



# Do You Have Supervisory or Administrative Employees Whom You Pay A Salary? If So, Please Keep Reading!

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**On May 18, 2016, the U.S. Department of Labor (“DOL”) issued its long awaited and unfortunately anticipated final rule increasing the minimum salary requirements under the Fair Labor Standards Act (“FLSA”) for the “white collar” exemptions— Executive, Professional and Administrative classifications.**

Although many employers felt like the infamous defeated cartoon character, Charlie Brown, and said “Good grief!” to themselves, it is not as bad as it seems. Here’s the nitty gritty of the Final Rule:

The Final Rule focuses primarily on updating the salary and compensation levels needed for Executive, Administrative and Professional workers to be exempt from overtime.

**The Final Rule’s highlights include:**

1. *Setting the standard salary level at \$913 per week (\$47,476 annually);*
2. *Setting the total annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test to \$134,004; and*
3. *Establishing a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels using the above percentiles.*

Additionally, the Final Rule amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the new standard salary level.

The effective date of the Final Rule is **December 1, 2016**. The initial increases to the standard salary level (from \$455 to \$913 per week) and HCE total annual compensation requirement (from \$100,000 to \$134,004 per year) will be effective on that date. Future automatic updates to those thresholds will occur every three years, beginning on January 1, 2020.

The good news for operators: this Final Rule does NOT apply to your route drivers if you are among those operators who can use the Motor Carrier Exemption to bring your drivers outside of the FLSA's overtime requirements.

### Here are the simple steps to analyze how you deal with the Final Rule:

1. How many of your current employees are actually affected by this final rule?
2. For those positions you determined are salaried, are they truly exempt and pass the duties test for being exempt under the FLSA (now is a good time to make that determination if a position was previously misclassified)?
3. Is a salary increase for those who do not currently meet the salary requirement a plausible financial decision to the required increases?
4. Are there job positions that should now be reclassified as non-exempt and the employees will now be entitled to overtime if they work over 40 hours?
5. Review your handbooks and policies regarding exempt and non-exempt status.
6. Tighten up your policies regarding working overtime and analyze the possibility of limiting the number of overtime hours worked for non-exempt employees.
7. Review and update policies and practices concerning "off the clock" time and ensure that there are proper controls regarding all hours actually worked by non-exempt employees.
8. Review benefits applicable to exempt and non-exempt employees and how a change in status may impact the benefits to your employees.

“It always seems impossible until it's done.”

### As Snoopy and Woodstock would say: "It always seems impossible until it's done." So, here are some options for implementing the Final Rule's changes:

1. Increase the employee's salary to meet the new regulations so the employee continues to meet the exemption;
2. Keep the salary the same and pay the required overtime payments based on the employee's regular rate of pay when the employee works over 40 hours (but you must track all hours worked);
3. Reduce the employee's salary or change the employee's pay to a lower hourly rate so the total earnings do not change after overtime is paid (yes, this is permissible by the DOL so long as any change is done prospectively and not retroactively for work already performed). Keep in mind though, that morale could be an issue of which this becomes more of a balancing act than a legal decision;
4. Eliminate the employee working any overtime hours;
5. Start using the Fluctuating Workweek Method ("FWW") so you only have to pay "half time" for overtime hours. What does this mean? Although this can be an administrative nightmare, this allows operators to pay employees (whose hours fluctuate week to week), a fixed weekly salary which gets divided by all hours worked that week to get an hourly rate. Then, for any overtime hours worked that week, the operator pays only "half time" for those hours

(instead of the traditional time and a half). If you choose this route (and be sure your state allows this type of compensation because some do not, i.e. CA), be sure you have a clear and written understanding with the employee that this is how he/she will be paid. Moreover, the fixed salary needs to ensure the employee is paid at least minimum wage for each hour worked.

6. Some combination of the above options.

Many times when dealing with such issues, employers are left scratching their heads much like Charlie Brown who opines, "In the book of life, the answers are not in the back." Thus, it is best for operators to run by any changes with your Legal counsel (or the author) to assist in navigating these business changes to get the best result for your organization and your employees.

A copy of the final rule as well as other information can be found at: <https://www.federalregister.gov/articles/2016/05/23/2016-11754/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and-> ■



#### About the Author:

Heather A. Bailey, Esq., a partner with SmithAmundsen LLC and a NAMA Knowledge Source Partner for over a decade, focuses her practice on labor and employment law issues for employers. Did you

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