

# HR Heads-up

PERIODIC UPDATES ON IMPORTANT HR LEGAL ISSUES

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## *Department of Labor Issues Final Overtime Rules*

Jennifer Mirus  
JMIRUS@BOARDMANCLARK.COM

Doug Witte  
DWITTE@BOARDMANCLARK.COM

For the last three years we have been writing about the new overtime rule under the Fair Labor Standards Act (FLSA). The rule, primarily aimed at increasing the outdated salary thresholds for the “white collar” overtime exemptions, was first proposed under the Obama Administration. On the eve of taking effect it was blocked by the courts. The overtime rule has been revised and now reissued by the Department of Labor (DOL) under the Trump Administration. The “final” rule has been issued and will go into effect on January 1, 2020.

Given the tortured history of the overtime rule, a logical question is whether this rule will really go into effect on January 1, 2020. Despite the prolonged court battles over the previous version of the rule, and the fact that worker advocacy groups are threatening litigation over the current version, employers should be preparing as if the overtime rule will go into effect as planned on January 1, 2020.

As a reminder, three primary exemptions from the FLSA’s overtime rule are the executive, administrative and professional exemptions, known as the “white collar” exemptions. In order to be exempt under a white collar exemption, an employee must be paid a minimum salary threshold, must be paid on a salary basis, and must meet specific job duties tests. The final rule does not make any changes to the “job duties” tests for the executive, administrative or professional exemptions.

### **SALARY THRESHOLD INCREASED**

The most significant change in the new rule is an increase to the minimum salary threshold that is needed to qualify for exempt status. The new minimum salary threshold will be \$684 per week (annualized to \$35,568 per year). This is a slight increase from the March proposed rule of \$679 per week (equivalent to \$35,308 per year). Payment can also be made bi-weekly at \$1,368; semi-monthly at \$1,482; or monthly at \$2,964. The final rule does not contain an automatic indexing or schedule to increase the salary level over time. However, DOL has stated it is committed to periodically reviewing and updating the salary threshold more regularly. Employers can employ

an exempt employee on a part-time basis, but there is no pro-rated level of the salary threshold for part-time employees. Part-time employees must be paid at least \$684 per week in order to be treated as exempt.

## NON-DISCRETIONARY BONUSES MAY BE INCLUDED

Under the final FLSA rule, employers will be able to count certain bonuses and incentive compensation toward meeting ten percent of the minimum salary thresholds for executive, administrative, computer and professional employees. Specifically, employers may count non-discretionary bonuses, incentives, and commissions that are paid annually or more frequently. An employer may designate and utilize any 52-week period it chooses for this purpose (e.g., calendar year, fiscal year, anniversary year). If, by the last pay period of the 52-week period, the employee's total compensation (salary plus non-discretionary bonuses, incentive compensation, and commissions) is less than \$35,568, the employer may make one final payment to meet this threshold no later than the next pay period following the end of the year. This payment may only be counted toward the prior year's salary threshold and may not also count toward the current year's threshold. If an employer fails to make this catch-up payment, the overtime exemption will be lost for the 52-week period for that employee.

## HIGHLY COMPENSATED EMPLOYEES

In addition to the white collar exemptions, the FLSA also recognizes an overtime exemption for highly compensated individuals. The final rule increases the minimum annual compensation level needed to qualify for the highly compensated exemption from the current \$100,000 per year to \$107,432 per year. The proposed rule in March included a \$147,414 per year threshold. To qualify as a highly compensated employee, an employee must also receive at least \$684 per week on a salary or fee basis without regard to the payment of non-discretionary bonuses and incentive payments. It is important to note that Wisconsin law does not include a highly compensated employee exemption, and therefore, because employers must generally comply with both state and federal law, private sector employers in Wisconsin cannot rely on the highly compensated employee exemption.

## ACTION PLAN FOR EMPLOYERS

Employers should review their pay practices to ensure they understand which positions in their workforce must be paid overtime, whether they are paying overtime in a compliant manner, and which positions may qualify for an overtime exemption.

Employers should evaluate not only whether changes to exempt status will be necessary, but should explore options to address the new rules. For example, employers with exempt workers who currently earn more than \$455 per week but less than \$684 per week, and who satisfy the duties requirements, may comply with the new rules by either increasing employees' salaries to the new level, limiting hours to preclude overtime work, and/or by reclassifying the employees as non-exempt.

If employers adjust salary levels to meet the new requirement, they should consider the impact on other employees who also may request a pay increase.

While many employers have begun making changes to address changes to exempt status over the last few years, those employers who have "kicked the can down the road" on this issue should take action now.

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Twenty-seven Boardman Clark attorneys were selected by their peers for inclusion in the 2020 edition of *The Best Lawyers in America*® in 41 different practice areas. In the area of Employment Law -Management, Attorneys Jennifer Mirus, JoAnn Hart, Mike Julka, and Jim Ruhly were named to the list; in the area of Labor Law-Management, Attorneys JoAnn Hart, Mike Julka, and Jim Ruhly were named to the list. Attorney Michael Julka was named the *Best Lawyers*® 2020 Labor Law - Management “Lawyer of the Year” in Madison. Inclusion in *Best Lawyers*® is based entirely on peer review, using a methodology designed to identify the consensus opinion of leading lawyers about the professional abilities of their colleagues. You can see the full list of recognized Boardman Clark attorneys and read more about the *Best Lawyers*® methodology on our website.