



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

The Fair Labor Standards Act (FLSA) requires most employees to be paid a minimum wage and overtime. However, some categories of employees are exempted from those requirements via the “white-collar” exemptions. On September 24, 2019, the Department of Labor (DOL) announced its Final Rule updating earnings thresholds under the FLSA for those exemptions.

Generally, in order for a worker to fall within the scope of the white-collar overtime exemptions, the worker’s pay must, among other requirements, exceed the minimum salary level established by the regulations. The Final Rule will raise the salary level to \$684 per week (\$35,568 per year) from its current amount of \$455 per week (\$23,660 per year). The Final Rule also raises the compensation level for highly compensated employees – who are subject to a more minimal duties test – from \$100,000 to \$107,432 annually. These changes take effect on January 1, 2020.

Key Provisions of the Final Rule:

1. Raises the “standard salary level” from \$455 per week to \$684 per week.
2. Sets the total annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test to \$107,432 per year.
3. Allows employers to use nondiscretionary bonuses and incentive payments to satisfy up to 10% of the standard salary level.
4. Revises special salary levels for workers in U.S territories and the motion picture industry.

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.

Scope of the White-Collar Exemptions

As previously mentioned, the Final Rule increased the salary level from \$455 per week to \$684 per week. The salary level is one of three tests for determining whether workers 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 the employee performs to ensure the job is appropriately classified as exempt or non-exempt. It is possible that exempt classifications will be more closely scrutinized once the Final Rule becomes effective on January 1, 2020, and it is critical that employers analyze the potential coverage, review those positions classified as exempt, and ensure the exemption is not being improperly applied.

Sources:

<https://www.dol.gov/whd/overtime2019/>

https://www.dol.gov/whd/overtime2019/overtime_FAQ.htm#9

<https://www.dol.gov/whd/regs/compliance/whdfs14.pdf>

https://www.dol.gov/whd/overtime2019/overtime_FR.pdf

Posted October 2, 2019