



Client Alert

Q&A on Department of Labor's New FLSA Overtime Rule

SESCO Management Consultants has been conducting teleseminars and webinars for the past three (3) weeks with various national and state trade and business associations as well as individual clients on the new final rule regarding overtime regulations. The seminars have been well received and highly attended. Should your trade association or organization wish to schedule a conference with SESCO Management Consultants, please contact Kim Tester at kim@sescomgt.com.

The following are questions that attendees have asked in these seminars and SESCO is sharing the Q and A's as we feel these are informative.

Q: In summary, what do I need to understand about these new overtime requirements?

A: The Department of Labor has issued white-collar exemptions. These exemption tests have not changed under the new rules. If any of your organization's positions meet a white-collar exemption test, then your organization does not have to pay that position overtime or require a time record to be maintained. These white-collar exemptions include the Executive, Administrative, Professional, Outside Sales (no salary requirement), Computer, and Highly-Compensated. Each one of these white-collar exemptions have requirements (tests) that your position must meet in terms of performing certain duties. In addition to meeting the duties tests, the position must **also** be paid on a guaranteed salary basis. This guaranteed salary basis is being increased effective December 1, 2016 from \$23,660 (\$455 a week) to \$47,476 per year (\$913 per week). The salary threshold for the Highly-Compensated White-Collar Exemption is increasing to \$134,004 per year.

In addition, the guaranteed salary threshold will be **automatically updated** by the DOL **every three (3) years** based on certain economic benchmarks with the first increase scheduled to occur on January 1, 2020.

The bottom line for employers is that they must in one fell swoop increase an exempt employee's salary to the new \$47,476 per year for the position to remain exempt from overtime, or change the position from exempt to nonexempt and thus implement a nonexempt pay plan that yields overtime.

Q: Is paying an employee above the salary threshold the only requirement needed to avoid overtime?

A: No, just because an employer compensates an employee via a guaranteed salary that meets the new threshold (\$47,476) does not mean that he or she is not entitled to overtime. The

position must meet one of the white-collar exemptions from overtime **and** receive the guaranteed salary.

Q: Do these new rules affect the Fluctuating Workweek Method of Payment?

A: No. The Fluctuating Workweek Method of Payment was not affected by the new rules nor does the Fluctuating Workweek Method of Payment require a guaranteed salary of \$47,476. The Fluctuating Workweek Method of Payment is a viable nonexempt pay plan option versus hourly with time and one-half (150%) over 40 hours per week. The Fluctuating Workweek Method of Payment provides for a guaranteed salary (only has to yield minimum wage for all hours worked) and the only requirement for the employer is to pay half time (50%) for hours worked in excess of 40 hours per week. This pay plan can be considered very positive for employer and employee alike.

Q: I am a non-profit employer, must I comply with these regulations?

A: Yes. There are no special exemptions for non-profit employers, religious organizations or carve outs for small businesses. If your organization, regardless of IRS status, is considered an enterprise you are covered by these regulations.

Q: If I change an exempt employee's pay plan from salary to hourly with overtime, can I restrict their hours of work?

A: Yes. This will be one of the more common solutions in that employers will restrict employees from working overtime to avoid a significant increase in labor costs. As labor costs are all employers' largest single, controllable costs, employers will closely manage rates of pay and working hours.

Q: Do these new regulations affect any of the nonexempt, partial exemptions (overtime only)?

A: No. Partial exemptions from overtime (only) still remain in effect for retail dealerships (automotive, equipment, aircraft, and boat), retail operations and their commissioned employees, motor carriers and healthcare, re: 8/80 overtime rule.

Q: Are there any organizations or positions that are not covered by these new regulations?

A: Yes.

- Higher Education Sector – Rules do not apply to:
 - Bona fide teachers
 - Coaches
 - Graduate and undergraduate students
 - Academic administrative personnel

- State and local governments
- Politicians and their staff
- Non-enforcement for providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds. Threshold does not become effective until March 17, 2019.
- Teachers in secondary education, doctors, lawyers

Q: Can I ever make deductions from the exempt, guaranteed salary?

