



Department of Labor Issues Final Regulations Regarding FLSA Exemptions

In May 2016, the Department of Labor (Department) published a final rule to update regulations (final regulations) under the Fair Labor Standards Act (FLSA). The final regulations will take effect on December 1, 2016. Because of this impending deadline, school districts will want to take immediate action to comply with the final regulations. This article will briefly summarize the changes to the FLSA regulations made by the final rule and discuss the impact on school positions.

Background / Current Regulations

The FLSA is a federal law that sets minimum wage, overtime, equal pay, recordkeeping, and child labor standards for employees who are covered by the Act. State and local governments, including school districts, must comply fully with the FLSA. Employees who are covered by the Act fall into two categories: nonexempt and exempt. Non-exempt employees are subject to all of the FLSA requirements. Exempt employees are generally not subject to the minimum wage and overtime provisions, but are still subject to the other FLSA requirements. It is the employer's burden to prove that an employee is exempt.

Exemptions are identified by different categories, including bona fide executive, administrative, academic administrative, professional, and computer employees. The FLSA regulations define the requirements for each of these exemptions. Each exemption generally includes three basic requirements: (1) a salary basis requirement; (2) a salary level requirement; and (3) a primary duty requirement.

- *Salary Basis.* An employee must be paid on a salary, rather than an hourly, basis. In other words, each pay period, the employee must regularly receive a predetermined amount constituting all or part of his or her compensation, without regard to the quality or quantity of the work performed. Some exempt employees (administrative, professional, and computer) may also be paid on a fee basis.
- *Salary Level.* An employee must earn a minimum weekly salary. Under the current rules, the minimum salary requirement is generally \$455 per week (equivalent to \$23,660 annually).
- *Primary Duty.* An employee's primary duty must be the performance of exempt work. Although an exempt employee may perform some nonexempt duties, the primary duty of the employee must be exempt in nature. Employees who spend more than 50 percent of their work time on nonexempt duties may still have exempt work as their primary duty. Each exemption identifies the duties that an employee must perform to meet that exemption.

Below is a brief summary of each of the exemptions and the positions within school district that generally fall within these exemptions.

- *Executive Employees.* These employees generally include those who engage in the management of the district or a department within the district, which generally involves oversight of employees and control over the work involved. Employees who may qualify in a school district include the supervisor of buildings and grounds, transportation director, and food service program director.
- *Administrative Employees.* These employees are generally those who engage in running or servicing the district or a department within the district. Administrative duties include work in such areas as finance, accounting, budgeting, procurement, safety and health, personnel management, human resources, labor relations, computer network, and similar activities. Employees who may qualify in a school district setting include the human resource director or business director.
- *Administrative Employees (academic administrative).* Administrative employees also include those in educational establishments. These employees are generally those who perform work related to the academic operations and functions in a school, rather than administration along the lines of general business operations. Such employees include the superintendent; any assistants responsible for administration of such matters as curriculum and other aspects of the teaching program; the principal and any vice-principals; academic counselors; and other employees with similar responsibilities. As explained below, such employees also have a separate salary level component.
- *Professional Employees.* Professional employees are generally those who are engaged in work that requires knowledge of an advanced type in science or learning acquired by a prolonged course of specialized instruction. Employees who may qualify in a school district setting include a school nurse or physical therapist.
- *Professional employees (teachers).* Teachers are professional employees but are covered under a separate regulatory section. Such employees are those who are engaged in teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who are employed and engaged in the activity as a teacher in an educational establishment by which the employee is employed. The salary level and salary basis requirements do not apply to teachers.
- *Computer Employees.* Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals. Computer employees may also be paid on an hourly basis of not less than \$27.63 per hour.

The current regulations also contain a relaxed duties test for certain “highly compensated” employees who receive total annual compensation of \$100,000 or more and are paid at least \$455 per week.

Final Regulations

In 2014, President Obama issued an Executive Order directing the Secretary of Labor to “update and modernize” the overtime exemption rules under the FLSA. In 2015, the Department issued proposed regulations based on this directive, and the proposed regulations resulted in about 270,000 comments. Based on these comments, the Department has now issued its final regulations. The final regulations include the changes below.

Changes to Salary Amounts. The final regulations significantly increase the salary threshold for applicable exemptions. The final regulations set the minimum salary level for applicable exemptions at the 40th percentile of weekly earnings for full-time salaried employees in the lowest wage Census Region (currently the South), which is equal to \$913 per week (\$47,476 for a full-year worker).

Updates to Amounts Every Three Years. The final regulations also do not identify a specific amount that would remain stable over time. Instead, the final regulations establish a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the applicable percentile. Future automatic updates to these thresholds will occur beginning in January 1, 2020.

Highly Compensated Employees. The final regulations also raise the compensation requirement needed to qualify for the highly compensated employee exemption. To meet this exemption, an employee must receive total annual compensation of at least the annualized earnings amount of the 90th percentile of full-time nonhourly workers nationally, or \$134,004 annually. This amount will also be updated every three years, beginning January 1, 2020.

Changes Related to Nondiscretionary Bonuses. The final regulations also made an important change related to non-discretionary bonuses and the inclusion of such bonuses within the calculation of weekly salary. In particular, the final regulations now specifically permit school districts to count nondiscretionary bonuses, incentives, and commissions toward up to ten percent of the required salary level. However, school districts must pay those amounts on a quarterly or more frequent basis. The final regulations also allow districts to make a “catch-up” payment at the end of each quarter in order for employees to meet the salary level test.

