



Overview of the Department of Labor's Overtime Rules and Impact on Employers May 25, 2016

Presented by:

Andrea M. Kirshenbaum
Principal
Wage & Hour Practice Group
Post & Schell, P.C.



Disclaimer

This presentation does not offer specific legal advice, nor does it create an attorney-client relationship. You should not reach any legal conclusions based on the information contained in this presentation without first seeking the advice of counsel.

About the Presenter:



Andrea M. Kirshenbaum

Principal, Post & Schell, P.C.

Andrea Kirshenbaum is a Principal in Post & Schell's Employment & Employee Relations and Wage and Hour Practice Groups and a member of the Firm's Appellate Department. She defends employers nationally in federal and state court litigation involving all major employment statutes, represents them in related government investigations, and counsels them proactively on compliance with these statutes.

Ms. Kirshenbaum focuses a significant portion of her practice on wage and hour related compliance and litigation under the Fair Labor Standards Act (FLSA) and applicable state laws governing wages and pay practices. Ms. Kirshenbaum serves as the wage and hour columnist for The Legal Intelligencer.

P: 215.587.1126

E: akirshenbaum@postschell.com

Agenda

- Background on Department of Labor's (DOL) Final Rule on Overtime under the Fair Labor Standards Act (FLSA)
 - Brief History
 - Notice of Proposed Rulemaking
 - Key Provisions of the Final Rule
- Developing a plan/response to the Final Rule by the December 1, 2016 effective date



July 6, 2015

Department of Labor releases Notice of Proposed Rulemaking (NPRM), which contains a new proposed minimum salary threshold for workers to qualify for “white-collar” exemptions to the FLSA overtime requirements.

Would more than double the current salary basis of \$23,660 per year (\$455 per week).

*“On an annual basis, workers will get roughly **\$1.2 to \$1.3 billion** in additional wages as a result of this rule.”*

-DOL Secretary Thomas Perez

Obama Administration's Memo

- July 6th NPRM from DOL followed a March 14, 2014 memorandum from President Obama
- Directed Secretary of Labor to propose revisions to the FLSA's overtime regulations

The screenshot shows the White House website's briefing room page. The header includes the White House logo and navigation links: BRIEFING ROOM, ISSUES, THE ADMINISTRATION, PARTICIPATE, 1600 PENN. The main content area is titled 'Briefing Room' and lists various categories: Your Weekly Address, Speeches & Remarks, Press Briefings, Statements & Releases, White House Schedule, Presidential Actions (highlighted), Executive Orders, Presidential Memoranda (highlighted), Proclamations, Legislation, Nominations & Appointments, and Disclosures. The main article is a Presidential Memorandum dated March 13, 2014, titled 'Presidential Memorandum -- Updating and Modernizing Overtime Regulations'. The subject is 'Updating and Modernizing Overtime Regulations'. The text discusses the Fair Labor Standards Act (the "Act"), 29 U.S.C. 201 et seq., which provides basic rights and wage protections for American workers, including Federal minimum wage and overtime requirements. It notes that most workers covered under the Act must receive overtime pay of at least 1.5 times their regular pay rate for hours worked in excess of 40 hours per week. However, regulations regarding exemptions from the Act's overtime requirement, particularly for executive, administrative, and professional employees (often referred to as "white collar" exemptions) have not kept up with our modern economy. Because these regulations are outdated, millions of Americans lack the protections of overtime and even the right to the minimum wage. Therefore, the President directs the Secretary of Labor to propose revisions to modernize and streamline the existing overtime regulations. In doing so, the Secretary shall consider how the regulations could be revised to update existing protections consistent with the intent of the Act; address the changing nature of the workplace; and simplify the regulations to make them easier for both workers and businesses to understand and apply. The memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Background

- Since 1940, DOL regulations have generally required each of three tests to be met for the FLSA's white-collar exemptions to apply, absent certain exceptions:
 - 1) The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed
 - 2) The employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations
 - 3) The amount of salary paid must meet a minimum specified amount, which is currently **\$23,660** per year (\$455 per week)

Background

- The former minimum weekly salary amount was not inflation-adjusted, and therefore eroded in terms of real dollar value over time
 - Modest increase in 2004 under the Bush administration—the first since 1975
- Highly-compensated employees (HCEs) are exempt from overtime pay requirements if their total annual compensation amounts to at least \$100,000 (which must include at least \$455 per week paid on a salary or fee basis)
 - **And** customarily and regularly perform at least one of the exempt duties or responsibilities of an executive, administrative, or professional employee identified in the standard tests for exemption

DOL's 2004 Final Rule



- Discarded the old "long test" for employees paid a lower salary, and "short test" for employees paid a higher salary
- Replaced the short-test/long-test structure with a single "standard" duties test
- "Standard" duties test does not strictly limit the amount of nonexempt work that may be performed by exempt employees (as did the old long duties test)
- Does require that exempt employees ***primarily perform*** work of an exempt character in order to satisfy the exemption criteria
 - Executive, Administrative, Professional, etc.



