U.S. Department of Labor
Wage and Hour Division

(October 2019)

Fact Sheet 17T: Special Salary Levels For the U.S. Territories

This fact sheet provides general information on the exemption from minimum wage and overtime pay provided by Section 13(a)(1) of the FLSA as defined by 29 C.F.R. Part 541, and applied to the U.S. Territories.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at not less than time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both the federal minimum wage and overtime pay requirements for employees employed as bona fide executive, administrative, professional and outside sales employees. These exemptions are sometimes referred to collectively as the "white-collar" exemptions, and are defined in the Department's regulations located at 29 C.F.R. Part 541. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for one of these exemptions, employees generally must (1) be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed ("salary basis test"); (2) be paid at least a specified weekly standard salary level ("salary level test"); and (3) primarily perform executive, administrative, or professional duties as defined by the regulations ("duties test"). Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's Part 541 regulations.

See other fact sheets in this series for more information on the exemptions for executive, administrative, professional, computer and outside sales employees, and for more information on the salary basis requirement.

The Department revised the regulations located at 29 C.F.R. Part 541 and issued a Final Rule on September 27, 2019 with an effective date of January 1, 2020. The Final Rule sets the standard salary level at $684 per week (or $35,568 annually for a full-year worker). However, the regulations set lower special salary levels for the U.S. Territories. Also under the new rule, employers may use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary and special salary levels.

Special Salary Levels

The Final Rule set two special salary levels for U.S. Territories. For Puerto Rico, the Commonwealth of the Northern Mariana Islands (CNMI), Guam, and the U.S. Virgin Islands, the Final Rule set the special salary level at $455 per week. For American Samoa, the Final Rule set the special salary level at $380 per week.

<u>Puerto Rico, CNMI, Guam, and the U.S. Virgin Islands</u>
The Department has applied the standard salary level to Puerto Rico since 2004.[1] In 2016, Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA).[2] Section 404 of PROMESA states that "any final regulations issued related to" the Department's 2015 overtime rule Notice of Proposed Rulemaking (NPRM)—i.e., the 2016 final rule—"shall have no force or effect" in Puerto Rico until the

[1] *See* 69 FR 22172.
[2] *See* Pub. L. 114-187, 130 Stat. 549 (June 30, 2016).

Comptroller General of the United States completes and transmits a report to Congress assessing the impact of applying the final regulations to Puerto Rico, and the Secretary of Labor, "taking into account the assessment and report of the Comptroller General, provides a written determination to Congress that applying such rule to Puerto Rico would not have a negative impact on the economy of Puerto Rico."[3]

It is the Department's belief that PROMESA does not apply to the 2019 final rule as it is a new rulemaking, and thus not "related to" the 2015 overtime rule NPRM within the meaning of PROMESA. Section 404, however, reflected Congress's apprehension with increasing the salary level in Puerto Rico, and given the current economic climate there, the Department set a special salary level in Puerto Rico of $455 per week—the level that currently applies under PROMESA.

The Department also currently applies the standard salary level to CNMI, Guam, and the U.S. Virgin Islands.[4] However, understanding that the U.S. territories face their own economic challenges and that an increase in the salary level affects them differently than the States, and to promote special salary level consistency across U.S. territories, the Department also set a special salary level of $455 per week for CNMI, Guam, and the U.S. Virgin Islands.

American Samoa

The Department has historically applied a special salary level test to employees in American Samoa because minimum wage rates there have remained lower than the federal minimum wage.[5] The Fair Minimum Wage Act of 2007, as amended, provides that industry-specific minimum wage rates in American Samoa will increase every three years until each equals the federal minimum wage.[6] The disparity with the federal minimum wage is expected to remain for the foreseeable future.

The special salary level test for employees in American Samoa has historically equaled approximately 84 percent of the standard salary level.[7] However, understanding that American Samoa has a lower minimum wage than the other U.S. Territories, the Department set the special salary level in American Samoa equal to 84 percent of the special salary level applicable to the other U.S. territories ($455 per week)—resulting in a special salary level of $380 per week.

