



*Eye On Washington*

# Legislative Update



A more human resource.™

## DOL Releases FAQs on New Overtime Regulations

As previously announced, the United States Department of Labor (DOL) on May 18, 2016 released final regulations, published in the Federal Register on May 23, 2016, that modify certain provisions of the Fair Labor Standards Act (FLSA). Specifically, the final regulations increase the minimum salary required to be earned by an employee in order for that employee to be exempt from the FLSA overtime requirements from \$455 per week (\$23,660 per year) to \$913 per week (\$47,476 per year) for a full-time worker. In addition, the FLSA was modified to allow up to 10% of minimum salary level that can come from non-discretionary bonuses, incentive payments, and commissions, paid at least quarterly. **The effective date of the changes to the FLSA overtime rules is December 1, 2016.**

For more information on the revised overtime regulations, see the *Eye on Washington*, [DOL Releases Changes to FLSA Overtime Rules](#).

Subsequent to the release of the final regulations the DOL held a number of webinars to address concerns regarding the new overtime rules. From these sessions, the DOL has created 115 frequently asked questions (FAQs) designed to provide more clarity to the upcoming December 1 effective changes.

---

### A sampling of these FAQs, taken directly from the DOL's publication, are as follows:

**Q. With regard to the non-discretionary bonus and catch up payment provisions, does "quarterly" mean calendar quarter? Fiscal quarter? Or is it up to the employer's discretion?**

A. No, it does not mean the calendar quarter. It is the employer's discretion when the quarter will begin.

**Q. Can an employer say that an Xmas bonus is part of your salary in effort to meet the new standard?**

A. When the Final Rule takes effect on December 1, 2016, employers will newly be allowed to satisfy up to 10 percent of the standard salary level with nondiscretionary bonuses and incentive payments (including commissions). Nondiscretionary bonuses and incentive payments are forms of compensation promised to employees, for example, to induce them to work more efficiently or to remain with the company. By contrast, discretionary bonuses are those for which the decision to award the bonus and the payment amount is at the employer's sole discretion and not in accordance with any preannounced standards. An unannounced holiday bonus would qualify as a discretionary bonus, because the bonus is entirely at the discretion of the employer, and therefore could not satisfy any portion of the \$913 standard salary level.

**Q. Are employers in compliance if they follow the annualized amounts? (Or do they have to make sure they are always in compliance each week?)**

A. An employee's exempt status - and, if nonexempt, the employee's right to overtime pay - is determined on a weekly basis. Generally, to retain exempt status, an employee must satisfy the duties test and earn at least \$913 per week.

**Q. What is the salary requirement for part time salary workers?**

A. Whether a worker is full-time or part-time, the standard salary level to qualify for exemption will be \$913 per week.

**Q. How will this new rule affect California? California has always been consistent or more favorable to the employee than FLSA. This new rules suggests FLSA is now more favorable to the employee. Or am I missing something?**

A. The Fair Labor Standards (FLSA) provides minimum wage and hour standards, and does not prevent a State from establishing more protective standards. If a State establishes a more protective standard than the provisions of the FLSA, the higher standard applies in that State. To the extent the new minimum salary amount of \$913 per week under the Overtime final rule is higher than the State requirement, the employer in that State must comply with the higher standard and pay not less than \$913 per week for an exempt white collar employee.



*Eye On Washington*

# Legislative Update



A more human resource.™

**Q. Do you plan to provide written guidance with further details regarding the application of the 10% “credit”?**

A. Yes, we plan to issue additional guidance before the Final Rule becomes effective on December 1, 2016.

**Q. Comp Time: Are comp time programs still allowed? Meaning that any hours over 40 hours can be banked to use later to either take time off or maybe get paid at end of year at straight time?**

A. Only employers that are public agencies under the FLSA (e.g. a state government) can provide comp time in lieu of overtime premium payments.

**Q. If the employee is being paid hourly but all the duties are applicable should he be paid salary instead? If this employee wants to stay being paid hourly should it be documented and signed by the employee?**

A. Employees paid on an hourly basis are generally entitled to overtime pay, even if they satisfy the duties requirements for exemption. Employers are not required to pay employees who satisfy the duties test on a salary basis unless the employer intends to assert the exemption and not pay overtime.

