

## **SUMMARY OF FEDERAL LAW CHANGES AFFECTING EXEMPT/NON-EXEMPT WORKER STATUS**

On May 18, 2016, the Department of Labor (DOL) announced its changes to the Fair Labor Standards Act (FLSA) “white collar” overtime exemption rules. The Final Rule, strengthens overtime protections for workers. Generally, in order for a worker to fall within the scope of the “white collar” overtime exemptions, the worker’s pay must exceed the standard salary level. Through the adoption of the Final Rule, the DOL has increased this salary level to equal the 40th percentile of earnings of full-time salaried workers from the lowest wage Census Region. This change raises the salary level from its previous amount of \$455 per week (i.e., \$23,660 per year) to \$913 per week (i.e., \$47,476 per year). The Final Rule also raises the compensation level for highly compensated employees subject to a more minimal duties test from \$100,000 to \$134,004 annually. These changes take effect on December 1, 2016. The Final Rule also establishes a mechanism for automatically updating the salary and compensation levels every three years, with the first update to take place in 2020.

### **Key Provisions of the Final Rule\***

1. Sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, which is \$913 per week or \$47,476 annually for a full-year worker;
2. Sets the total annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally, which is \$134,004; and
3. Establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles and to ensure that they continue to provide useful and effective tests for exemption.

\* <https://www.dol.gov/whd/overtime/final2016/overtime-factsheet.htm>

### **Coverage Under the FLSA**

In order to be subject to minimum wage and overtime requirements employees must be “covered” by the FLSA. This is achieved in one of two ways:

1. the organization is a covered enterprise; **or**
2. a particular worker is individually covered.

## Enterprise Coverage

Nonprofits, such as churches and church-related organizations, are not specifically exempted from the FLSA. However, the DOL has acknowledged that enterprise coverage does not apply to a private, non-profit enterprise where the religious or educational activities are not in substantial competition with other businesses, unless it is operated in conjunction with a hospital, a residential care facility, a school or a commercial enterprise operated for a business purpose. Like all other employers, nonprofits would be covered by the FLSA if they meet the enterprise coverage test. To meet the enterprise coverage test, an entity must have annual revenues from commercial activity of at least \$500,000 or it must operate a hospital, preschool, school, or older adult or disability care facility. Activities that are charitable in nature and income used in furtherance of charitable activities (e.g., donations) do not count towards reaching the \$500,000 threshold. Thus, in order to determine whether a church is a covered enterprise, the following must be considered:

1. The church:
  - a. is engaged in commerce or in the production of goods for commerce; **AND**
  - b. grosses an amount greater than \$500,000 annually

**OR**

2. The church operates a hospital or school (including a preschool), or some other “named enterprise” (assuming the school, preschool, etc. is not a separate employer).

## Individual Coverage

Organizations that are not covered on an enterprise basis may still have some employees who are covered individually. Individual employee coverage is based on the nature of the particular employee’s work activities. An employee who engages in interstate commerce or in the production of goods for interstate commerce is covered by the FLSA.

A church is covered if an employee engages in any interstate or foreign commerce, including selling or packaging goods made in another state, or even regularly sending mail, making telephone calls or other communication, or travelling to other states.

## Clergy and Other Religious Workers

No exemption for clergy is included in the FLSA. That being said, some courts have held that the FLSA does not apply to clergy employees. There currently is no definitive guidance on which employees would be considered “other religious workers” and this decision, in any event, is dependent on the particular facts and circumstances. Additionally, while the DOL has not formally adopted any exemption in promulgated regulations, both its Field Operations Handbook and the new Final Rule include language indicating that “clergy and other religious works” are not covered by the FLSA.

## **Summary**

The Final Rule did not change the white collar exemptions' duties tests. However, a review of the baseline white collar exemption requirements will help clarify what has changed as a result of the Final Rule.

As previously mentioned, the Final Rule increased the salary level from \$455 per week to \$913 per week. The salary level is one of three tests for determining whether employees employed as executive, administrative, or professional employees are exempt from the FLSA's minimum wage and overtime requirements. The other two tests are the "salary basis test" (the worker must be paid a salary, rather than by the hour or on some other basis) and the "standard duties test" (the worker's job duties must fall within the scope of either the executive, administrative, or professional exemptions).

It is important to remember that job titles never determine exempt status under the FLSA. Additionally, receiving a particular salary, alone, does not determine whether an employee is exempt from overtime and minimum wage protections. It is important to be aware of the responsibilities and tasks that the employee performs to ensure the job is appropriately classified as exempt or non-exempt.

It is likely that exempt classifications will be more closely scrutinized once the Final Rule becomes effective on December 1, 2016, and it is critical that employers analyze the potential coverage, review those positions classified as exempt, and ensure that the exemption is not being improperly applied.

### **Sources:**

<https://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf>

<https://www.dol.gov/whd/overtime/final2016/overtime-factsheet.htm>