

The U.S. Department of Labor's New Rules for FLSA Classification and the Colorado Department of Labor's Proposed New Rules for Employee Classification: What Businesses and Nonprofits Need to Know

On January 1, 2020, a new "salary basis test" under the Fair Labor Standards Act (FLSA) will go into effect, providing employees with increased overtime protection, and requiring employers to adhere to the new standard. In addition, another salary basis test proposed (on November 18, 2019) by the Colorado Department of Labor (if enacted) will require Colorado employers to comply with even higher thresholds, effective July 1, 2020. Refer to the table below.

It is important to note that employees must generally satisfy a **duties test** and a **salary basis test** to be classified exempt. And, there are both federal and state regulations that govern employee classification. Meeting the federal and applicable state salary basis test thresholds, alone, does not mean an employee may be properly classified as exempt.

Before the turn of the year, employers should review their pay practices in light of the new federal and proposed state regulations to identify the employees that must be paid overtime, determine if they are paying overtime in a compliant manner, and ascertain which employees may qualify for an overtime exemption. Under the new FLSA rule, an estimated 1.3 million workers will become newly entitled to overtime protection because of the increase in the salary level threshold.¹ Therefore, we can also safely assume that Colorado employers can expect a change in exemption and/or overtime pay requirements for thousands of employees. A few specific employees and work classes will be excluded from the rule.²

A thorough analysis is required to understand the current classification of employees and the potential need to reclassify employees under both the duties test and the salary basis test. However, the reclassification process has many implications and should be determined with a thoughtful approach. Employers with salaried workers making less than a specific threshold (refer to the table below) and not receiving overtime pay will need to undertake one or more of the following: 1) increase employees' salaries to the new threshold level, 2) manage hours to avoid overtime work, and/or 3) reclass employees as nonexempt.

Deciding the optimal path involves considerations that extend beyond number crunching and updating payroll systems. To mitigate potential impacts to the business, the intangible aspects of the changes need to be addressed. For example, some employers may consider reallocating roles and responsibilities and cross-training to reduce the overtime incurred by those employees with a salary that meets the new threshold and, therefore, are required to receive overtime pay. In addition, other companies may hire more hourly employees to limit or prevent overtime; however, with an increase in hourly workers, existing employees may feel less valued, more dispensable and less invested in the organization. Turnover may increase, which may result in lost institutional knowledge, reduced efficiencies and greater recruiting and hiring costs.

Significant overtime exposure may, in some cases, be avoided simply by raising employees' annual salaries slightly - an option that may make sense for employees who are currently earning close to the new threshold, who regularly work a significant amount of overtime, and who also satisfy the duties test such that they may be classified as exempt. Employers must consider that salary increases are often learned by other employees who may also ask for an increase or who may become discouraged and less engaged by the perceived overlook. In addition, the amount of expected steady work (vs. seasonal or unique initiative-based demand) for the employee at issue should be considered. In certain cases, it may be easier to limit the hours of certain workers to reduce the drain of writing checks for excessive overtime, then an overall increase in annual salary. Note: beginning January 1, 2020, employers can use (if paid annually) commissions, nondiscretionary bonuses

¹ https://www.dol.gov/whd/overtime2019/overtime_FAQ.htm

² Some workers will be excluded from FLSA's rule and, therefore, will not receive overtime pay: individuals who have at least 20% ownership of a company, the highest-ranked and highest-paid employee of a non-profit organization, many agricultural workers, and all farm workers (farm workers will experience mandated meal breaks and more flexible rules on rest breaks).

and incentive payments to meet up to 10% of the minimum salary requirement that would prevent the employee from receiving overtime pay.

The extensive considerations discussed in this article demonstrate the importance for employers to wield extended efforts in reviewing their pay practices, employee classification, and workforce positions. A careful and bespoke approach and a thoughtful communication plan should also be designed and implemented.

If you have any questions regarding the issues in this article, please contact Dan Stiles at dan@stiles.legal.

Federal Salary Test Standard			
Current Non-exempt employees	Current Exempt employees	Effective January 1, 2020 Non-exempt employees	Effective January 1, 2020 Exempt employees
Must be paid overtime <i>1.5 x regular rate for each hour over 40 hours p/week</i>	No overtime pay	Must be paid overtime <i>1.5 x regular rate for each hour over 40 hours p/week</i>	No overtime pay
Hourly employees -and- Salaried employees earning less than \$23,660 annually	Salaried employees earning \$23,660 or more annually	Hourly employees -and- Salaried employees earning less than \$35,568 annually	Salaried employees earning \$35,568 or more annually
Colorado Salary Test Standard			
Current Non-exempt employees	Current Exempt employees	Effective (if enacted) July 1, 2020 Non-exempt employees	Effective (if enacted) July 1, 2020 Exempt employees
Must be paid overtime <i>1.5 x regular rate for each hour over:</i> <ul style="list-style-type: none"> ▪ 40 hours per week ▪ 12 hours per day ▪ 12 consecutive hours 	No overtime pay	Must be paid overtime <i>1.5 x regular rate for each hour over:</i> <ul style="list-style-type: none"> ▪ 40 hours per week ▪ 12 hours per day ▪ 12 consecutive hours 	No overtime pay
Hourly employees -and- Salaried employees earning less than \$23,660 annually	Salaried employees earning \$23,660 or more annually	Hourly employees -and- Salaried employees earning less than \$42,500 annually <i>\$42,500 would increase \$3,000 per year through 2026. Thereafter, it would be adjusted annually by the same CPI that raises Colorado's minimum wage.</i>	Salaried employees earning \$42,500 or more annually <i>\$42,500 would increase \$3,000 per year through 2026. Thereafter, it would be adjusted annually by the same CPI that raises Colorado's minimum wage.</i>

This summary is not intended to constitute legal counsel.