**Q. I have an employee that works 50 hours a week on exempt status. He will be moved back to hourly, and will get a pay reduction. This will help us to maintain his current weekly wage. Is this something that we can do and be in compliance with FLSA.**

A. Employers have a range of options for responding to the updated standard salary level. For each affected employee newly entitled to overtime pay, employers may:

- o increase the salary of an employee who meets the duties test to at least the new salary level to retain his or her exempt status;
- o pay an overtime premium of one and a half times the employee’s regular rate of pay for any overtime hours worked;

o reduce or eliminate overtime hours;

o reduce the amount of pay allocated to base salary (provided that the employee still earns at least the applicable hourly minimum wage) and add pay to account for overtime for hours worked over 40 in the workweek, to hold total weekly pay constant;

o or use some combination of these responses.

The circumstances of each affected employee will likely impact how employers respond to this Final Rule.

**Q. Is the amount/week calculated before or after taxes?**

A. Thanks for your question. The Department looks at an employee’s gross wage amount before taxes.

**Q. Do all employees of a company have to be on the same quarter for purposes of the “true-up” payment, or can each employee be on an individual quarter based on start date?**

A. No, employees do not have to be on the same quarter.

“For purposes of computing pay due under the Fair Labor Standards Act, a single workweek may be established for a plant or other establishment as a whole or different workweeks may be established for different employees or groups of employees.” 29 CFR 778.105. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act. The same principle applies to the treatment of nondiscretionary bonuses and incentive payments (including commissions), which, beginning on Dec. 1, 2016, may satisfy up to 10 percent of the new standard salary level, provided that such payments are paid on a quarterly or more frequent basis. For each employee, the beginning of the quarterly period is left to the employer’s discretion. 29 CFR 541.602(a)(3) as well as 81 Federal Register 32427 provides more information regarding the treatment of catch-up payments for nondiscretionary bonuses.



# Eye On Washington Legislative Update



A more human resource.™

**For a copy of the DOL FAQs, click the link provided below:**

<https://www.dol.gov/whd/overtime/final2016/webinarfaq.htm>

It should be noted that on September 20, 2016, two separate lawsuits challenging these regulations were filed in federal court in Texas. One case was brought on behalf of 21 states, which claim that the regulations exceed the Department of Labor's authority, and also are unconstitutional, as they might result in a federal requirement for states to deplete state resources. The other was filed on behalf of numerous business and industry groups. It claims that the Department of Labor's regulations were created in a way that was arbitrary, capricious, and contrary to required procedures and applicable law. It also claims that the regulations' inclusion of only 10% of non-discretionary bonuses in the minimum wage threshold is so restricted as to be meaningless, and that it "because it arbitrarily excludes other types of compensation (e.g., discretionary bonuses, profit-sharing, stock options, employer-funded retirement benefit, and deferred compensation)."

Both cases are seeking a stay (delay) of implementation of the new regulations. ADP's compliance team is monitoring these actions and will provide updates as they become available.

**For a copy of the states' lawsuit, click below:**

<http://www.theemployerhandbook.com/files/2016/09/Nevada-v.-USDOL.pdf>

**For a copy of the business groups' lawsuit, click below:**

<http://www.theemployerhandbook.com/files/2016/09/Planolawsuit.pdf>

---

## ADP Compliance Resources

ADP maintains a staff of dedicated professionals who carefully monitor federal and state legislative and regulatory measures affecting employment-related human resource, payroll, tax and benefits administration, and help ensure that ADP systems are updated as relevant laws evolve. For the latest on how federal and state tax law changes may impact your business, visit the ADP *Eye on Washington* Web page located at [www.adp.com/regulatorynews](http://www.adp.com/regulatorynews).

ADP is committed to assisting businesses with increased compliance requirements resulting from rapidly evolving legislation. Our goal is to help minimize your administrative burden across the entire spectrum of employment-related payroll, tax, HR and benefits, so that you can focus on running your business. This information is provided as a courtesy to assist in your understanding of the impact of certain regulatory requirements and should not be construed as tax or legal advice. Such information is by nature subject to revision and may not be the most current information available. ADP encourages readers to consult with appropriate legal and/or tax advisors. Please be advised that calls to and from ADP may be monitored or recorded.

If you have any questions regarding our services, please call 855-466-0790.