A: Yes, the allowable deductions as issued by the FLSA did not change and employers can deduct from the guaranteed salary basis for select reasons:

- For personal leaves of absences as approved that are in full-day increments.
- When PTO, vacation or sick leave is exhausted and the salaried exempt employee is absent in full-day increments.
- For disciplinary reasons such as safety infractions.
- For beginning and ending weeks.
- For Family and Medical Leave – salary can be deducted for partial day absences/ intermittent leave.

SESCO suggests that your policy is very clear concerning these deductions and subsequently communicated to staff.

Q: Can I pay an employee on a salaried basis even if they are nonexempt?

A: Yes. The only obligation would be that if the employee works in excess of 40 hours per week, they would be due overtime.

Q: If I think a position is exempt but I'm not 100% sure, can I pay them on an hourly basis with overtime over 40?

A: Yes, employers can always pay employees on an hourly basis if they wish to do so. Therefore, if there is any question whether a position is truly exempt, paying the employee on an hourly basis with overtime or on the Fluctuating Workweek Method of Payment may be the safest method.

Q: How should I prepare for these new regulations for those exempt salaried positions who fall under the new salary requirement of \$47,476?

A: SESCO recommends the following process be implemented:

- Require those who are currently exempt but will not meet the new salary threshold of \$47,476 to start recording hours worked. Do not use overtime, FLSA, Wage and Hour

regulations, etc. for the reason thereof. If you do, employees will simply “pad” their time.

- Over the next several weeks and months, determine how many hours the position is actually working. If it is 40 or less, then no action necessarily needs to be taken as anyone can be paid on a salaried basis. The only obligation would be to pay overtime should they work over 40.
- If the position is working a significant number of hours over 40, determine if those hours can be reduced to 40, thus limiting your overtime liability.
- If the position is required to work overtime and you cannot increase the exempt salaried basis to the new \$47,476, then you must determine whether or not you are going to implement an hourly rate with overtime or the Fluctuating Workweek Method of Payment with half time over 40.
- In either case, the time records as maintained between now and December 1st will be vital to serve as a benchmark so that when employees receive overtime, hours do not escalate beyond what is expected and thus increase your labor costs.

Q: In some of our pay classifications, we have positions that are currently being paid over the \$47,476 and some that are being paid less. Can we have two (2) separate pay scales (exemption statuses) for the same job classification?

A: Yes. For those over the \$47,476, you can continue to pay them on a salaried exempt basis. For those under the \$47,476, you can elect not to increase their guaranteed salary and convert them to a nonexempt pay plan, re: hourly with overtime or Fluctuating Workweek Method of Payment with half time (50%).

Q: What challenges might present themselves should I increase salaried exempt staff from their current salary to the new salary threshold of \$47,476?

A: When increasing existing salaries for one class of employees and not others, this can create significant pay compression within your compensation program, thus creating internal inequity -- which is far more important than external equity. It can also create internal morale issues as a class of employees will receive pay increases and others will not. Finally, when hiring in new exempt employees to the new \$47,476 threshold, they will be hired in at salaries normally paid to more experienced, tenured employees. Therefore, labor costs and internal equity/morale issues will be a reality. Organizations must be able to answer these difficult questions that will be raised by staff. Compensation systems will also need to be developed and/or revised to address these pay compression issues.

Q: I saw in the media that U.S. Senator Lamar Alexander and others have vowed to vote out the new overtime rule before December 1st and that we will not have to worry about the regulations. Is this possible?

A: While anything is possible, it is highly doubtful and more than likely, these senators are merely posturing. Moreover, even following the presidential election, if the Republicans win

the White House, we view it as highly unlikely that the new rule will be unwound or repealed. As with most all employment regulations, there is a slim chance that they will be repealed and/or revised and employers must become familiar with the new rules and be prepared to comply.

Q: Can SESCO assist us with our exemption classifications and help us prepare for the new salary threshold?

A: Yes, SESCO can be of assistance on or offsite in assessing the exemption status of your positions as well as in preparing for changes from exempt to nonexempt pay plans as required as well as in revising and updating compensation systems to control labor costs.

For more information on these new FLSA overtime regulations and how they will affect your business, and more importantly how you can comply in a cost effective manner, contact SESCO Management Consultants at 423-764-4127 or sesco@sescomgt.com