



THE FLORIDA BAR

# LABOR & EMPLOYMENT LAW SECTION E - U P D A T E S

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## THE DEPARTMENT OF LABOR'S FINAL RULE ON OVERTIME EXEMPTIONS *HOW WILL THIS IMPACT YOU OR YOUR CLIENTS?*

### ***Background***

On March 13, 2014, President Obama signed a Presidential Memorandum directing the Department of Labor to redefine which white-collar workers will be protected by the minimum wage and overtime standards imposed by the Fair Labor Standards Act.<sup>1</sup> The ultimate goal was to streamline and modernize the standards under the DOL's regulations.<sup>2</sup> In response, the DOL published a Notice of Proposed Rulemaking on July 6, 2015.<sup>3</sup> Interested parties submitted over 270,000 public comments in the two months that followed.<sup>4</sup> Bearing in mind this extensive feedback, the DOL's Wage and Hour Division then crafted the Final Rule.<sup>5</sup> President Obama and Labor Secretary Thomas E. Perez formally announced the publication of the Final Rule on May 18, 2016.<sup>6</sup>

### ***An Overview of FLSA Minimum Wage and Overtime Protections***

The FLSA requires a covered employer to pay its employees at least the federal minimum wage for all hours worked and overtime pay equal to one and one-half times the regular rate for all hours worked above forty in any given work week.<sup>7</sup> The FLSA exempts, however, "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman."<sup>8</sup> In other words, when it comes to "white-collar" employees, covered employers are not necessarily required to adhere to the FLSA minimum wage and overtime standards.<sup>9</sup>

In order to qualify as an exempt white-collar employee, a three-part test must be met: (1) the employee must be paid a "predetermined and fixed salary" (salary basis test); (2) the amount of the salary paid must meet a minimum specified amount (salary level test); and (3) the employee's job duties must "primarily involve executive, administrative, or professional duties" (duties test).<sup>10</sup> If all three requirements are met, then the employee is exempt from the FLSA's minimum wage and overtime protections.<sup>11</sup>

### ***The Final Rule***

The Final Rule's primary focus is on an increased threshold salary for white-collar exemptions and highly compensated employee exemptions. It also includes a change to the salary basis test for white-collar exemptions. In addition, the Final Rule provides for automatic updates to the exemptions every three years.

### ***New Threshold for White-Collar Exemptions***

On December 1, 2016, the salary threshold for white-collar exemptions (including exemptions for executive, administrative, professional, computer and outside sales employees) will increase two-fold from \$455 per week to \$913 per week (or from \$23,660 to \$47,476, annually).<sup>12</sup> This reflects "the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region."<sup>13</sup>

The Final Rule also presents an updated salary basis test for white-collar workers.<sup>14</sup> This will allow employers to apply non-discretionary incentive compensation (such as non-discretionary bonuses) to satisfy up to 10% of the new white-collar salary threshold, so long as this compensation is given on at least a quarterly basis.<sup>15</sup>

### ***New Threshold for Highly Compensated Employees***

On December 1, 2016, the annual salary threshold for highly compensated employees ("HCE") will increase by 34%, from \$100,000 to \$134,004.<sup>16</sup> According to the DOL, this reflects the new HCE standard of "the annual equivalent of the 90th percentile of full-time salaried workers nationally."<sup>17</sup> Employers will not be able to use the amended salary basis test in order to satisfy the amount for an HCE exemption, however.<sup>18</sup>

### ***Automatic Updates***

The Final Rule also calls for the salary and compensation levels to be automatically updated every three years.<sup>19</sup> The

DOL reasoned that, as income rises over time, the current threshold will not properly distinguish the employees who should actually be exempt and will eliminate minimum wage and overtime standards for those who should, under the true meaning of the FLSA, be entitled to them.<sup>20</sup> Automatic updates will prevent this from happening.<sup>21</sup>

The salary threshold for white-collar workers will be amended in order to maintain the percentile established in the Final Rule (the 40th percentile of “full-time salaried workers in the lowest-wage Census Region”).<sup>22</sup> Additionally, the HCE threshold will be amended to maintain its established percentile (“the 90th percentile of full-time salaried workers nationally.”) The first automatic update is scheduled to take place on January 1, 2020.<sup>23</sup>

### ***What Will Remain the Same?***

The new rule leaves the duties test under the FLSA unchanged.<sup>24</sup> Yet, it would behoove employers, employees and legal practitioners alike to revisit this test to confirm that an employee is, indeed, exempt. According to findings from the DOL’s recent outreach efforts, many people have significant misconceptions about overtime eligibility under the FLSA.<sup>25</sup> For example, many individuals believe that anyone who receives a salary is exempt.<sup>26</sup> Others are unaware of what types of duties must be performed in order to be classified as exempt.<sup>27</sup> Employers may want to consider an internal audit to ensure that all employees will be properly classified once the Final Rule goes into effect.