May 18, 2016

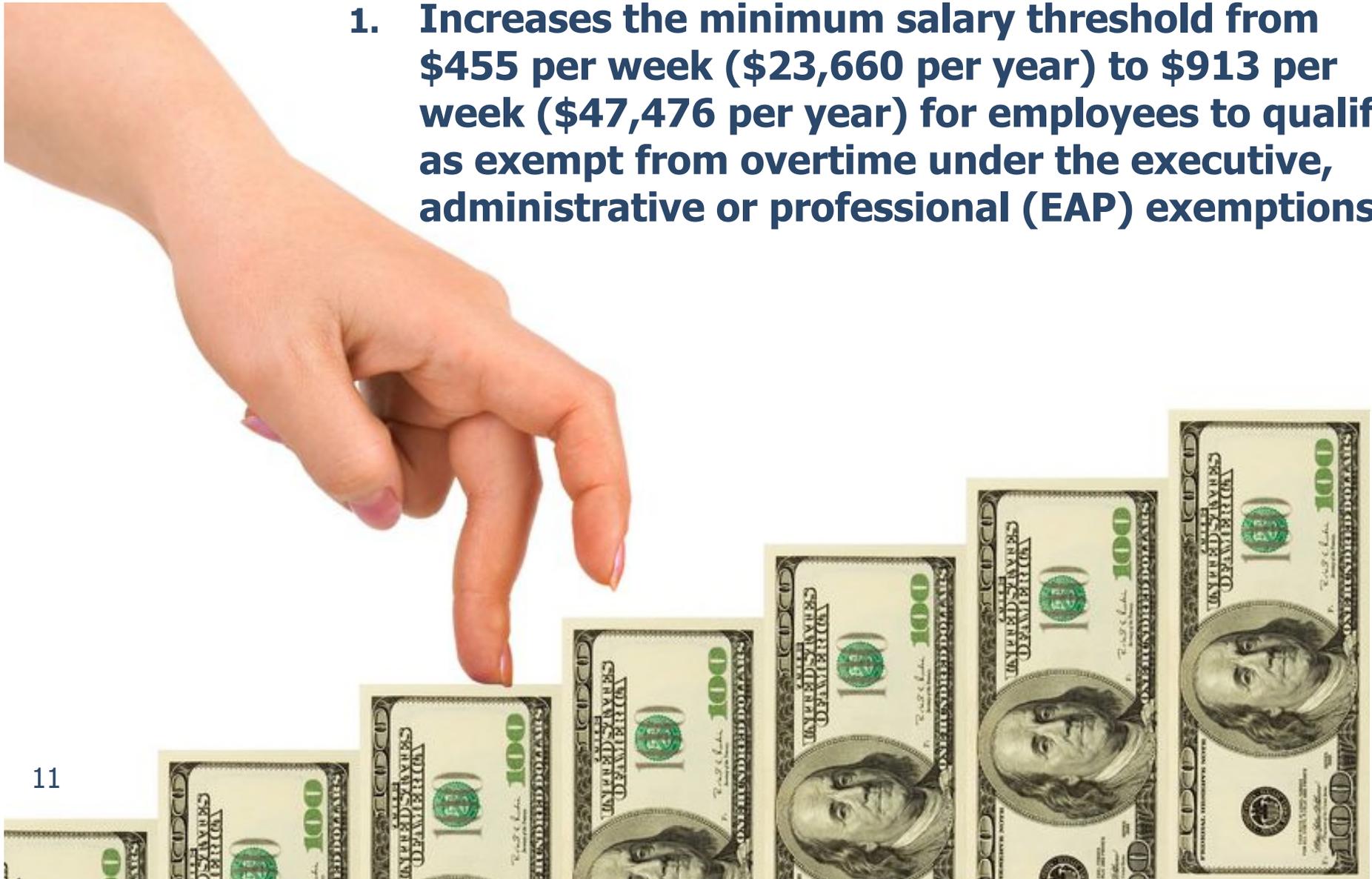
President Obama and Secretary Perez formally announced the publication of the Department of Labor's Final Rule updating the overtime regulations, which will extend overtime pay eligibility **to over 4 million workers** absent intervening employer action.

The effective date of the Final Rule is December 1, 2016.

The initial increases to the standard salary level (from \$455 to \$913 per week) and HCE total annual compensation requirement (from \$100,000 to \$134,004 per year) will be effective on that date. Future automatic updates to those thresholds will occur every three years, beginning on January 1, 2020.

Key Provisions of the Final Rule

1. **Increases the minimum salary threshold from \$455 per week (\$23,660 per year) to \$913 per week (\$47,476 per year) for employees to qualify as exempt from overtime under the executive, administrative or professional (EAP) exemptions**



