



# Arkansas Association of Defense Counsel

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## The FLSA's New Final Rule and Its Impact on Your Clients

The Department of Labor's Final Rule updating the nation's overtime regulations will go into effect on December 1, 2016. *See* 29 CFR Part 541. The impact of this new rule cannot be overstated, with the DOL estimating that in the first year up to 4.2 million employees will either need to be re-classified as non-exempt and paid overtime wages whenever they work more than 40 hours a week, or receive an increase in salary to meet the new requirement. U.S. Dep't of Labor, Wage and Hour Division, *Fact Sheet: Final Rule to Update the Regulations Defining and Delimiting the Exemption for Executive, Administrative, and Professional Employees* (May 2016).

The primary purpose of the update was to modernize the regulations governing the exemption of executive, administrative, and professional ("white collar") employees from the minimum wage and overtime pay requirements of the Fair Labor Standards Act, which took effect in its original form in 1938. Ellen C. Kearns, *et al*, *The Fair Labor Standards Act Ch. 5.II* (3<sup>rd</sup> ed 2015). "Executive" and "administrative" positions are to have the primary duty of "management of the establishment" and do "no substantial amount of work of the same nature as that performed by non-exempt employees." Kearns, *supra* citing Fed. Reg. 2518 (Oct. 20, 1938). A "professional employee" was to perform work that was predominantly intellectual and varied in character" and was to involve "discretion and judgment both as to the manner and time of performance as opposed to work subject to active direction and supervision." *Id.*

The last update to the exemption came in 2004, and it required three tests to be met:

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"). *See* 29 CFR §§541.200(a)(1), .300(a)(1), and .400(a).

2. The amount of salary paid must meet a minimum specified amount, which currently stands at \$455 per week, or \$23,660 annually ("salary level test") *See* 29 CFR §§541.303, 304, 600(d).

3. The employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations ("duties test"). 69 Fed. Reg at 22, 122-260.

However, the Final Rule that goes into effect in December, 2016 provides three major changes that will have a substantial impact not only on clients, but also law firms in their capacities as employers. Specifically, for an employee to be exempt the following must be considered:

1. The standard salary level will be \$913 per week or \$47,476 annually for a full-year worker.

2. The total annual compensation requirement for highly compensated employees, subject to the minimal duties test, must exceed \$134,004 (previously set at \$100,000).

3. The Final Rule also establishes a mechanism for automatically updating the salary and compensation levels every three years in order to maintain the levels at the applicable percentiles and to ensure that they continue to provide useful and effective tests for exemption. *See* U.S. Dep't of Labor, Wage and Hour Division, *Guidance for Private Employers on Changes to the White Collar Exemptions in the Overtime Final Rule* (May 18, 2016) [hereinafter *Guidance*].

Employers will now be able to use nondiscretionary bonuses and incentive payments to meet the standard salary level, however, these types of payments will be capped at 10 percent of the required salary amount. *Id.* Overall, in order for a white collar exemption to apply, an employee's specific job duties and earnings must meet all of the applicable requirements provided in the regulations. *Id.* Not all white collar employees qualify for the white collar exemptions; in fact, many salaried white collar employees are entitled to minimum wage and overtime. *Id.*

Supreme Court precedent provides that an employee can be denied the benefits conferred under the Fair Labor Standards Act only upon proof by the employer that the employee's activities fall squarely within the scope of a particular exemption. *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190 (1966). These exemptions must be asserted as an affirmative defense to a claim under the Fair Labor Standards Act. *Corning Glass Works v. Brennan*, 417 U.S. 188 (1975). Furthermore, the employer bears the burden of proof in arguing that such an exemption applies. *Hertz v. Woodbury Co.*, 566 F.3d 775 (8<sup>th</sup> Cir. 2009).

Clearly these changes are significant, but what are some of the implications for attorneys representing clients, as well as attorneys in their capacities as employers, and what are some appropriate next steps to take?

1. Contact clients now to prepare for these changes rather than representing them after a wage and hours lawsuit has been filed. 2. Review the status of current employees in order to determine who will no longer be exempt by looking at compensation levels and analyzing the duties of each employee. Also consider the fact that while many employees will be protected upon the effective date, the Final Rule will not affect those employees that do not work more than 40 hours per week. Potential options to address affected positions include raising salaries to maintain an exemption, pay current salaries with overtime after 40 hours, reorganize workloads and schedules, and/or adjust wages. *Guidance, supra*.

3. Develop policies and procedures that address the issues created by the Final Rule, then train managers, supervisors, and human resource employees on the changes in the regulations and how to address them. Specifically, address computation of hours worked, timekeeping expectations, overtime approval, and the consequences of unauthorized overtime. Liz Alton, *Preparing Your Business for FLSA Overtime Rule Changes*, Forbes, May 9, 2016, <http://www.forbes.com/sites/adp/2016/05/09/preparing-your-business-for-flsa-overtime-rule-changes/#4160f2f8a284>.

4. Create a system to schedule updates for positions that will be affected by the three-year adjustment. Schedule annual reviews with human resource departments and review classifications and job descriptions regularly. Rissell, *supra*.

**The thanks of the AADC go out to Andrew D. Curtis of the Davis, Clark, Butts, Carithers & Taylor Firm in Fayetteville.**



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