### ***Impact of the Final Rule***

In the DOL’s estimation, 4.2 million white-collar employees will need to be reclassified as non-exempt unless their employers opt to increase their salaries to meet or exceed the newly established thresholds.<sup>28</sup> Separate from that, an estimated 65,000 highly compensated employees (those who currently earn at least \$100,000 annually) may become eligible for minimum wage and overtime protection.<sup>29</sup> In just ten years, the DOL projects five million workers will be affected by the new standards.<sup>30</sup> The Final Rule will become effective on December 1, 2016,<sup>31</sup> giving employers just over six months to implement any necessary changes to payroll and employment policies and ensure that all of their employees are properly classified and compensated under this new scheme.

~By Kelly M. Pena | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

### ***Endnotes***

1 See Presidential Memorandum of March 13, 2014; Updating and Modernizing Overtime Regulations, 79 Fed. Reg. 18,737 (Apr. 3, 2014).

2 *Id.*

3 See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 38,515 (July 6, 2015).

4 See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,391, 32,397 (May 18, 2016).

5 *Id.* The text of the Final Rule may be found here: <https://federalregister.gov/a/2016-11754>.

6 *Id.*

7 See 29 U.S.C. 207(a)(1).

8 See 29 U.S.C. 213(a)(1).

9 *Id.*

10 See 81 Fed. Reg. 32,391, 32,392 (May 18, 2016). Since 1940, the regulations implementing the white-collar exemption have required this three-part test. *Id.* See also 29 CFR Part 541.

11 *Id.*

12 See 81 Fed. Reg. 32,391, 32,393 (May 18, 2016).

13 *Id.* Teachers, academic administrative personnel, physicians, lawyers, judges, and outside sales workers are not included.

14 *Id.* at 32,544-545.

15 *Id.*

16 *Id.* at 32,544.

17 81 Fed. Reg. 32,544 (May 18, 2016).

18 *Id.*

19 Prior to this, the DOL had increased the salary levels only seven times since the FLSA’s enactment in 1938. *Id.* at 32,392-393.

20 *Id.* at 32,430.

21 *Id.*

22 81 Fed. Reg. 32,430 (May 18, 2016).

23 Based on historical wage growth, the DOL estimates that the white-collar exemption threshold will increase to \$984 per week in 2020, and the HCE annual compensation requirement will be about \$147,524. *Id.* at 32,544.

24 *Id.* at 32,545.

25 *Id.* at 32,396.

26 *Id.*

27 81 Fed. Reg. 32, 396 (May 18, 2016).

28 *Id.* at 32,541.

29 *Id.*

30 *Id.*

31 *Id.* at 32,391.

# LABOR AND EMPLOYMENT LAW SECTION SCHEDULE AT ANNUAL CONVENTION HILTON BONNET CREEK, ORLANDO

**June 16, 2016**

**5:00 p.m. – 6:00 p.m.**

Labor & Employment Law Section Executive Council Meeting

**6:30 p.m. – 8:30 p.m.**

Reception Honoring the Chief Justice of the Florida Supreme Court  
Co-Sponsored by the Labor and Employment Law Section and the  
Florida Federalist Society

## InSession: Transforming Practices through Technology

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at the  
**2016 Annual Florida Bar Convention**

Wednesday, June 15, 2016

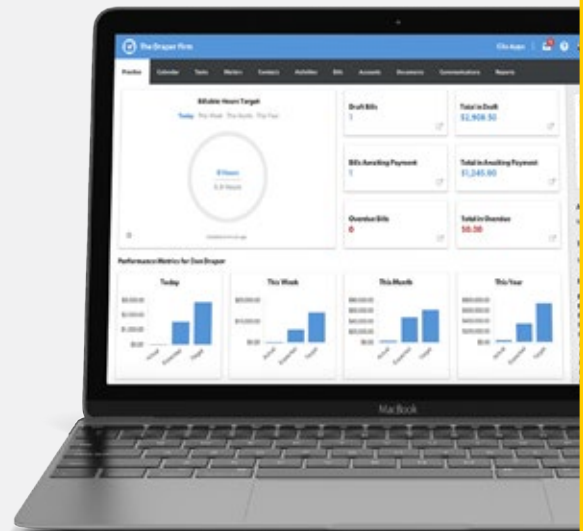
9:00am – 5:00pm

Clio is proud to announce John Suh, CEO of LegalZoom, as the keynote speaker for this exciting session. Join industry leaders for practical ways to grow, innovate, and lead within the legal industry.

CLE Course #2186R

8 Hours General CLE Credit

Breakfast, lunch, and snacks will be provided.



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