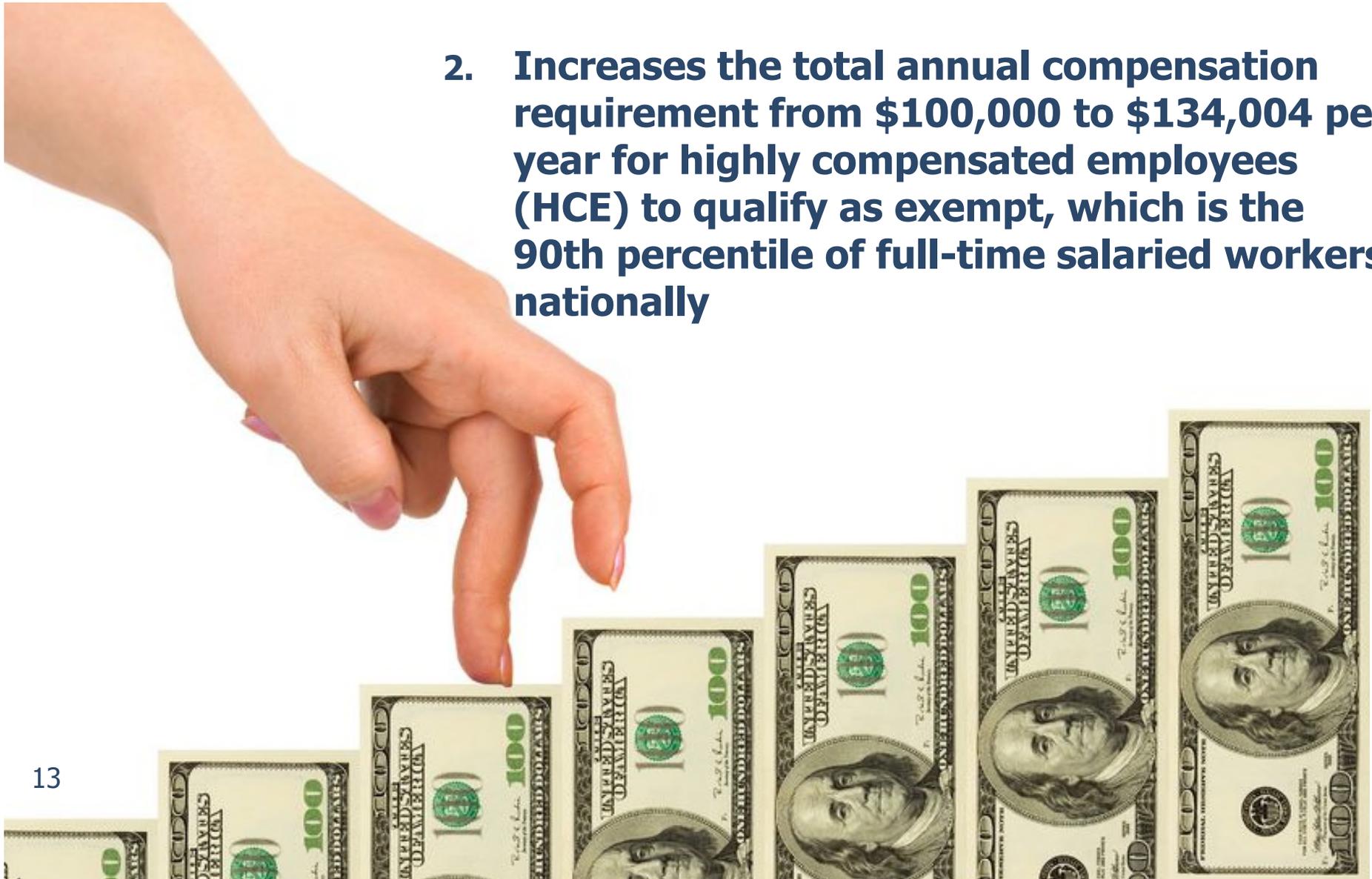
Key Provisions of the Final Rule

- This is slightly less than \$3,000 below the level included in the proposed regulations and reflects the **40th percentile of weekly earnings for full-time salaried workers in the lowest-wage Census region (currently the South)**



Key Provisions of the Final Rule

2. **Increases the total annual compensation requirement from \$100,000 to \$134,004 per year for highly compensated employees (HCE) to qualify as exempt, which is the 90th percentile of full-time salaried workers nationally**



