

## CUT AND PASTE POST OCTOBER, 2019

### DOL Announces New White Collar Salary Levels

On September 24, 2019, the Department of Labor (DOL) released its final regulations making changes to 29 CFR Part 541 governing overtime exemptions under the Fair Labor Standards Act (FLSA). Under the [final rule](#), the Department:

- Is increasing the "white collar" salary level from \$455 to \$684 per week (equivalent to \$35,568 per year for a full-year worker). This is just slightly above the originally proposed rate of \$35,508 per year.
- Is increasing the total annual compensation level for "highly compensated employees (HCE)" from \$100,000 to \$107,432 per year. The DOL had originally proposed increasing this pay to \$147,414. According to the SHRM website, the actual increase is based on the 80th percentile, rather than the 90th percentile, of all full-time salaried workers' earnings nationwide.
- Allows employers to use nondiscretionary bonuses and incentive payments (including commissions) that are paid at least annually to satisfy up to 10 percent of the exempt employees' standard salary level. The DOL said this is in recognition of evolving pay practices; and
- Revises the special salary levels for workers in U.S. territories and in the motion picture industry.

**The final rule will be effective on January 1, 2020.**

**What didn't change?** Sometimes, it's as important to know what didn't change as what did change:

1. **Montana Law.** If you're subject to Montana Wage and Hour Laws and not the Fair Labor Standards Act, the new salary levels will not apply unless/until Montana goes through its rule making process.

#### 2. Job Duties Tests

Paying the required salary is not enough. In order to qualify for a white collar exemption, employees must be paid the required salary, but must also meet the appropriate job duties test (see [DOL Fact Sheet 17A](#)). There is no change to this requirement, or to the tests used to determine whether an employee performs exempt duties.

3. **No Ongoing Adjustments.** These salaries were last updated in 2004. The Rule proposed during the Obama administration would have required a review of these salaries every 3 years. The new rule does not adopt this strategy but, in the 9/24/19 Final Rule, the DOL acknowledged the public comments that waiting too long cause future increases to be larger and more challenging for businesses to absorb. Therefore, the DOL has committed to reviewing this Rule more frequently.

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**What should you do now?** If you haven't already done so, here are some steps to take between now and the end of the year:

- **Figure out if you're subject to the Federal FLSA or to Montana's equivalent law** - Keep in mind an employee may be subject to the FLSA even if the employer isn't. If you're not sure about coverage, contact the Montana Department of Labor, Wage and Hour Bureau.
- **Understand employees' salaries and who is currently exempt** - Identify all exempt workers with a salary below \$35,568. Then, to the extent that your company relies on the highly compensated employee exemption, do the same for everyone earning between \$100,000 and \$107,432 per year.
- **Review and update job descriptions** – Even though the DOL did not change the duties test, it is a good time to make sure that your job descriptions are clear, and that Exempt employees will continue to remain exempt if they meet the new salary basis test.
- **Develop a strategy for managing conversions to nonexempt status** - For workers who earn close to the new minimum salary, it may make sense to raise their salaries to \$35,568. Otherwise, start planning on paying them as nonexempt employees. Things to think about ... How many hours do the affected employees currently work? Would it be better to increase their pay rather than incurring overtime costs? Will you need to restrict schedules at or near 40 hours? Where are you going to set the newly non-exempt employees' pay? Are you going to have to adjust other Exempt employees' pay to avoid compression?

**Here are some resources that will help you prepare for this change:**

U.S. Department of Labor Resources	Society for Human Resource Management Resources
<a href="#">Final Rule Fact Sheet</a> <a href="#">Frequently Asked Question</a> <a href="#">Small Entity Compliance Guide</a> <a href="#">Overtime Pay Webpage</a>	<ul style="list-style-type: none"> <li>• <a href="#">FLSA Exemption Classification</a></li> <li>• <a href="#">Determining Overtime Eligibility in the United States</a></li> <li>• <a href="#">FLSA January 1, 2020 Salary Increase: Impact Analysis Guide and Calculator</a></li> <li>• <a href="#">Memo to Exempt Employees Regarding the FLSA Changes</a></li> <li>• <a href="#">Memo to All Employees Regarding the FLSA Changes</a></li> <li>• <a href="#">How can employers avoid salary compression when raising the minimum salary for exempt employees under the revised overtime regulations?</a></li> </ul>

### **Montana Supreme Court: Exotic Dancer Was Not An Independent Contractor**

Mays worked on and off as an exotic dancer at Sagebrush Sam's pursuant to an Independent Contractor Agreement (ICA) the parties executed on July 25, 2013. Under the ICA, Mays paid Sam's \$15 per night for stage rental fees and \$4 or \$5 for private dance room fees. Mays was paid nothing by Sam's, but was permitted under the ICA "to keep payments/tips which are received directly from Sam's clientele."



On June 7, 2016, Mays filed a wage claim with the Montana Department of Labor and Industry, alleging she was misclassified as an independent contractor and was owed employment wages for hours she worked, claiming minimum wage. The matter was referred to the Independent Contractor Central Unit (ICCU) to determine the employment relationship between Mays and Sam's. Finding Mays did not satisfy the criteria to be an independent contractor, the ICCU determined Mays was an employee and transferred the matter to the Wage and Hour Unit to determine whether Mays was owed wages.

This is an interesting case with lots of twists and turns. Want to hear more? The name of the case is *Wage Claim of Mays v. Sam's Inc.* Go to [this link](#), Select **Case Number**, and enter DA 19-0007.