Nondiscretionary Bonuses and Incentive Payments (Including Commissions)

Under the Final Rule, employers may use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level or the special salary levels that apply to certain U.S. territories. Such payments may include, for example, nondiscretionary incentive bonuses tied to productivity and profitability. For employers to credit nondiscretionary bonuses and incentive payments toward a portion of the standard or special salary levels, the Final Rule requires such payments to be paid on an annual or more frequent basis and permits the employer to make a "catch-up" payment at the end of each 52-week period.

[3] *See* 48 U.S.C. 2193(a)-(b). The Comptroller General's report was published on June 29, 2018 and is available at: https://www.gao.gov/products/GAO-18-483.

[4] In Guam and the CNMI, the Department has applied the salary level test(s) applicable to the States. In the Virgin Islands, the Department applied a special salary level test prior to 2004, but applied the standard salary level beginning in 2004.

[5] *See* 69 FR 22172.

[6] *See* Sec. 1, Pub. L. 114-61, 129 Stat. 545 (Oct. 7, 2015).

[7] *See, e.g.*, 69 FR 22172.

Up to 10 Percent of the Standard Salary Level

Employers may satisfy up to 10 percent of the special salary requirements ($45.50 per week for Puerto Rico, CNMI, Guam and the U.S. Virgin Islands, and $38 per week for American Samoa) with nondiscretionary bonuses, incentive payments, and commissions. Each pay period an employer must pay the exempt executive, administrative, or professional employee on a salary basis at least 90 percent ($409.50 per week for Puerto Rico, CNMI, Guam, and the U.S. Virgin Islands, and $342 for American Samoa) of the applicable special salary level. The remaining portion of the required special salary level (up to 10 percent) may be fulfilled through payment of nondiscretionary bonuses or incentive payments, so long as the payments are paid at least annually. The Department recognizes that some businesses pay significantly larger bonuses; where larger bonuses are paid, however, the amount attributable toward the special salary level is limited to 10 percent of the required salary amount for the workweek. Note that this does not mean bonuses are capped. It only means that the amount an employer may credit against the weekly standard or special salary level is limited to 10 percent of the required salary level amount.

Examples

Example 1

Employee A works in Puerto Rico and meets the duties test for an executive employee. Employee A receives a salary of $410 per week and two production bonuses; $1,000 in June and $1,500 in December. As a result, Employee A's salary and nondiscretionary bonuses for the year total:

$410 (salary) x 52 weeks + $1,000 (June bonus) +$1,500 (December bonus) = $23,820

Employee A received $410 per week on a salary basis, which exceeds $409.5 (90 percent of the special salary level required for Puerto Rico, CNMI, Guam and the U.S. Virgin Islands). Employee A's salary and nondiscretionary bonuses for the 52-week period total $23,820, which exceeds the special salary level for that period ($23,660 = $455 x 52 weeks). Because the employee meets the duties test for an exempt executive and met the special salary level requirements for Puerto Rico, Employee A is exempt from overtime pay for the year.

Example 2

Employee B works in American Samoa and meets the duties test for an executive employee. Employee B receives a salary of $345 per week and commissions totaling $2000 in the 52-week period. As a result, Employee A's salary and commission payments for the year total:

$345 (salary) x 52 weeks + $2000 (Commission) = $19,940

Employee B received $345 per week on a salary basis, which exceeds $342 (90 percent of the special salary level required for American Samoa). Also, Employee B's salary and commission payments for the 52-week period total $19,940, which exceeds the required total annual amount of $19,760 ($380 x 52 weeks) in American Samoa. Because the employee meets the duties test for an exempt executive and met the special salary level requirements for American Samoa, Employee B is exempt from overtime pay for the year.

