Fact Sheet: Treatment of Bonuses for Exempt White Collar Employees

Important information regarding recent overtime litigation in the U.S. District Court of Eastern District of Texas
On July 26, 2017 the Department of Labor published a Request for Information (RFI), Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees. For more information, please visit **http://www.dol.gov/whd/overtime/rfi2016.htm**

Section 13(a)(1) of the FLSA provides an exemption from both **minimum wage** and **overtime** 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. 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 alone do not determine exempt status, and neither does the receipt of a particular salary. In order for an exemption to apply, an employee's specific job duties and earnings must meet all of the applicable requirements.

The Department published a Final Rule updating the white collar exemption regulations on May 23, 2016, available at **https://federalregister.gov/a/2016-11754**. The Final Rule sets the standard salary level at the 40th percentile of full-time salaried workers in the lowest wage Census Region ($913* per week or $47,476 annually for a full-year worker). Employers may satisfy as much as 10 percent of the standard salary level requirement through the payment of nondiscretionary bonuses and incentive pay (including commissions). The Final Rule also sets the total annual compensation requirement for highly compensated employees (HCE) at the annual equivalent of the 90th percentile of full-time salaried workers nationally ($134,004) and establishes a mechanism for automatically updating the standard salary and HCE compensation levels every three years to maintain these percentiles. Under the Final Rule, for the first time, employers will be able to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. 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 salary level test, the Final Rule requires such payments to be paid on a quarterly or more frequent basis and permits the employer to make a "catch-up" payment at the end of each quarter.

Quarterly Payment

In order for nondiscretionary bonuses and incentive payments (including commissions) to satisfy a portion of the standard salary level test for the executive, administrative, and professional exemptions, such compensation must be paid at least quarterly.

Up to 10 Percent of the Standard Salary Level

Employers may satisfy up to 10 percent of the standard salary requirement ($91.30 per week) 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 ($821.70 per week) of the standard salary level required. The remaining portion of the required 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 quarterly. The Department recognizes that some businesses pay significantly larger bonuses; where larger bonuses are paid, however, the amount attributable toward the standard 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 salary level is limited to 10 percent of the required salary level amount.

Example: Up to 10 Percent of the Standard Salary Level

Employee A is an assistant manager whose work duties meet the duties test for an executive employee. Employee A receives a salary of $825.00 per week and a quarterly production bonus of $2000.00 paid in the first pay period after the end of the quarter. As a result, her total salary for the quarter is:

$825.00 x 13 = $10,725.00

$10,725.00 + $2000.00 = $12,725.00

Employee A has exceeded the total salary level requirement during the quarter of $11,869.00 ($913.00 x 13 weeks) of which at least $10,682.10 ($821.70 per week x 13 weeks) must be received by the employee on a salary basis. Because the employee meets the duties test for an exempt executive and met the salary level requirements, Employee A is exempt for the quarter.

Catch-Up Payment

If at the end of a quarter the sum of the salary paid plus the nondiscretionary bonuses and incentive payments (including commissions) paid does not equal the standard salary level for 13 weeks, the employer has one pay period to make up for the shortfall (up to 10 percent of the salary level, inclusive of prior nondiscretionary bonuses and incentive paid in that quarter). Any such catch-up payment will count only toward the prior quarter's salary requirement and not toward the salary requirement in the quarter in which it was paid. If the employer chooses not to make the catch-up payment, the employer will not have met the salary requirement for that quarter, and the employee would be entitled to overtime pay for any overtime hours worked during the quarter.

Example: Catch-Up Payment

Employee B meets the duties test for the professional exemption and is paid a salary of 90 percent the standard salary level in each workweek for the quarter ($821.70). At the end of the quarter, the employer tallies Employee B's nondiscretionary bonuses and commissions, which amount to $750. The quarter is 13 weeks long, so the total salary is:

$821.70 (salary) **x 13 weeks = $10,682.10**
amount paid in salary on a weekly basis.

$10,682.10 (salary paid) + **$750** (bonus earned) = **$11,432.10**
(salary plus nondiscretionary bonus paid).

Employee B must be paid a total of $11,869.00 per quarter to meet the salary requirement ($913 x 13 weeks). Because the total of salary and commissions paid does not equal the standard salary level for 13 weeks, the employer may within one pay period make an additional payment of at least $436.90 to Employee B to meet the salary requirement and thus maintain the exemption.

$11,432.10 + $436.90 = 11,869.00

If the employer does not make the catch up payment, the employee is entitled to overtime pay for any overtime work performed during that time period where the employer treated the employee as exempt as a result of the expected bonus. For example, if Employee B worked 45 hours during one of the weeks during the quarter where the non-discretionary bonus plus salary did not meet the combined salary threshold, the employer would owe Employee B overtime pay for the five hours worked during that past quarter.

Discretionary versus Nondiscretionary Bonuses

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.

The Department's regulations describe a discretionary bonus as 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." See 29 C.F.R. 778.211(b). The amount of a discretionary bonus is "determined by the employer without prior promise or agreement." For example, a surprise holiday bonus is considered a discretionary bonus.

Nondiscretionary Bonuses for Highly Compensated Employees

The white collar regulations contain a special rule for highly compensated employees 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 $134,004 and must also receive at least the new standard salary amount of $913* per week on a salary or fee basis.

The Department has not made changes to how employers may use bonuses to meet the salary level component of the HCE test. While nondiscretionary bonuses and incentive payments (including commissions) may be counted toward the HCE total annual compensation requirement, the HCE test does not allow employers to credit these payment forms toward the standard salary level requirement. HCEs must receive at least the full standard salary level amount ($913* per week) each pay period on a salary or fee basis without regard to the payment of nondiscretionary bonuses and incentive payments. The regulation continues to permit nondiscretionary bonuses and incentive payments (including commissions) to count toward the total annual compensation requirement. See 29 C.F.R. § 541.601(b)(1).

Example: Nondiscretionary Bonuses for Highly Compensated Employees

Assume Employee C is compensated at more than $135,000 annually and customarily and regularly performs at least one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee. Employee C must be paid at least $913* per week on a salary or fee basis in order to meet the HCE exemption. Nondiscretionary bonuses and incentive payments cannot be used to reach the $913* per week amount but can be used to satisfy the annual compensation requirement. If Employee C receives a salary of $1,500 per week and nondiscretionary bonuses and commissions over the year totaling $57,000, Employee C is an exempt highly compensated employee.

Effective Date

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. The change to the salary basis test permitting nondiscretionary bonuses and incentive payments (including commissions) paid at least quarterly to satisfy up to 10 percent of the standard weekly salary level test will also be effective on that date. Future automatic updates to those thresholds will occur every three years, beginning on January 1, 2020.

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

When the state laws differ from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at **www.dol.gov/whd/contacts/state_of.htm**.

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

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Note (added January 2018):

*The Department of Labor is undertaking rulemaking to revise the regulations located at 29 C.F.R. part 541, which govern the exemption of executive, administrative, and professional employees from the Fair Labor Standards Act's minimum wage and overtime pay requirements. Until the Department issues its final rule, it will enforce the part 541 regulations in effect on November 30, 2016, including the $455 per week standard salary level. These regulations are available at: https://www.dol.gov/whd/overtime/regulations.pdf