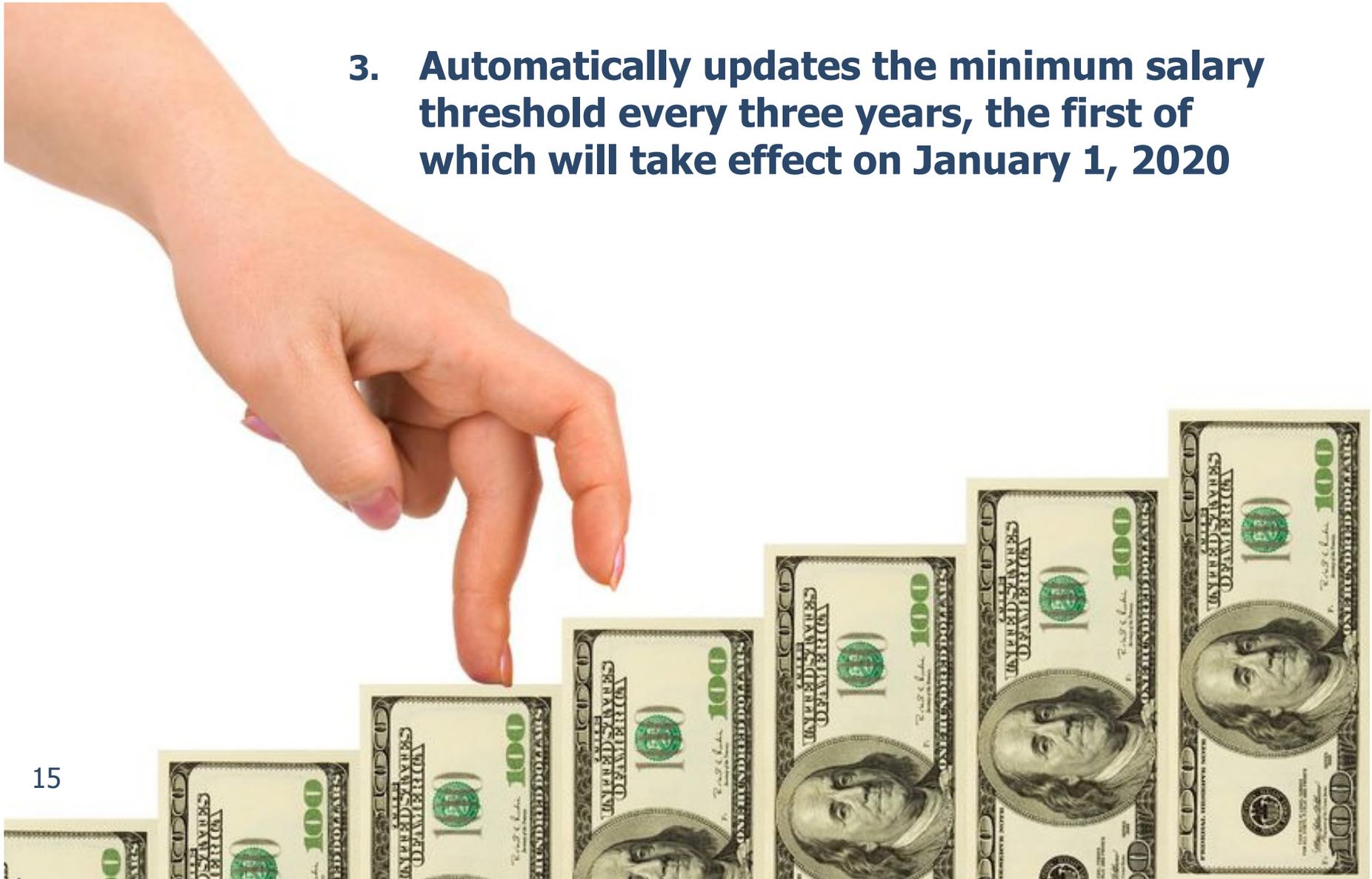
Key Provisions of the Final Rule

- This number is near \$12,000 more than the figure included in the proposed regulations



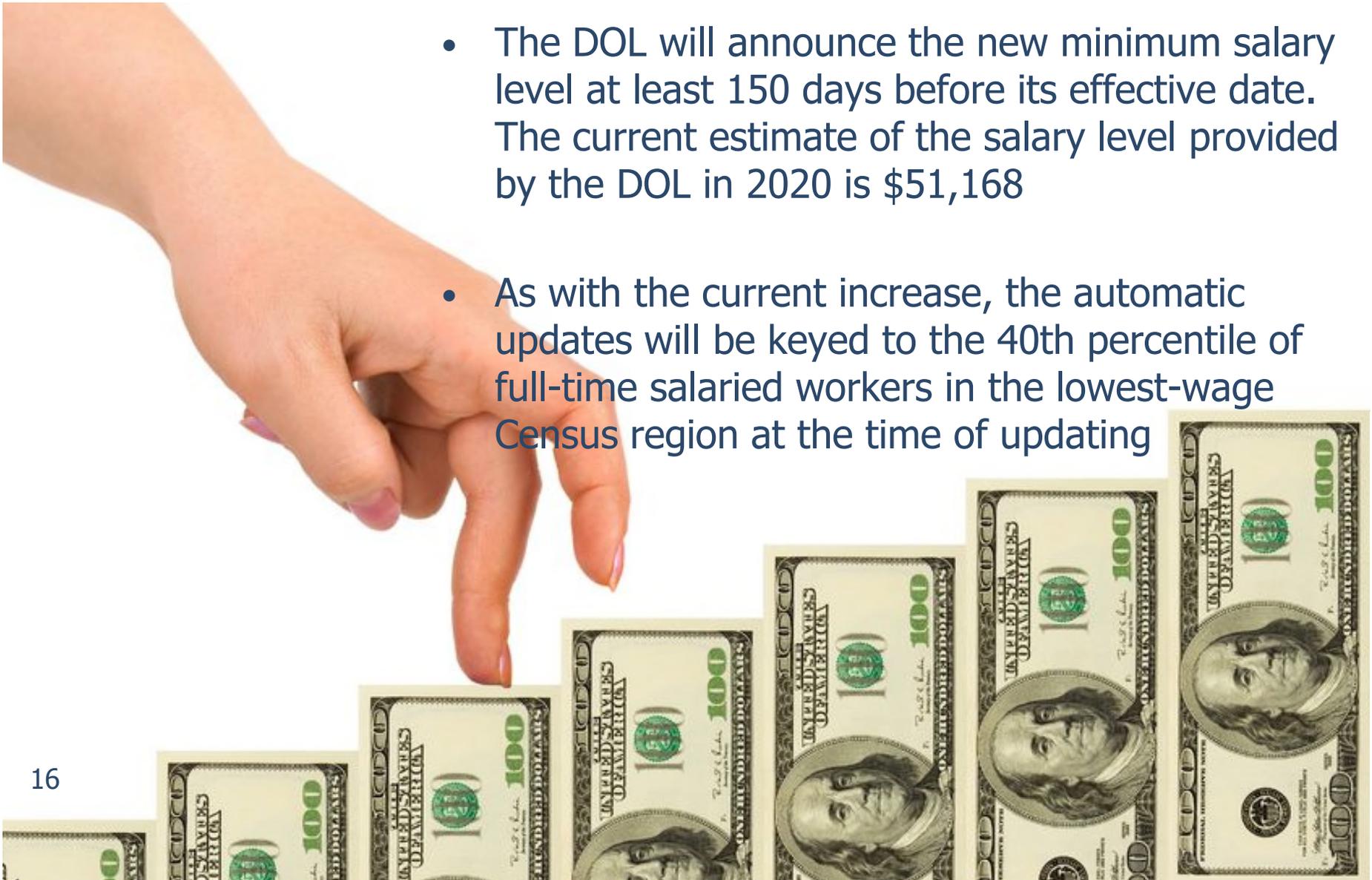
Key Provisions of the Final Rule

3. **Automatically updates the minimum salary threshold every three years, the first of which will take effect on January 1, 2020**