Catch-Up Payment

If at the end of the 52-week period the sum of the salary paid plus the nondiscretionary bonuses and incentive payments (including commissions) paid is less than the required salary level, the employer has one pay period to make up for the shortfall for the 52-week period. Any such catch-up payment will count only toward the prior 52-week period's salary requirement and not toward the 52-week period's salary requirement in which it is paid. If the employer chooses not to make the catch-up payment, the employer will not have met the salary requirement for the preceding year, and the employee would be entitled to overtime pay for any overtime hours worked during the previous 52-week period.

Examples

Example 3
Employee C works in Guam, meets the duties test for the professional exemption, and is paid a salary of approximately 90 percent of the standard salary level ($410) in each workweek for the year. At the end of the year, the employer tallies Employee C's nondiscretionary bonuses and commissions from the year, which amount to $2000.

$410 (salary) x 52 weeks = $21,320 amount paid in salary on a weekly basis.

$21,320 (salary paid) + $2,000 (bonuses earned) = $23,320 (salary plus nondiscretionary bonus paid).

Employee C must be paid a total of $23,660 per year to meet the salary requirement ($455 x 52 weeks). Because the $23,320 total of salary and nondiscretionary bonuses paid is less than the special salary level for 52 weeks, the employer must within one pay period make an additional payment of $340 to Employee C to meet the salary requirement in order to maintain the exemption.

$23,660 – $23,320 = $340

If the employer does not make the catch up payment, the employee is entitled to overtime pay for any overtime hours worked during the previous 52-week time period.

Example 4
Employee D works in American Samoa, meets the duties test for the professional exemption, and is paid a salary of approximately 90 percent of the standard salary level ($345) in each workweek for the year. At the end of the year, the employer tallies Employee C's nondiscretionary bonuses and commissions from the year, which amount to $1500.

$345 (salary) x 52 weeks = $17,940 amount paid in salary on a weekly basis.

$17,940 (salary paid) + $1,500 (bonuses earned) = $19,440 (salary plus nondiscretionary bonus paid).

Employee D must be paid a total of $19,760 per year to meet the salary requirement ($380 x 52 weeks). Because the $19,440 total of salary and nondiscretionary bonuses is less than the special salary level in American Samoa for 52 weeks, the employer must within one pay period make an additional payment of at least $320 to Employee D to meet the salary requirement in order to maintain the exemption.

$19,760 – $19,440 = $320

If the employer does not make the catch up payment, the employee is entitled to overtime pay for any overtime hours worked during the previous 52-week time period.

Discretionary versus Nondiscretionary Bonuses

As noted above, effective January 1, 2020, employers will be able to use nondiscretionary bonuses to satisfy up to 10 percent of the standard salary level. Promised bonuses such as those announced to employees to induce them to work more efficiently or to remain with the firm are considered nondiscretionary. *See* 29 C.F.R. 778.211(c). Examples include bonuses based on a predetermined formula, such as individual or group production bonuses, bonuses for quality and accuracy of work, retention bonuses, and commission payments based on a fixed formula.

Conversely, employers may not use discretionary bonuses to satisfy any portion of the standard salary level. A discretionary bonus is one in which the employer retains "discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid." 29 C.F.R. 778.211(b). The amount of a discretionary bonus is "determined by the employer without prior promise or agreement." *Id.* For example, a surprise holiday bonus is considered a discretionary bonus.

Highly Compensated Employees

The white-collar regulations contain a special rule for highly compensated employees (HCE) who pass a minimal duties test. Under the Final Rule, to be exempt as an HCE, an employee must receive total annual compensation of at least $107,432 and must also receive at least the new standard salary amount of $684 per week on a salary or fee basis. The special salary levels that apply to the U.S. Territories do not apply to the HCE exemption.

The Department has not made changes to how employers may use bonuses to meet the salary level component of the HCE test. *See* 29 C.F.R. 541.601(b)(1).

Effective Date

The effective date of the Final Rule is January 1, 2020.

For additional information, visit our Wage and Hour Division Website: www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4-USWAGE (1-866-487-9243).

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