statuses, notify employees of policy changes, and update payroll systems. Managerial costs associated with this Final Rule occur because hours of workers who are newly entitled to overtime may be more closely scheduled and monitored to minimize or avoid overtime hours worked.

The Final Rule is also expected to create new jobs due to the financial incentive for employers to spread overtime hours of employees newly entitled to overtime pay; however, the Department did not attempt to quantify the number of new jobs created due to data limitations. Other benefits of the Final Rule including strengthening overtime protections for workers currently misclassified as overtime-exempt and those at risk of misclassification as overtime-exempt; improved work-life balance; and improved worker health and productivity.

2. Q. How many employees does the Department estimate will be impacted by the salary level increases?

In the first year after the Final Rule becomes effective, the Department estimates that 4.2 million currently exempt workers who earn at least the 2004 salary level of \$455 but less than the new salary level of \$913 per week would, without some intervening action by their employers, become newly entitled to overtime protection. Of those, an estimated 65,000 currently exempt workers who earn at least \$100,000 but less than \$134,004, and who meet the minimal HCE duties test but not the standard duties test, would also become eligible for minimum wage and overtime in the first year. The Department also estimates that 5.7 million salaried white collar workers and 3.2 million salaried blue collar workers who are currently entitled to overtime will have their overtime protection strengthened because their status as overtime-eligible will be clear based on the salary test alone without the need to examine their duties. This includes an estimated 732,000 salaried white collar workers who the Department estimates are currently misclassified as exempt who will now receive greater overtime protection.

3. Q. How can I find information on the economic impacts of the Final Rule on a specific industry?

This information is provided in Tables 14, 30, 38 - 46, and B1 of the economic analysis of the Final Rule.

4. Q. Where can I find the earnings information the Department used in setting the salary and total annual compensation levels?

The Department set these levels using Bureau of Labor Statistics (BLS) data available at http://www.bls.gov/cps/research_series_earnings_nonhourly_workers.htm.