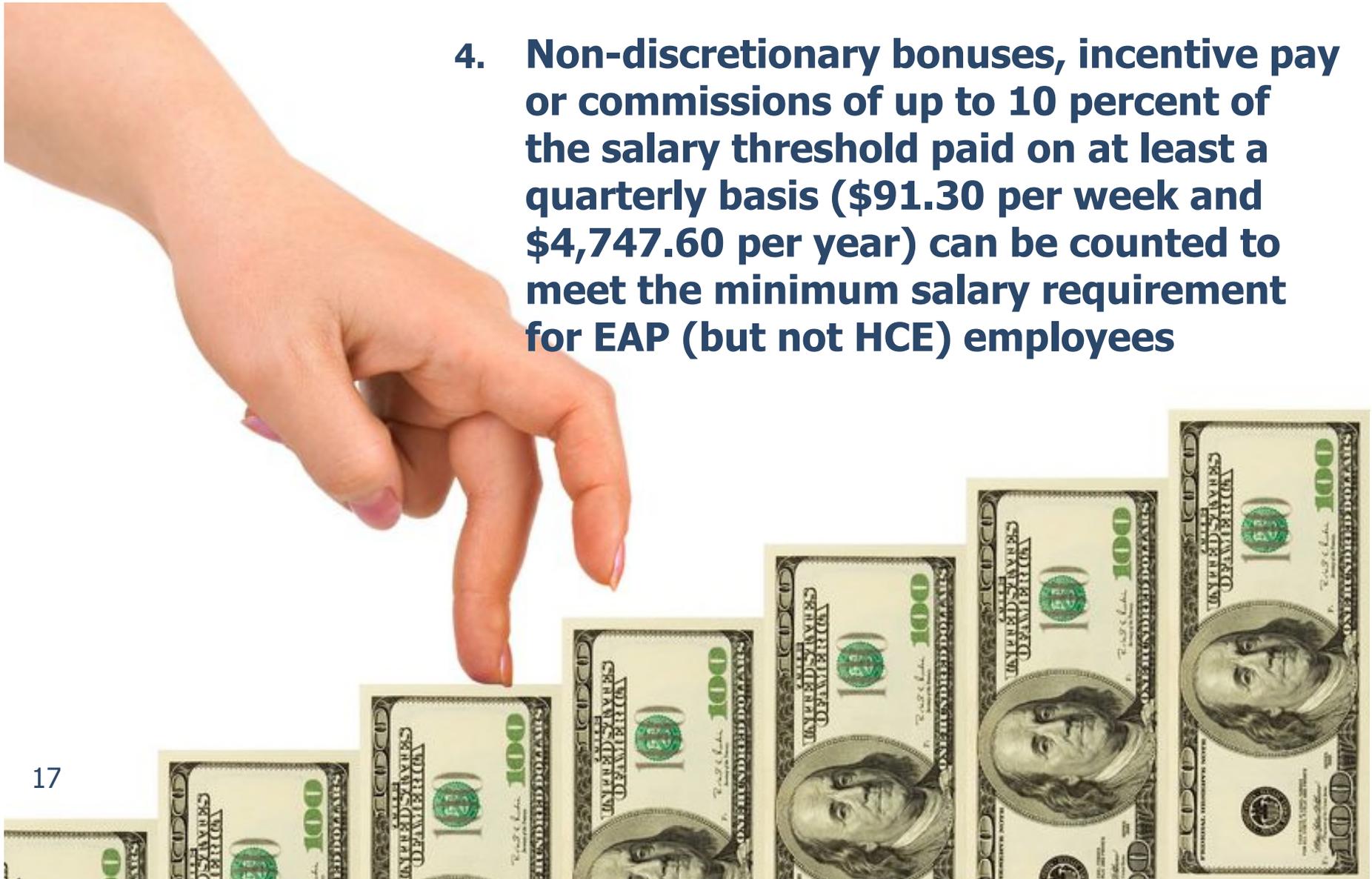
Key Provisions of the Final Rule

- The DOL will announce the new minimum salary level at least 150 days before its effective date. The current estimate of the salary level provided by the DOL in 2020 is \$51,168
- As with the current increase, the automatic updates will be keyed to the 40th percentile of full-time salaried workers in the lowest-wage Census region at the time of updating



