

## UNDERSTANDING FLSA EXEMPTIONS

The U.S. Department of Labor (DOL) recently announced its' final rule updating previous regulations for exemptions from minimum wage and overtime pay protection categories under the Fair Labor Standards Act (FLSA). These categories, often referred to as "white collar," are: executive, administrative, and professional employees. The rule which goes into effect December 1, 2016 was published on the Federal Register May 23, 2016.

The previous DOL update on these regulations was in 2004. At that time, the weekly salary level was set at \$455 (\$23,660 annually). Additional updates to this rule include collapsing the short and long duties tests into a single standard duties test and the introduction of a "Highly Compensated" exemption category for those earning more than \$100,000 annually.

While the FLSA provides minimum wage and overtime pay protections for many employees, those classified as *Exempt* generally require a series of tests to be met for this exemption to apply:

1. The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (salary basis test);
2. The amount of salary paid must meet a minimum specified amount (salary level test); and
3. The employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (duties test).

### Highlights of the Final Rule

The final rule focuses primarily on updating the salary and compensation levels needed for executive, administrative, professional and highly compensated employees to be exempt.

Specifically, the final rule:

- Sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, currently the South, which is \$913 per week or \$47,476 annually for a full-year worker;
- Sets the total annual compensation requirement for highly compensated employees (HCEs) subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally, which is \$134,004; and
- Establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles.

The final rule amends the salary basis test to allow employers to include nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level. The final rule makes no changes to the duties tests.

### Automatic Increases

To prevent the salary levels from becoming outdated, they will be updated every three years. The DOL will publish a notice with the new updated thresholds in the Federal Register at least 150 days before those updated amounts take effect. The first update will take effect on January 1, 2020; future automatic updates will take effect on January 1 of 2023, 2026, etc.

### Inclusion of Nondiscretionary Bonuses and Incentive Payments

Employers may use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. For employers to credit these payments toward the salary level test, they must be paid on a quarterly or more frequent basis.

### Standard Salary Level

The final rule sets a new standard salary level or "threshold" at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region, currently the South (\$913 per week, equivalent to \$47,476 per year for a full-year worker). The final rule also updates special salary levels for American Samoa and those in the motion picture industry.

## Requirements for Exemptions Under New Final Rule

Exemption	Salary Level Test	Salary Basis Test	Duties Test
<b>Executive</b>	At least \$913 per week (\$47,476 per year).	<ul style="list-style-type: none"> <li>At least 90% of the salary level (\$822 per week) must be paid on a “salary” basis.</li> <li>Up to 10% (\$91 per week) may be satisfied with nondiscretionary bonuses or incentive payments.</li> </ul>	The employee’s “primary duty” must be that of an exempt executive employee.
<b>Administrative</b>	<ul style="list-style-type: none"> <li>At least \$913 per week (\$47,476 per year).</li> <li>“Academic administrative personnel” may qualify with a salary at least equal to the entry salary for teachers at their educational establishment.</li> </ul>	<ul style="list-style-type: none"> <li>At least 90% of the salary level (\$822 per week) must be paid on a “salary” or “fee” basis.</li> <li>Up to 10% of the salary level (\$91 per week) may be satisfied with nondiscretionary bonuses or incentive payments.</li> </ul>	The employee’s “primary duty” must be that of an exempt Administrative employee.
<b>Professional</b>	At least \$913 per week (\$47,476 per year).  Salary level test does not apply to doctors, lawyers, or teachers.	<ul style="list-style-type: none"> <li>At least 90% of the salary level (\$822 per week) must be paid on a “salary” or “fee” basis.</li> <li>Up to 10% of the salary level (\$91 per week) may be satisfied with nondiscretionary bonuses or incentive payments.</li> </ul>	The employee’s “primary duty” must be that of an exempt professional employee.
<b>Computer</b>	At least \$913 per week (\$47,476 per year), or at least \$27.63 per hour.	<ul style="list-style-type: none"> <li>At least 90% of the salary level (\$822 per week) must be paid on a “salary” or “fee” basis unless the employee is paid on an hourly basis and receives at least \$27.63 per hour.</li> <li>Up to 10% of the salary level (\$91 per week) may be satisfied with nondiscretionary bonuses or incentive payments.</li> </ul>	The employee’s “primary duty” must be that of an exempt professional employee.

### Highly Compensated Employee (HCE)

The final rule sets the HCE total annual compensation level equal to the 90th percentile of earnings of full-time salaried workers nationally (\$134,004 annually). To be exempt under this category, an employee must receive at least the new standard salary amount of \$913 per week on a salary or fee basis **and** pass the duties test.

If an employee’s total compensation in a given annual period fails to meet the \$134,004 threshold, an employer may make a “catch-up” payment within one month of the end of the annual period. Catch-up payment can only apply towards the prior year’s total annual compensation. If a catch-up payment is not made within the timeframe allotted, the exemption is lost for the prior quarter and the overtime premium must be paid.

### Requirements for the Highly Compensated Employee (HCE)

Total Annual Compensation Requirement	Salary Basis Test	Duties Test
\$134,004 per year in total compensation, including payment of at least \$913 per week.	<ul style="list-style-type: none"> <li>100% of the standard salary level (\$913 per week) must be paid on a “salary” or “fee” basis.</li> <li>The remainder of the HCE total annual compensation requirement may be paid in nondiscretionary bonuses or incentive payments (including commissions).</li> </ul>	<ul style="list-style-type: none"> <li>The employee’s “primary duty” must be office or non-manual work.</li> <li>The employee must “customarily and regularly” perform any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee.</li> </ul>

**STILL HAVE QUESTIONS?** Lyons Human Capital Management is available to assist clients in reviewing FLSA classifications. Diane or a member of her team is able to assist with the development of job descriptions and can make FLSA recommendations as part of a for fee service. For more information about these services, please contact Diane Campanile at 844.LYONSHCM (844.596.6742) or [lyonsHCM@lyonsinsurance.com](mailto:lyonsHCM@lyonsinsurance.com).