



COUNTY ADVISORY BULLETIN

CAB

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NOTE:

On November 15, 2024, the Department of Labor's rule was vacated by the US District Court for the Eastern District of Texas. The rules discussed in this County Advisory Bulletin are no longer valid. The Department of Labor may appeal the ruling or issue revised rules. This CAB will be updated as the situation develops.

RECENT CHANGES TO FLSA OVERTIME REQUIREMENTS

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The U.S. Department of Labor, Wage and Hour Division (DOL) recently issued a Final Rule that became effective on July 1, 2024. The Final Rule dramatically changed the regulations under the Fair Labor Standards Act (FLSA) by increasing the standard salary level for executive, administrative, and professional employees (EAP), increasing the highly compensated employee (HCE) total annual compensation threshold, and allowing for periodic updates of the salary and compensation thresholds in years to come.

As of July 1, 2024, the Final Rule changed the standard salary level for the EAP exemptions from \$684 per week (\$35,568 annually) to \$844 per week (equivalent to \$43,888 annually), and the minimum earnings threshold for the HCE exemption from \$107,432 per year to \$132,964 per year. The Final Rule also provides for future updates to these levels, with the first increase occurring on January 1, 2025. The 2025 increase will change the standard salary level for the EAP exemptions from \$844 to \$1,128 and the total annual compensation for the HCE from \$132,964 to \$151,164, followed by updates every 3 years after the initial update on July 1.

Challenges to the Final Rule should be watched closely considering the U.S. Supreme Court's decision issued in June of 2024 that overruled the *Chevron* deference doctrine. Established in 1984, the *Chevron* deference framework required courts to defer to administrative agencies' interpretation of statutes. With this new decision, courts now have greater autonomy in interpreting the law, which enables them to more readily find that an agency, like the DOL, exceeded its authority and strike down these type of agency rules.

EXEMPTIONS UNDER THE FLSA

The FLSA provides exemptions from both minimum wage and overtime pay for employees employed as EAP. Currently, to qualify for an exemption, employees must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$844 per week, subject to the increases discussed above. Importantly, it is the employee's specific job duties and salary, not their job title, that determines whether the employee qualifies for an exemption.

For an employee to qualify for the executive exemption, the employee must (i) be compensated on a salary or fee basis at a rate of not less than \$844 per week; (ii) have their primary duty be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise; (iii) customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and (iv) have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

For an employee to qualify for the administrative exemption, the employee must (i) be compensated on a salary or fee basis at a rate of not less than \$844 per week; (ii) have their primary duty be the performance of office or non-manual work directly related to the management or general business operations of the employer or its customers; and (iii) have their primary duty include the exercise of discretion and independent judgment with respect to matters of significance.

For an employee to qualify for the professional exemption, the employee must (i) be compensated on a salary or fee basis at a rate of not less than \$844 per week; (ii) have their primary duty be the performance of work which requires advanced knowledge, such as work which is predominantly intellectual in character and includes work which requires the consistent exercise of discretion and judgment; (iii) have the advanced knowledge be in a field of science or learning; and (iv) have the advanced knowledge be customarily acquired by a prolonged course of specialized intellectual instruction.

For an employee to qualify for the HCE exemption, the employee must (i) perform office or non-manual work; (ii) be paid a total annual compensation of \$132,964 per year or more (which must include at least \$844 per week); and (iii) must customarily and regularly perform at least one of the duties that the EAP exemptions perform as discussed above.

The exemptions do not apply to manual laborers or other "blue-collar" employees who perform work involving repetitive operations with their hands, physical skill and energy. Non-management employees in manual labor/blue-collar jobs are not exempt from the minimum wage or overtime premium pay no matter how highly paid they may be.