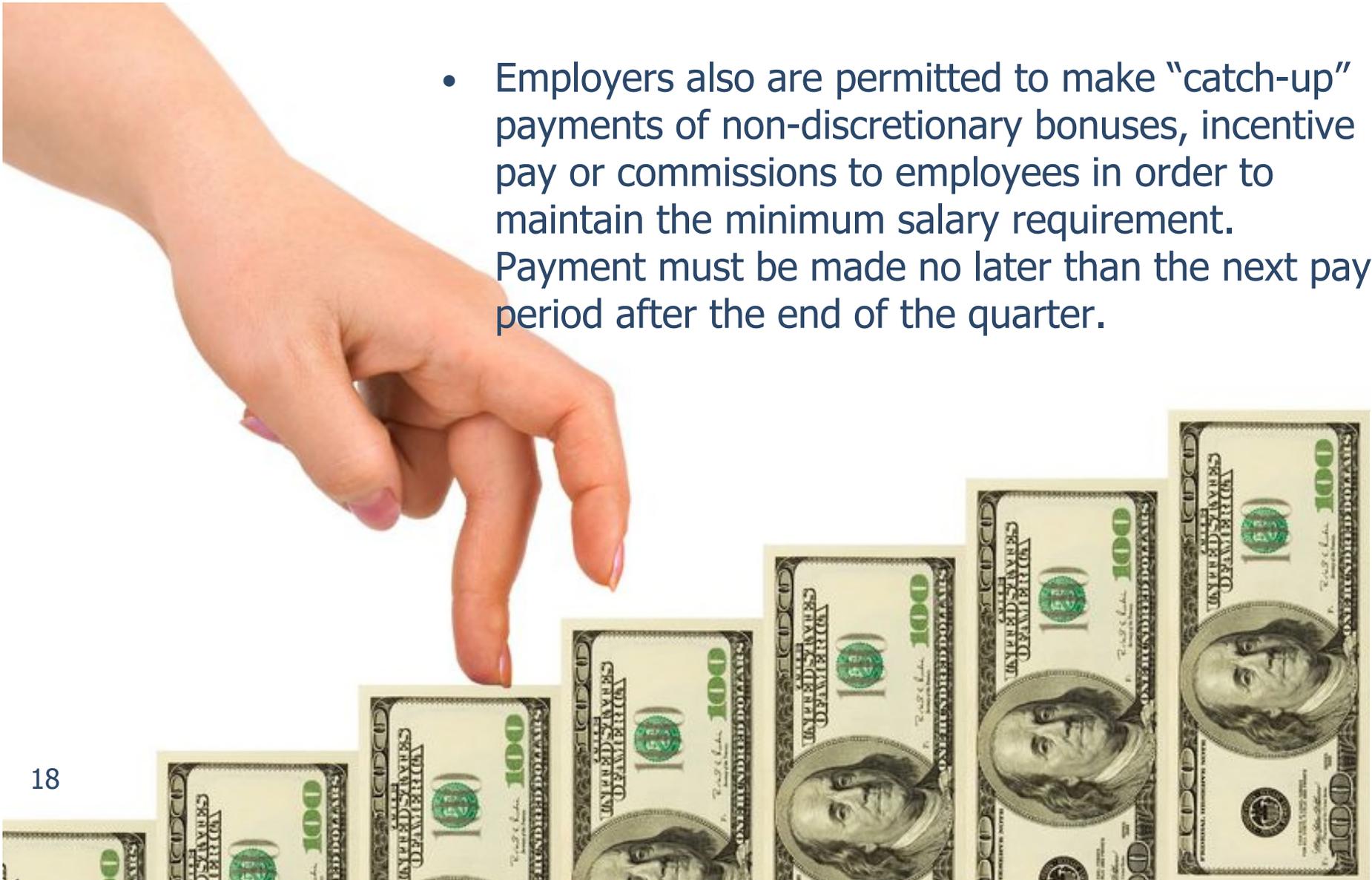
Key Provisions of the Final Rule

4. **Non-discretionary bonuses, incentive pay or commissions of up to 10 percent of the salary threshold paid on at least a quarterly basis (\$91.30 per week and \$4,747.60 per year) can be counted to meet the minimum salary requirement for EAP (but not HCE) employees**



