

WILENTZ

—ATTORNEYS AT LAW—

WILENTZ, GOLDMAN & SPITZER, P.A.

Who Is An Exempt Employee? FLSA Changes Its Answer

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On December 16, 2016, the changes to the Fair Labor Standards Act (FLSA) will go into effect that will modify the current test of exempt employee qualifications.

The FLSA has long-utilized a three part test to determine if an employee is exempt from receiving overtime as follows.

1. The employee must be paid a salary which does not vary;
2. The salary has to equal or exceed a set minimum amount; and
3. The employee's duties must consist of executive, administrative or professional duties or the employee must work in a specialized area, such as computer professionals or commissioned sales employees.

The minimum salary threshold has not been adjusted in over ten years; it is only that part of the test that will change. To be exempt from overtime, under the current salary test, an employee must earn at least \$455 per week, or \$23,660.00 per year. *Under the new salary test, to be exempt from overtime, an employee has to be paid at least \$913 per week or \$47,476.00 per year.*

Another change to the minimum salary threshold gives employers more flexibility in meeting the requirement. The FLSA will now allow an employer to pay up to ten percent of the required \$913 per week through non-discretionary bonuses and commissions. If an employer chooses to meet the salary test in this way, the employer must pay these mandatory amounts at least once per quarter.

Moreover, the minimum salary threshold will be updated every three years. The first update will occur in 2020.

Additionally, highly compensated employees, who do not meet all of the elements of the third prong of the overtime exemption test^[1], may still exempt from overtime if they earn at least \$100,000.00 per year under the current test. *As of December 1, 2016, to be classified as a "highly compensated employee" an employee will have to earn at least \$134,004.00 per year.*

In summary, to be exempt from overtime, the amount that must be paid to an employee, meeting the three part test, is going from \$455 per week/\$23,660.00 per year to \$913 per week/\$47,476.00 per year and the amount a highly compensated employee must earn is going from \$100,000.00 per year to \$134,004.00 per year.

[1] FLSA regulations note that because a high level of pay is a "strong indicator" of exempt status, it eliminates the need for a "detailed analysis" of job duties. Thus, the regulations state, an employee earning a salary of \$100,000 or more a year will qualify for exemption if the worker's primary duty is performing office/non-manual labor and the worker "customarily and regularly performs *any one or more* of the exempt duties" of an executive, administrative or professional employee.

Attorney

- Tracy Armstrong