

## **The Department of Labor Proposes to Raise the Minimum Salary for Overtime Exemption to \$35,000.**

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On March 7, 2019, the Department of Labor released a Proposed Rule to amend the criteria for overtime exemption by raising the minimum salary from \$23,660.00 to \$35,308.00 and to \$147,414.00 for highly compensated employees. This action, if finalized, would rescind the minimum wage and overtime Regulations that became final in 2016 and were enjoined from enforcement soon thereafter. These 2016 Regulations set \$47,476.00 as the minimum salary for exemption from overtime pay.

In order to qualify as exempt from overtime an employee must meet two tests: the function and compensation tests. The function analysis is to determine whether or not the employee performs executive, administrative, professional or computer system management service as a substantial portion of the time worked. The second inquiry is whether the employee is paid on a salary basis, i.e. paid a pre-determined amount that is paid on a regular basis without adjustment for actual hours worked. That salary amount must meet the minimum.

The 2016 Regulations included changes in the duties required to qualify for the executive, administrative, professional and computer system management exemptions. These proposed Regulations do not include any further guidance on the functions and duties required to satisfy these requirements. It should be noted that the qualifying primary responsibility and actual activity of the employees who would qualify as exempt need not be 100% of the work performed. What is required is that the basis for exemption be the primary duties of the employee, thus allowing for some work that is not executive, administrative, professional or computer system management.

Highly compensated employees are to be described as those paid at least \$147,414.00 on a salary basis, almost a 50% increase from the current \$100,000.00. If an employee is paid that minimum, the tests for exemption need not be met and primary duties can be outside the scope of those definitions, as found in Department of Labor Fact Sheet #17 and applicable Regulations at 29 CFR Part 541. In these four exempt job classifications, the employee is required to exercise some degree of independent action and judgement, without close supervision and considerable responsibility.

Another change is that up to 10% of non-discretionary income, such as commissions, can be included in the calculation of compensation to achieve the \$35,308.00 amount. Further, that compensation need not be paid quarterly, as in the prior Regulations, but may be paid annually, thus allowing for an end of the year upward adjustment to meet the income test.

Employers can adjust to this increase in the salary requirement by either increasing overall compensation or by converting the employee to an hourly basis in situations where there would not be many hours of overtime anticipated. In such a conversion it is important to look at whatever documents represent the relationship with the employee to be sure that commitments have not been made that would be inconsistent with the change. Also, an employer must pay for overtime worked, regardless of whether authorized in advance or not. Unauthorized overtime is a discipline issue, not a basis for withholding compensation.

After a comment period that will extend into the Summer, a Final Rule will be proposed with a probable effective date of January, 2020.