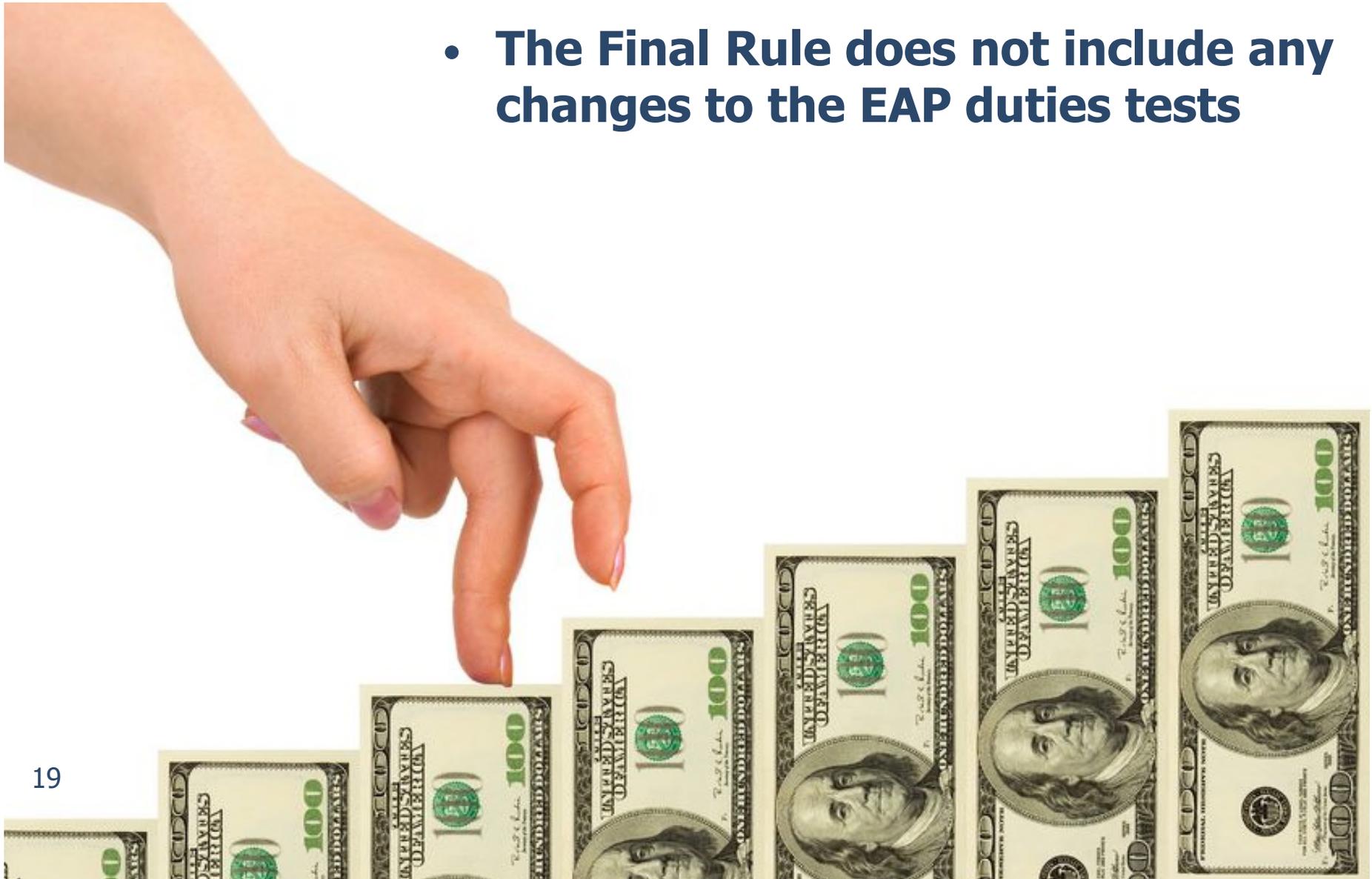
Key Provisions of the Final Rule

- Employers also are permitted to make “catch-up” payments of non-discretionary bonuses, incentive pay or commissions to employees in order to maintain the minimum salary requirement. Payment must be made no later than the next pay period after the end of the quarter.