Certain Salary Provisions Did Not Change. A few important things did not change under the final regulations with respect to salary basis and salary level:

- The teacher exemption is still not subject to any salary level or salary basis requirement under the FLSA.
- Computer employees may still be paid on an hourly basis at a rate of not less than \$27.63 per hour.
- Academic administrative employees still permits such individuals to be paid “on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment” where the administrator is employed.
- Some exemptions may also continue to be paid on a fee basis.

No Changes to Provisions Related to Type and Amount of Exempt Duties. Prior to the final regulations being released, many observers believed that the final regulations would tighten the rules regarding which “duties” an exempt employee may undertake. Some observers believed the FLSA rules would be reworked to require that a certain percentage of an employee’s time be spent on exempt tasks. In the end, however, the Department decided not to make any specific changes in the final regulations to revise the duties test at this time. There have been indications, however, that the duties test may be revised in a future round of rulemaking.

Impact of the Final Regulations on District Positions

Within these final changes, many districts have had questions as to the impact on certain positions. Below is a discussion on different school positions.

- *Teachers.* As mentioned above, the final regulations did not change the law with respect to one aspect of the professional exemption related to teachers; that is, the teacher exemption is not subject to the “salary basis” or “salary level” requirements that apply to other professional employees. Accordingly, consistent with the current law, a teacher in the district who meets the duties requirements related to the teacher exemption will be considered exempt, regardless of the amount that the teacher is paid. Thus, the final regulations do not change any approach related to full-time, part-time, substitute, and temporary teachers in the district.
- *Coaches.* The final regulations also likely do not impact the district’s approach to coaches in the district. In general, employees who only coach in school districts will likely continue to not meet any exemption under the FLSA, based solely on their duties as coaches in the district. However, if a part-time coach is also a full-time teacher in the district, the coach will likely continue to be considered exempt in his or her capacity as a coach, considering the totality of his or her employment (full-time teacher / part-time coach) in the district. As a result, it continues to be advisable for districts to continue to carefully consider its hiring and payment practices related to coaches in the district.
- *Academic Administrators.* Under the academic administrative exemption, the final regulations raised the amount of the salary level requirement. However, as mentioned above, the final regulations did not impact a separate salary level provision that only applies to academic administrators. Specifically, academic administrators may still meet the salary level requirement if they are paid “on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment” where the administrator is employed. As a result, if an academic administrator’s salary is at least equal to the entrance salary for teachers at the district, there is likely no need for a salary adjustment for that administrator.
- *Computer Employees.* The computer employee exemption also changed with respect to the specific salary level. However, as mentioned above, the law did not change a provision allowing computer employees to meet the salary level requirement if they are paid at a rate of not less than \$27.63 per hour. Therefore, any computer employee who met this hourly requirement under the current law will also meet this requirement under the final regulations.
- *Directors / Managers.* The category of “director” or “manager” may be the category of employee within the school district that is most affected by the final regulations. Such positions may include Director of Food Services, Director of Building and Grounds, Business Services Manager, or Human Resource Manager. Although the duties required to meet these positions have not changed, the amount that must be paid to these positions has changed, and therefore, districts will need to pay close attention to ensure that these positions are adjusted appropriately.

Common Questions

- What if the employee works less than 12 months? The salary requirement is looked at on a weekly or monthly basis, so only the weeks worked must meet the salary level requirement.
- What if the employee works less than 12 months but wants their salary paid out over 12 months and the result would be the weekly salary would then be less than the required minimum? The Department has stated such arrangements are acceptable, and employers only need to meet the salary amounts for the time actually worked.
- What if the employee works part time (30 hours per week)? The weekly salary requirement must still be met – it is not pro-rated.
- What if the district pays on a basis other than weekly? Employers can pay weekly, bi-weekly, semi-monthly or monthly and just adjust the amounts accordingly so that the weekly equivalent of \$913 is paid.

Considerations for School Districts

Again, the final regulations take effect on December 1, 2016. Until then, the current regulations will remain in place. The time period between now and December 1 gives districts an opportunity to address any positions that may be impacted by the final regulations (in particular, those positions that may not meet the new salary level requirements). One approach would certainly be for districts to increase the salary for that employee. However, another approach could be to reclassify the employee as nonexempt and pay overtime for any hours worked over forty in a work week. Previously exempt employees will need to be instructed and trained about their recordkeeping obligations and tracking their hours worked. Districts may also then decide to limit the hours of these reclassified nonexempt employees to avoid having to pay overtime.

It is advisable to identify now any impact that the regulations may have on certain positions and the potential impact of future budgeting or hiring. School district officials should also review any handbook provisions, policies, collective bargaining agreement provisions, and contracts that may be impacted by these regulatory changes, and they should also consider any relevant state law and its impact.

Conclusion

The changes to the regulations are important. However, the Department did not impact the primary duty tests for these exemptions, which would have made things even more challenging for district officials. Considering the current political climate, which includes a U. S. Presidential election in November, there could be legal challenges to these regulatory changes. However, for now, the changes will be the law in December 2016, so school districts must take action and decide how to address these changes and seek legal counsel as necessary.

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