

(\$913) results in a base rate of \$1,397 per week (or a proportionate amount based on the number of days worked).⁶³ The Department has revised § 541.709 to incorporate this change.

iii. Other Comments Requesting Special Salary Tests

The Department also received approximately a dozen comments concerning application of the proposed salary level to Puerto Rico. Nearly all of these commenters urged the Department to either exempt Puerto Rico from the updated standard salary level requirement (thus keeping the salary level at \$455) or to reinstate a special salary level test for Puerto Rico (set between the current and proposed salary levels).⁶⁴ In 1949, the Department established a special salary level for Puerto Rico because its minimum wage rate was below the FLSA minimum wage. See 14 FR 7705-06 (Dec. 24, 1949); Weiss Report at 21. The Fair Labor Standards Amendments of 1989 removed Puerto Rico from the special minimum wage provisions and instead applied the section 6(a)(1) minimum wage to Puerto Rico. See Sec. 4, Public Law 101-157, 103 Stat. 938 (Nov. 17, 1989). This change eliminated the justification for maintaining a special salary test in Puerto Rico, and so in the 2004 Final Rule we established that the standard salary level test applies to Puerto Rico. Puerto Rico continues to be subject to the section 6(a)(1) minimum wage, and the Department has consistently maintained a uniform salary level for all states and also for all territories subject to the FLSA minimum wage.

C. Inclusion of Nondiscretionary Bonuses, Incentive Payments, and Commissions in the Salary Level Requirement

As indicated in the NPRM, the Department has consistently assessed compliance with the salary level test by looking only at actual salary or fee

payments made to employees and, with the exception of the total annual compensation requirement for highly compensated employees, has not included bonus payments of any kind in this calculation. During stakeholder listening sessions held prior to the publication of the NPRM, several business representatives asked the Department to include nondiscretionary bonuses and incentive payments as a component of any revised salary level requirement. These stakeholders conveyed that nondiscretionary bonuses and incentive payments are an important component of employee compensation in many industries and stated that such compensation might be curtailed if the standard salary level was increased and employers had to shift compensation from bonuses to salary to satisfy the new standard salary level.

In recognition of the increased role bonuses play in many compensation systems, and as part of the Department's efforts to modernize the overtime regulations, the Department sought comments in the NPRM regarding whether the regulations should permit nondiscretionary bonuses and incentive payments to count towards satisfying a portion of the standard salary level test for the executive, administrative, and professional exemptions.⁶⁵ Specifically, the Department asked whether employers should be allowed to use nondiscretionary bonuses and incentive payments, paid no less often than monthly, to satisfy up to 10 percent of the standard salary level test. To ensure the integrity of the salary basis requirement, the Department stressed the importance of strictly limiting the amount of the salary requirement that could be satisfied through the payment of nondiscretionary bonuses and incentive pay, as well as the maximum time period between such payments.

The Department did not propose any changes to how bonuses are treated under the "total annual compensation" requirement of the HCE test, and stated that we were not considering changing the exclusion of board, lodging, or other facilities from the salary calculation or expanding the salary level test calculation to include discretionary bonuses, payments for medical, disability, or life insurance, or contributions to retirement plans or other fringe benefits. See, e.g., 80 FR

38535-36, 38537 n.36. However, the Department did seek comment on the appropriateness of counting commissions toward the salary level requirement.

The requirement that exempt employees be paid on a salary basis has been a part of the Department's part 541 regulations since 1940. As the Department said at that time, "a salary criterion constitutes the best and most easily applied test of the employer's good faith in claiming that the person whose exemption is desired is actually of such importance to the firm" that he or she is properly within the exemption. Stein Report at 26, see also *id.* at 19, 36. Since 1940, therefore, the regulations have required that an exempt EAP employee be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed. More recently, the Department has noted "that payment on a salary basis reflects an employee's discretion to manage his or her time and to receive compensatory privileges commensurate with exempt status." 69 FR 22177. While, as the Department noted in the NPRM, employers are allowed to pay additional compensation beyond the required salary in the form of bonuses, those payments have not counted towards the payment of the required minimum salary level. The Department's discussion in the NPRM of including nondiscretionary bonus payments in the standard salary level was informed by our concern that permitting the standard salary level to be satisfied by bonus payments that frequently correlate to the quantity and quality of work performed could undermine the utility of the salary basis requirement in identifying bona fide EAP employees.

The Department received a variety of comments concerning whether the regulations should permit nondiscretionary bonuses and incentive payments to satisfy a portion of the standard salary level test. Commenters representing employers generally supported this change as an improvement over the current regulations, though many objected that the option the Department was considering was too restrictive. Most of the commenters representing employees that addressed this idea opposed it on the grounds that it would complicate the test for exemption and undermine the worker protections established by the salary basis requirement.

Commenters representing employers offered a range of reasons for generally supporting the inclusion of nondiscretionary bonuses and incentive

⁶³ The Department calculated this figure by dividing the new salary level (\$913) by the current salary level (\$455), and then multiplying this product (rounded to the nearest hundredth) by the current base rate (\$695). This produces a new base rate of \$1,396.95, which we rounded to the nearest whole dollar (\$1397).

⁶⁴ Commenters included the Cadillac Group of Companies, Caribbean Restaurants, the Puerto Rico Bankers Association, the Puerto Rico Chamber of Commerce, the Puerto Rico Hotel & Tourism Association, the Puerto Rico Manufacturers Association, the Secretary of Labor for Puerto Rico (the Honorable Vance Thomas), the Training and Labor Affairs Advisory and Human Resources Administration Office (OCALARI, by its Spanish acronym), one individual commenter, and one anonymous commenter. Two individual employee commenters from Puerto Rico offered general support for the Department's proposal.

⁶⁵ Promised bonuses such as those announced to employees to induce them to work more efficiently or to remain with the firm are considered non-discretionary. See 29 CFR 778.211(c). Examples include individual or group production bonuses, and bonuses for quality and accuracy of work. Incentive payments, including commissions, are also considered non-discretionary.