



The Federal Minimum Salary Threshold for Exempt Status Trumps California Law

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On December 1, 2016, the Department of Labor's highly controversial final rule impacting the minimum salary for exempt status will go into effect.

The final rule makes four key changes:

1. It raises the minimum salary threshold required to qualify for the Fair Labor Standards Act's (FLSA) white collar exemptions from **\$23,660 to \$47,476 per year** (or from **\$455 to \$913 per week**).
2. It increases the minimum salary for highly compensated employees from **\$100,000 to \$134,004 per year**. However, California employers should not rely on this exemption because it does not apply in California.
3. It will automatically update these salary levels every three years.
4. It permits employers to use nondiscretionary bonuses, incentive payments, and commissions to satisfy up to 10 percent (10%) of the minimum salary level. However, only certain types of incentive compensation apply under the final rule and it may not be applicable in California because salary is required to be a fixed sum, which is different from the FLSA.

[Click here](#) to see the Department of Labor's FAQs on the final rule and [click here](#) to see the General Guidance for Private Employers on the final rule.

What the Final Rule Does Not Do

At least for now, the Department of Labor has not changed the exemptions for outside salespeople, retail commission, teachers, lawyers, or doctors. Notably, the final rule also does not change the duties tests i.e., the kinds or amounts of work necessary to sustain exempt status. Indeed, there are no changes to the primary duty and the concurrent duties provisions. Additionally, employees must still be paid a fixed, predetermined salary that is not subject to reduction due to variations in the quality or quantity of work performed in a workweek.

Impact on California Employers

The final rule will have a dramatic impact on California employers because, for the first time, the FLSA minimum salary requirement for exempt status will be higher than California's standard (currently \$800 per week). Thus, California employers paying exempt workers less than \$913 per week (or less than \$47,476 per year) will be required to either increase the salaries of such exempt employees or pay them overtime wages.

For example, in California, the minimum wage is currently \$10.00 an hour. This means that to meet the California minimum salary test, an employee must earn at least \$41,600 per year (2 x \$10 x 2080 hours). Thus, there is a shortfall of \$5,876. And, even though the California minimum wage increases to \$10.50 an hour on January 1, 2017, that will only raise the minimum salary requirement for exempt status to \$43,680 per year, under California law.

Best Practices for California Employers

Although some members of Congress are currently taking steps to challenge the final rule, California employers should assume the final rule will go into effect on December 1. Thus, now is an excellent time for California employers to be strategic and proactive.

Several things for employers to consider include:

1. Auditing their work force to ensure that affected employees have been properly classified as exempt and taking this opportunity to reclassify if appropriate;
2. Increasing the salary of any affected employees to meet the FLSA threshold and maintain exempt status, assuming those employees meet the duties test (that is, the duties are truly those of an executive, administrative or professional employee). This option works well for employees who have salaries near the new salary level and regularly work overtime;
3. Maintaining the salary of exempt employees at \$800 per week (2 x \$10 x 40) to preserve the California exemption and pay FLSA overtime at one-and-a-half times the employees' regular rate of pay for hours worked over 40 in a week. The employee would be exempt under California law but non-exempt under the FLSA. This means that such employees would continue to be exempt from California's meal and rest period requirements. This option works well for employees who work 40 hours or fewer in a typical workweek, with only occasional overtime; and/or
4. Reclassifying the affected employees to non-exempt, hourly status and avoid having employees work overtime, or reduce base salary to budget for overtime, or consider an alternative work week schedule.

How Nossaman Can Help

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