

An alarm clock with a black metal frame and two bells is positioned in the upper left. The clock face is white with black numbers and hands. To the right of the clock, several stacks of gold coins are arranged in a row, decreasing in height from left to right. The background is a gradient from light purple at the top to light orange at the bottom.

Exempt Employees Are About To Become Much More Costly - Should You Reclassify?

By Karen L. Gabler, Esq.

Business owners generally prefer to classify employees as exempt whenever possible: an “exempt” employee need not be paid for daily overtime (California only) or weekly overtime (California and federal law). To be exempt, an employee must meet both the salary test and the duties test. Under the salary test, the employee must meet the minimum California and federal salary basis. An employee whose salary does not meet these minimum thresholds may not be considered exempt, no matter what position the employee holds or what duties the employee performs. Assuming the salary threshold is met, the employee then must meet the duties test; i.e., the employee must perform exempt duties more than 50% of the time.

California’s salary basis has exceeded the federal salary basis in the past, making it unnecessary to consider federal law when classifying employees as exempt. The California minimum exempt salary threshold is always two times the current minimum wage based upon a 40-hour workweek; with a minimum wage of \$10.00, California’s exempt salary basis is \$41,600. This year, however, federal law has finally surpassed the California standard. Effective December 1, 2016, the federal minimum threshold for salaried exempt employees will increase from \$455 per week (\$23,660 per year) to \$913 per week (\$47,476 per year). This renders the minimum exempt salary basis one of the very few areas where federal law is more restrictive than California law, rendering the California standard irrelevant once the DOL final rule is in effect.

Under federal law, an employer may apply earned commissions or non-discretionary bonuses to meet up to 10% of this federal minimum salary threshold, so long as this additional compensation is paid to employees at least quarterly. Annual bonuses would not qualify for this option. Employers should note, however, that California law looks solely at base salary to determine whether the

employee is paid the minimum threshold, and commissions may not be used to qualify for the minimum salary basis.

Federal law also has an exemption for “highly compensated employees” (HCEs). Under certain circumstances, these employees can be exempt from all federal overtime regardless of their job duties. Under the new federal standard, this HCE threshold will be raised from \$100,000 to \$134,004. Note, however, that California has no such HCE exemption and this federal exemption cannot be used for California employees.

The federal threshold may be automatically increased every three years, with the first update set to occur on January 1, 2020. In California, the exempt salary threshold increases with each increase to the minimum wage.

With the impending salary threshold change only weeks away, employers may have to consider implementing substantial raises for certain exempt employees in December. In the alternative, employers may wish to reclassify those exempt employees into non-exempt status with an appropriate hourly wage. Remember that non-exempt employees must receive a regular hourly rate for all hours worked, and must receive and take all rest breaks and meal periods. Non-exempt employees must also keep time records, documenting their starting time, the time out/in for the meal period, and the time they stopped working. Again, even if employees meet the salary threshold, they also must still meet the duties test, performing exempt duties more than 50% of the time.

For questions regarding the classification of exempt and non-exempt employees, or for information any other employment law issues, contact Karen Gabler (www.lightgablerlaw.com) for further information.

Karen L. Gabler is an employment attorney representing employers and management. With over 24 years of experience, Karen advises clients on a variety of proactive strategies that businesses can implement to ensure legal compliance and avoid workplace disputes. She provides management and staff training, develops workplace policies and employee agreements, investigates employee complaints and provides day-to-day employment advice and counsel to businesses of all sizes and in all industries.

