New Exempt Rule
Article submitted by Align

Come December 1, 2016, any employee earning less than $913/week – or $47,476/year – must not be considered exempt from receiving overtime pay if they work more than 40 hours in any given week. Said the other way around, unless an employee makes at least $47,476/year, s/he is not exempt from overtime rules. Period. Bear in mind that even if an employee earns the minimum amount to be considered for exempt status, there are other tests related to the duties of the job. Just earning at least $47,476/year does not automatically make the employee exempt from overtime rules.

This is not speculation or a proposed rule; this is final as of now. (See 29 CFR, Part541, which you can find online at **http://federalregister.gov/a/2016-11754**. It's 162 pages. The executive summary – the "why" of the change – is fascinating.) While strong business and human resources lobbies worked hard to prevent this dramatic increase, and hopes to yet get it changed, it's imperative that your business plans immediately begin to assume this is the new law of the land.

While there are two other "tests" for exempt status, until the employee's pay is equal to or greater than the new minimum (thus passing the salary level test), the other tests do not matter.

There are some positions that are exempt from following the rule – certain IT personnel (but not all); outside sales employees; teachers and practicing doctors and lawyers.

It's also possible to include some bonus and incentive pay to create a salary of at least the minimum amount; however, this exception doesn't apply to all bonuses and incentives; nor may an employer consider benefits when calculating the minimum salary.

The unintended consequences create a longer list than we have space for here; but we can tell you what we think the choices boil down to for each and every employer in the U.S.:

1. Make your currently-exempt employees non-exempt and have them start "punching the clock" (probably a computer keystroke). Of course, that means you'll have to watch those "little extras" that you have historically asked them to do – and probably that they enjoy doing. But if your key and largely autonomous personnel aren't making the new minimum and you can't afford to give them all pay increases, this is the affordable option. Get ready to manage a workplace where employees may resent time keeping; and where you may need to do more tasks yourself in order to avoid paying overtime that you can't afford.

With this option, there are additional considerations.

- If you choose this option you may want to budget for some overtime pay for these formerly-exempt employees. Thus, you aren't paying the full increase to get them to the required exempt pay level, but they will end up earning extra income because you will be paying overtime rates for work that can't be completed in a 40-hour work week.

- You might also decide to add some staff – at least part time – if that costs less than paying overtime to non-exempt employees.
- You could research and decide to use a “hybrid” pay category in which employees are non-exempt but are salaried – that is, they earn the same pay each week regardless of the number of hours worked up to 40. After 40 hours are worked in any given week, the employee must be paid overtime. When converting employees from exempt to non-exempt, this option can provide the flexibility the employees are used to, thus taking some of the sting out of the transition.

2. Give them all the increase to meet the new minimum for exemption from overtime. We suggest this means that employees already making that new minimum should also get a salary increase so that they are receiving comparatively the same difference from the exempt employees that have to be given raises to meet the minimum – but that certainly isn’t a requirement. If you choose this route, get ready to scrutinize your budget to see what you can do without so that you can afford higher pay.

In order to determine what works best for you, there are spreadsheets and long talks in your future. Don’t just jump to a conclusion without doing some calculations, including determining how many more than 40 hours each week your exempt employees work on average. Also consider the culture of your business and the impact to it if you want or need to make currently-exempt employees non-exempt. This will be an exercise in change management, no matter what choices you make.

Much has been discussed about whether nonprofits are exempt from the new rule. The possibilities for claiming exemption haven’t changed from the current rules, under which it is difficult to establish that either the nonprofit itself is exempt or that each employee of the nonprofit is exempt. The primary downfall for most nonprofits is the practice of interstate commerce, which has been broadly defined as using the US mail service, processing payments of any type that originate outside your state of business, and even using the internet for routine business, such as buying supplies. If you’re serving on the board of a nonprofit, or you are an executive director, you must take responsibility for learning more and determining the impact to your budget, your workforce and/or your workflow.

One more piece of news: as it’s published (on May 23, 2016, again at **http://federalregister.gov/a/2016-11754),** the new rule mandates an increase in this minimum every three years. So keep an eye on this rule from now on. If you don’t, it could sneak up on you, and again cause a major business disruption.

For more information about Align, visit our website www.TheAlignTeam.org or call 877-322-5446.