Key Provisions of the Final Rule

- **The Final Rule does not include any changes to the EAP duties tests**



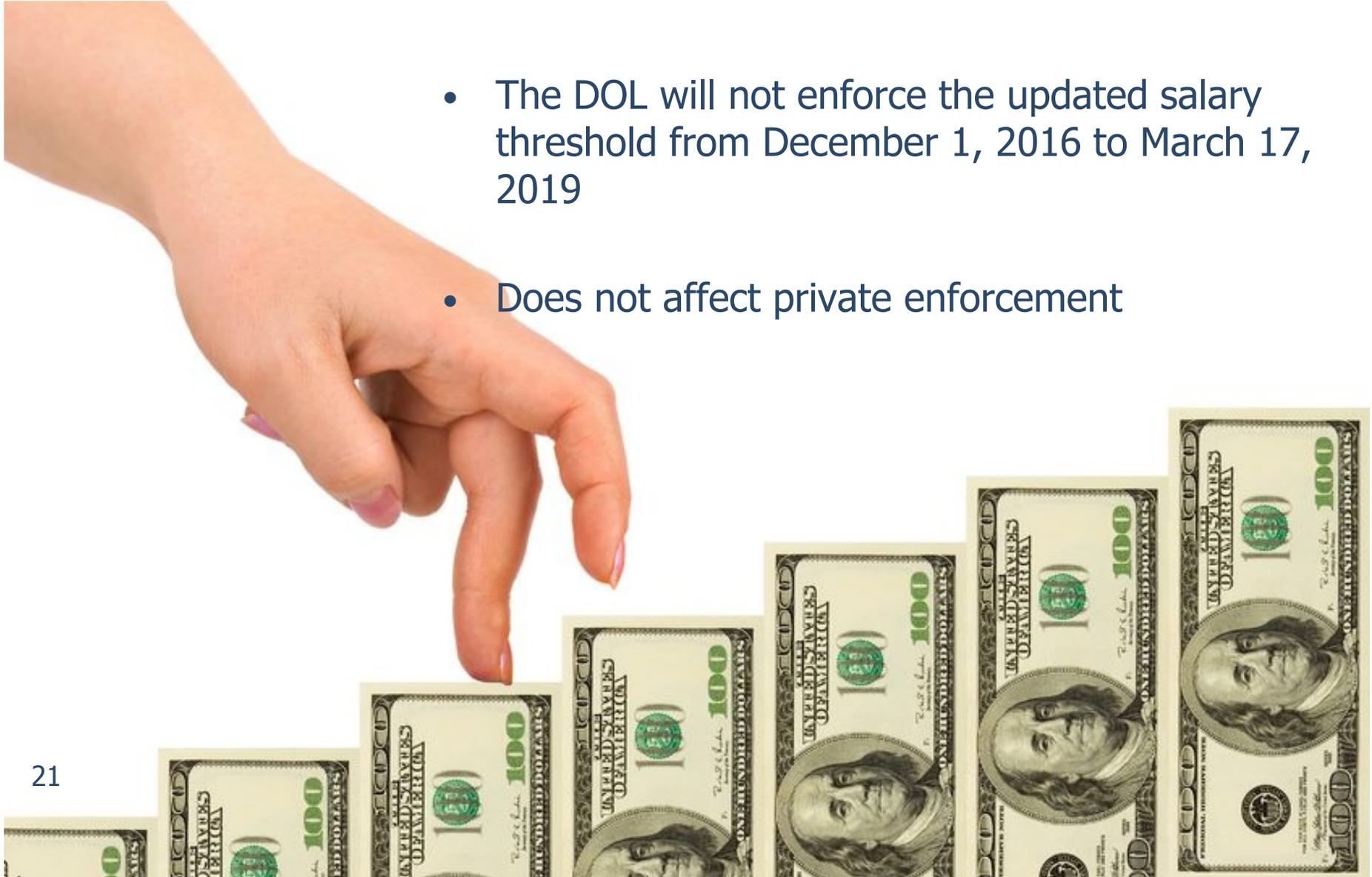
Other Changes in the Final Rule

- **New salary level applies to fee basis regulation- adequacy of fee basis tested against \$913 per week based on hours required to complete tasks**
- **Computer professional hourly rate- \$27.63**



Limited Non-Enforcement for Medicaid-funded services for individuals with intellectual and developmental disabilities in residential homes and facilities with 15 or fewer beds

- The DOL will not enforce the updated salary threshold from December 1, 2016 to March 17, 2019
- Does not affect private enforcement



Implementation of the Final Rule



"Employers have a wide range of options for responding to the changes in the salary level."

Sunday

Monday

Tuesday

Wednesday

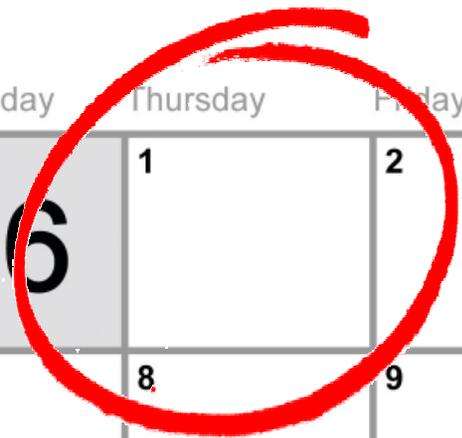
Thursday

Friday

Saturday

December 2016

				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31



Be Aware

- For organizations that have a significant number of exempt employees currently earning less than \$913 per week, compliance with the Final Rule will potentially have ripple effects throughout the organization
 - Will impact the work of both exempt and non-exempt employees
- The Final Rule may have the unintended consequence of creating salary compression at the lowest rungs of the exempt workforce while at the same time creating an increased workload for the remaining exempt workforce



Planning/Response Ahead of 12/1/16

- Employers should conduct comprehensive reviews of their workforces to assess the impact of the Final Rule
 - Not only on workers considered for reclassification, but more broadly analyze the impact of the regulations on the workplace
 - Similar to a wage and hour audit
- Carefully consider *how* compliance efforts are discussed
 - Strongly consider conducting review under the ambit of attorney-client privilege

Planning/Response Ahead of 12/1/16

- Bring together a cross-disciplinary team including **finance, operations, legal and employee relations** professionals to assess the impact of the Final Rule and make compliance recommendations



Planning/Response Ahead of 12/1/16

- For executive, administrative or professional (EAP) employees, currently classified as exempt and earning close to the new salary threshold, employers may choose to increase the salary level to maintain exempt status (especially where employees work substantially more than 40 hours per week)
- Employers providing raises in order to maintain exempt status should be aware that **this is a three-year and not a permanent solution**
 - The updated salary level in 2020 could be far higher than what the DOL currently is estimating (\$51,168)

Planning/Response Ahead of 12/1/16

- Employees making <\$45,000 likely will be reclassified as nonexempt
 - For those employees, employers will need to assess how much (if any) overtime the newly reclassified employees likely will work
 - Determine an hourly wage rate or salary for those employees - taking into account those estimates
- Consider changes to job duties of workers or broader restructuring of job classifications
 - Including potential reduction in hours of newly reclassified employees and potential increase in hours of exempt employees

Planning/Response Ahead of 12/1/16

- Given the ability to count up to 10 percent of nondiscretionary bonuses and commissions toward the salary requirement, assess bonus and commission plans for effected employees and consider modifications
- Consider the impact of employee reclassification on the benefits available to reclassified employees and assess whether to consider changes to benefit plans

Planning/Response Ahead of 12/1/16

- If a significant number of employees will be reclassified, consider how to track the time of this newly nonexempt group of employees
- Consider what impact the reclassification will have on both the employees and the workplace
 - For example, will newly reclassified employees no longer be permitted to carry company-issued electronic devices; will they no longer be permitted to work remotely?



Planning/Response Ahead of 12/1/16

- Conduct a detailed analysis of staffing patterns to find opportunities for efficiency
- Revise financial forecasting/budgeting models to account for changes to staffing and potential increased overtime expenditures
- Assess hiring additional workers to try to reduce the need for overtime hours by current employees

Important to Remember

- Although the duties tests were not modified by the Final Rule, **this is a good time to consider changes to the exempt classification** of certain positions that may not meet the duties' requirements
- Or bolster the exempt status of certain positions by reconfiguring job families or departments



Important to Remember

- Communication with employees regarding any changes is **essential**
 - Especially to reclassified employees who may perceive the reclassification as a demotion



Important to Remember

- Training regarding new practices/reclassifications essential
 - Management
 - Newly reclassified employees



Important to Remember

- **Throughout the compliance analysis, keep in mind the requirements of more restrictive state and local law**
 - The FLSA continues to remain a floor, not a ceiling