TIPS FOR HOW EMPLOYERS CAN RESPOND

Adjust Pay and Review Duties

Employers need to make adjustments for affected employees based on the standard salary level now in effect and prepare for the January 1, 2025 increase. Now is a good time for employers to review positions that are close to the new dollar thresholds and either reclassify those employees as non-exempt or increase their compensation to meet the minimum level required to continue to qualify for the applicable exemption. In addition, a review of the employees' duties would be beneficial to ensure that they are properly classified in the first place and meet one of the EAP or HCE exemptions based on their actual duties performed as discussed above.

Update Overtime and Other Timekeeping Policies

Another prudent measure would be to review the existing policies and align them with the FLSA requirements. This could include revising policies to not include an employee's use of leave for a holiday, vacation, or sickness as "hours worked" when determining an employee's entitlement to overtime. This is permissible because the FLSA does not consider the use of leave as "hours worked" for overtime purposes, whether paid or unpaid, and merely requires that employees be compensated for all hours worked. This will not solve the problem imposed by the new updates to the FLSA, but it will reduce the circumstances when an employee will be entitled to overtime pay.

Provide Compensatory Time in Lieu of Overtime Pay

To weather the impact of the recent and upcoming salary modifications of the FLSA, under certain prescribed conditions, public agencies can also entertain providing compensatory time off, at a rate of not less than one and one-half hours for each overtime hour worked, rather than cash overtime pay. The accrual of compensatory time, however, is not unlimited. Law enforcement, fire protection, and emergency response personnel and employees engaged in seasonal activities may accrue up to 480 hours of comp time while all other state and local government employees may accrue up to 240 hours. At the end of the day, the hours of overtime worked will still be paid. Compensatory leave also requires that it be paid out at the rate that the employee makes at the time of its use, so that could result in a greater financial impact on the public agency if the employee received a raise after accruing the compensatory leave.

Fluctuating Workweek Method of Computing Overtime

Employers may also utilize the fluctuating workweek method (FWW) of computing overtime. The FWW is an alternative way to compensate nonexempt employees and to calculate the overtime pay they are owed. Under the FWW, nonexempt employees receive a set weekly salary no matter how many hours they work, plus additional overtime pay when they work more than 40 hours in one workweek. There are certain conditions that must be met before the FWW method is used. For example, an employer and employee must agree that the set salary is compensation (apart from overtime premiums and any additional non-excludable pay) for all their hours worked each workweek, whether they work few or many hours. In addition, the employees' hours must change on a week-to-week basis, and employees must receive the agreed-upon fixed salary even when they work less than their regularly scheduled hours. The FWW method is not a defense to misclassification of employees, however, because there must be a prior agreement between the parties for a weekly salary as compensation for all straight time.

The FWW would not be appropriate for all nonexempt employees. For example, the FWW would not apply to employees of public agencies engaged in law enforcement or fire protection activities who receive a salary as compensation for working specific, fixed hours within a work period. 29 CFR § 778.114 further explains the FWW method.

Other Considerations

Positions may be paid on an hourly, daily, or a shift basis, without jeopardizing an exemption under the FLSA. See 29 C.F.R. § 541.604(b). An exempt employee does not lose the exemption under these circumstances if their employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned. The "reasonable relationship test" is met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek. For example, an exempt employee guaranteed compensation of at least \$1,210 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid \$350 per shift without violating the \$1,128 per week salary basis requirement that goes into effect on January 1, 2025.

Also, the fact that employees may be required to work a certain number of hours per week and may be required to use accrued paid leave to cover their absences (or to not be paid if their absences exceed their accrued paid leave), does not remove an employee's exemption. See 29 C.F.R. § 541.710.

For now, counties should continue to prepare and react to the changes to the standard salary levels. Additionally, counties should work with human resources personnel and/or legal counsel when taking proactive measures to remain compliant with the FLSA updates and stay updated with any legal challenges that may arise.

If you have questions about the new changes to the FLSA, feel free to contact attorneys Marc Fishel or Benjamin Humphrey at mfishel@fisheldowney.com and bhumphrey@fisheldowney.com.