

## Legal Alert

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### THE NEW RULES IMPACTING OVERTIME

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New rules slated to go into effect January 1, 2016, are going to make 4.6 million more workers entitled to overtime. Employers need to start planning for this change now.

#### Exempt and Non-Exempt Employees

Employees fit into two categories—those exempt from overtime and those entitled to overtime. Owners are not employees so these rules do not apply to them. To be considered exempt from overtime, the employee must, as their primary duties, perform services that meet the definition for administrative, executive, or professional workers. These are often referred to as the white-collar exemptions.

The line separating employees that meet the white-collar exemptions and those who do not is not always clear.

To qualify for the executive employee exemption, that employee's primary duties must be managing the enterprise, or managing a customarily recognized department or subdivision. An executive employee must customarily and regularly direct the work of two or more other full-time employees. In addition, the employee must have the authority to hire and fire, or have significant influence in such decisions including advancement and promotion.

A qualifying administrative employee must perform as their primary duties office or non-manual work directly related to the management or general business operations of the employer. The critical additional factor for this exemption is whether in the performance of the employee's primary duties, they exercise discretion and independent judgment with respect to matters of significance. This last element is often difficult to evaluate.

Another fuzzy consideration is deciding what are primary duties. Does that mean more than 50% of the time? Maybe. It is defined by the regulations as the principal, main, major, or most important duty the employee performs. Someone who supervises production, but spends a lot of time

doing the production work themselves, likely will not be exempt. If a supervisor only incidentally helps with production, they will probably be exempt if all of the other factors are present.

Just a brief word about the professional exemption. Basically, these are individuals with advanced degrees or training such as doctors, lawyers, accountants, engineers, architects, clergy and scientists.

### **Paid on a Salary Basis**

If an employee meets one of the primary duties tests outlined above, there is an additional criteria. They have to be paid a minimum salary. This is where the big change is coming.

At present, if an employee's duties meet the definition of an administrative employee, executive, or learned professional, to be exempt from overtime, they must be paid on a salary basis of at least \$455 per week (\$23,660 per year). To be paid on a salary basis means that the employee is paid the same amount every week regardless of hours worked or productivity. The employer cannot reduce the employee's pay because they left early to attend a parent-teacher conference, or a doctor's appointment.

The proposed rule is going to increase the minimum required salary for exempt employees to a projected \$970 per week, or \$50,440 a year, starting in 2016. It is estimated that this change will impact 4.6 million workers who would otherwise qualify as exempt. Stated another way, even if the primary duties of an employee qualify her as exempt, that employee will be entitled to overtime if she makes less than \$50,440 a year.

### **Conclusion**

Starting next year, employees making less than \$50,440, regardless of their duties, are going to be entitled to overtime for hours worked in excess of 40 in any work week. Now is the time to be making adjustments, if needed, to be ready for this change.

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