

FEDERAL POLICY UPDATE



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*** SPECIAL ALERT ***

May 18, 2016

» **DOL EXPANDS OVERTIME PROTECTIONS, LABOR COSTS TO INCREASE**

On May 18, 2016 the Department of Labor (DOL) finalized rules that will directly impact the labor costs and employee classifications of senior housing operations by revising the overtime exemption requirements of the Fair Labor Standards Act (FLSA). This change will require all operators to conduct an assessment of current salary levels and make any necessary adjustments to be in compliance with the new law, which goes into effect on **December 1, 2016**. The DOL estimates 4.2 million Americans will become newly eligible for overtime pay.

» **WHAT IS FLSA?**

THE FLSA is the law that mandates covered employers to pay at least a federal minimum wage and overtime premium pay at time and a half for any hours worked over 40 in a work week. However, under current law there are exemptions if certain criteria are met. For example, if an employee is “salaried”, paid at a rate of \$455 per week or \$23,660 per year, and meets a “duties” test, the employee would be considered a “white collar” employee and therefore not entitled to overtime pay.

» **WHAT CHANGE DOES THE NEW RULE MAKE TO CURRENT LAW?**

This new rule doubles the current salary threshold to \$913 per week or \$47,476 per year effective December 1, 2016. This means that all employees compensated at a level up to the new threshold will be entitled to overtime pay. In addition, the rule provides for automatic increases to the salary and compensation thresholds every three years to prevent them from becoming outdated. It also increases the salary threshold for certain less stringent rules for “highly compensated” employees from \$100,000 to \$134,004. A new provision allows employers to count bonuses and commissions toward the salary threshold (up to 10%), but only if those payments are made on at least a quarterly basis.

Workers are still subject to the same “duties test” in determining whether the overtime rules apply to those making above the new \$47,476 threshold.

» **WHY DID DOL TAKE THIS ACTION?**

The stated primary goal of the DOL in this rulemaking was to update the exemption’s salary level requirement. They cite salary as the best indicator of exempt status but the threshold has not been adjusted since 2004.

» **WHAT DO I NEED TO DO FIRST?**

Employers should review all employee classifications and begin planning for the changes. Reach out to your Human Resources Department and employment counsel to ensure your company’s readiness for Q3 & Q4 2016 and beyond. At a minimum, you should pay immediate attention to those employees whose salaries are currently within the former and new threshold range of \$23,660 and \$47,476 and consult with legal counsel about any necessary reclassifications, salary adjustments or new management directives.

» **ARE THERE ANY STRATEGIES TO MITIGATE THE NEW LABOR COSTS ASSOCIATED WITH THIS RULE?**

Unfortunately, there are no magic “work arounds” available to employers. This rule will most certainly increase your labor costs. Over 270,000 comments were filed with the DOL, including a submission from ASHA, expressing great concern about moving forward with this rule. While a reasonable salary adjustment may have been appropriate given the levels were last adjusted in 2004, one of this magnitude is certain to create financial challenges for many operators.



In an effort to help operators prepare for the changes, the following highlights some of the likely strategies employers may consider in order to meet the requirements of the new law.

- Increase an employee's salary level to above the salary threshold. This would make the most sense for those employees already compensated at a level approaching the threshold. In some cases, the higher salary may be less costly than reclassifying the employee as non-exempt and paying anticipated overtime costs.
- Maintain the current salary level but carefully monitor the hours of the "now non-exempt" employee to reduce overtime liability. Cross train employees to fill in for others who may be at risk of overtime. Anticipate a potential decrease in staff moral due to the perception of being "downgraded" from salary to hourly.
- Hire additional part time employees if necessary to handle the extra work that otherwise might have been done by newly reclassified employees.
- Re-evaluate telecommuting and on-call policies relative to potential added costs and recordkeeping. Unfortunately, this rule will reduce employee flexibility and force employers to move to more rigid schedules and timekeeping.
- Consider the "fluctuating workweek method," which permits employers to pay non-exempt employees a fixed salary, even if the employee's hours fluctuate from week-to-week. Under this method, employers pay fluctuating workweek employees overtime at only an

additional one-half the regular rate of pay, as opposed to time and one-half the rate. Consult state law before implementing this approach. California has expressly determined that it does not comply with state wage-and-hour laws.

- Ensure your company has a sensible overtime policy. Studies show that when overtime levels are too high a counterproductive cycle sets in. Workers are tired, they are more likely to get sick and absenteeism becomes an issue which leads to more overtime, less productivity and increased risk of accidents or mistakes.
- Don't forget about state law overtime requirements. Conducting business in a state like California, that has different requirements for your exempt employees, may require additional adjustments.

These are a few of the options for your consideration as you begin to develop a plan to address the new rules. You are encouraged to seek legal counsel specific to your company's business structure. This material is informational and does not constitute legal advice. For a copy of the final rule visit <https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-11754.pdf> and for the corresponding Fact Sheet visit <https://www.dol.gov/sites/default/files/overtime-overview.pdf>.

The DOL will also release three technical guidance documents, designed to help private employers, non-profit employers, and institutions of higher education come into compliance with the new rule. Once available, ASHA will post on our website.

For further information on any of the topics in this *Federal Policy Update*, please contact:

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