

**DOL REGULATIONS
DOUBLING THE SALARY REQUIRED TO BE EXEMPT TEMPORARILY
ENJOINED/BUT LITIGATION ONGOING**

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On May 18, 2016, the Department of Labor issued its long-awaited Fair Labor Standards Act (FLSA) final regulations on the salary level necessary to establish an exemption from overtime. The regulations were scheduled to be effective December 1, 2016.

The new regulations more than doubled the minimum salary level necessary for an employee to be eligible for most of the “white collar” exemptions from overtime. “White collar” employees are professionals, supervisors and administrators as defined by the FLSA. These new rules presented significant operational challenges for many employers, particularly those in lower paying industries, and rural economies with lower costs-of-living and certainly public employers and many schools.

For white collar employees to be eligible to be exempt from overtime, they must both (1) meet the salary requirements, and (2) primarily perform administrative, executive, professional or certain computer duties.¹ The new regulations only changed the salary test – but changed the minimum salary--a lot.

I. The New White Collar Salary Test

The new regulations would have been the first upward adjustment in the salary level in twelve years. In 2004, The Department of Labor (DOL) raised the minimum salary level to \$455 per week or \$23,660 annually. Under the DOL’s new regulations, the minimum salary level for the exemption would be \$913 per week or \$47,476 per year to qualify for the exemption.

Importantly, for the first time, the required salary level would be adjusted every three years. The every three year adjustment would be to the 40th percentile of earnings of full-time, salaried workers in the lowest census region (currently the South). The DOL has stated it expects the minimum salary level to reach \$51,168 in 2019.

Some commentators expect the minimum salary to rise even more in 2020 due to the large number of salaried employees between \$23,660 and \$47,476 who will be reclassified as hourly employees, thus, raising the 40th percentile to higher paid salary employees; they believe

¹ Those same professional computer employees who perform systems analysis, design development, testing or modification of computer programs or software, can be paid an hourly rate of \$27.63 per hour and be exempt from overtime. There is no minimum salary for lawyers, doctors or teachers.

there would be a significant rise in the salary matching the 40th percentile for the 2020 level. Thus, the concern was both a current one as well as a challenge for the future.

II. The New Highly Compensated Salary Test

In addition to the traditional white collar exemptions, the 2004 regulations established a Highly Compensated Employees (HCE) test for those who performed one of the exempt duties of an executive, administrative or professional employee. Employees who meet the 2004 HCE test were currently exempt if their salary is \$100,000.

Effective December 1, the salary level necessary to satisfy this exemption would have risen to \$134,004. For the first time, employers would be able to include non-discretionary bonuses, incentive pay and commissions in reaching the required HCE salary level (currently \$134,004) so long as the "salary" is equal to or greater than the new standard salary level (\$47,476 per year as of 12-1-16). The non-discretionary bonus could make up the difference. The highly compensated salary level will also be adjusted in three years. The 2020 HCE figure will be based on the 90th percentile of all salaried workers. The DOL expects the HCE level to rise to \$147,524 per year in 2020.

III. Lawsuits to Enjoin New Rule

Twenty-one (21) states and fifty (50) business groups, including the U.S. Chamber of Commerce, filed suits against the Department of Labor seeking to enjoin the new regulations. The suits were filed in the Eastern District of Texas before Judge Amos Mazzant, who had been appointed by President Obama. The States, led by Texas and Nevada, argued the new regulation would force them to raise their labor costs dramatically. State of Nevada at al. v. U.S. Dept. of Labor, et al.

On November 22, Judge Mazzant enjoined the new regulations on the basis that the Department of Labor had exceeded its authority in two respects. First, by raising the salary level too high such that it became the dominant factor in determining whether an employee was exempt Judge Mazzant held the DOL was not entitled to difference because "the raise in the salary level supplants the duties test. If Congress intended the salary requirements to supplant the duties test, then Congress, not the Department (of Labor) should make that change."

Judge Mazzant also found fault with the requirement that the salary level be adjusted every three years. He found the automatic raise in the minimum salary every three years violated the Administrative Procedure Act because it did not give the public a chance to comment on changes to the salary level.

On December 1, the Department of Labor filed a notice of appeal with the Court of Appeals for the Fifth Circuit and asked the Court of Appeals to expedite the appeal. The Court

of Appeals agreed and ordered all briefing completed by January 31, 2017 with oral argument shortly thereafter.

Therefore, the appeal will not be decided before the new administration on January 20, 2017. The President-Elect has not spoken about the regulations but has promised to roll-back business regulations. It is difficult to predict what will happen. The Court of Appeals could dissolve the injunction and reinstate the rules. Alternatively, the new administration could withdraw the appeal and settle the case on the basis of Judge Mazzant's ruling. This would effectively cause the new rules to lapse. Congress could also vote to repeal the new regulations under the Congressional Review Act.

IV. Conclusion

Schools should keep abreast of this litigation and any regulatory action by the new Trump administration.

Regardless how the litigation is resolved, schools should cautiously apply the exemptions – whatever the salary level ends up being. School should get legal opinions that the exemptions they apply to employees are proper. Errors in classification of exempt personnel can lead to expensive litigation and class action litigation and awards of double damages and attorney's fees. Nationally, plaintiff's lawyers have developed expertise in pursuing wage and hour litigation over misclassification of exempt personnel. Employers do not want to be the focus of their attention.