

What Constitutes “Incentive Payments” Under the Final Overtime Regulations?

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In order to qualify for one or more of the white collar exemptions to the overtime requirements under the Fair Labor Standards Act (FLSA), an employee must meet three tests: (1) the salary basis test (which asks how the employee is paid), (2) the salary level test (which establishes a minimum salary amount that employees must earn to be considered exempt), and (3) the primary duties test (which asks which kinds of job duties the employee performs). The new final regulations revising the minimum salary amount were published in the *Federal Register* on Monday, May 23, 2016. The new minimum salary level, which takes effect on December 1, 2016, is \$913 a week or \$47,476 annually.

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The new regulations allow employers—for the first time—to credit certain incentive payments toward the minimum salary threshold. But what constitutes incentive payments? The better question to ask may be: What does *not* constitute an incentive payment? Note that the regulations do not define “incentive pay” but it is clear that incentive pay does not include the value of medical benefits, retirement benefits, or board and lodging paid by an employer.

Pursuant to the new rule, up to 10 percent of the salary amount may be satisfied by the payment of a nondiscretionary bonuses, incentives, or commissions as long as employers pay these amounts quarterly or more frequently. In the past, the Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) has never allowed the value of medical benefits or any other supplemental benefits to count toward the minimum salary amount. For instance, the WHD has historically refused to allow credits for board and lodging (which can nevertheless be credited toward the payment of the minimum wage) to count toward the minimum salary amount. This position has been consistent since 1940. It is only in these new final regulations that the WHD has announced it will now allow employers to count certain incentive payments toward the minimum salary amount.

In the commentary to the final regulations, the WHD discussed its decision to allow nondiscretionary bonus and commission payments to count toward 10 percent of the minimum salary amount. The WHD specifically discussed incidental benefits, stating:

In the [proposed regulations], the Department stated that we were not considering expanding the salary level test calculation to include discretionary bonuses or changing the exclusion of board, lodging, or other facilities from the salary calculation, a position the Department has held consistently since the salary requirement was first adopted. The Department also declined to consider including in the salary requirement payments for medical, disability, or life insurance, or contributions to retirement plans or other fringe benefits. The Department reemphasizes here that such forms of compensation remain excluded from the salary level test calculation.

In short, the value of incidental benefits provided by an employer to an employee may not be considered in calculating the employee's salary for compliance with the new overtime rules under the FLSA.

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