

Update: FLSA “Overtime” Regulations

The Executive, Administrative, and Professional Exemption under the New Rule

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Employee Exemptions

- **Most Common Exemptions:** Section 13(a)(1) provides an exemption from both minimum wage and overtime for employees who are employed in a bona fide:
 - Executive
 - Administrative or
 - Professional capacity.

Executive, Administrative, Professional Exemptions

- To qualify under the executive, administrative or professional exemption, the individual must meet three tests:
 - Salary Level
 - Salary Basis
 - Job Duties
- The salary level and salary basis tests are identical for executive, administrative and professionals. The duties tests differ for each.
- Less showing is required under the duties test for “Highly Compensated Employees” (HCEs).
- These tests do not apply to doctors, lawyers, teachers, and outside sales employees

Purpose of Salary Level Test

- In 1938, the “exemption was premised on the belief that exempted workers earned salaries well above the minimum wage...”
- “The premise behind the standard salary level test . . . is that employers are more likely to pay higher salaries to workers in bona fide EAP jobs.”
- “The salary level requirement was created to identify the dividing line distinguishing workers who may be performing exempt duties from the nonexempt workers whom Congress intended to be protected by the FLSA's minimum wage and overtime provisions.
- DOL considers salary level test to be the “best single test” of exempt status
- Salary level test has been updated 7 times since 1948, last one being 2004

New Final Rule- History

- March 13, 2014 - President Obama signed a Presidential Memorandum directing the DOL to modernize and simplify the overtime regulations with the goal of insuring FLSA's overtime protections are fully implemented.
- July 6, 2015 - Proposed Rule Issued and received almost 300,000 comments
- May 18, 2016, DOL announced that it will publish a Final Rule updating the regulations regarding the salary threshold for exempt, administrative, and professional employees.
- May 23, 2016, Final Rule published in Fed. Register at 81 FR 32391- available online at <https://federalregister.gov/a/2016-11754>
- **Final Rule effective December 1, 2016**

Summary of Changes from New Rule

- Only Salary Level Test and Salary Basis Test were changed (no changes to Duties test)
- Required salary level increased just over 100%
- Required salary level for highly compensated employees (HCEs) increased
- Automatic update to salary level every 3 years
- Some changes to salary basis test

Changes to Salary Level Test

- Final Rule sets salary level to minimum **\$913** per week (**\$47,476** annually).
 - Current rule is \$455/week (\$23,660 annually)
 - Proposed rule was \$970/week (\$50,440 annually)
- Changes salary minimum for highly compensated employee (HCE) from \$100,000 to **\$134,004**
- American Samoa \$767/week
- Motion Picture Industry \$1,397

Why \$913 per week?

- Census Region (Q4 2015)
 - South \$913
 - Midwest \$994
 - Northwest \$1036
 - West \$1050
 - All Census Regions \$972
- DOL did not want to “deny employers the ability to use the exemption for too many employees in low wage areas.”

Changes to Salary Level Test- Automatic Update

- Salary level is automatically updated every 3 years
 - 40th percentile of the weekly earnings of full-time salaried workers in the lowest-wage Census region (currently the South)
 - beginning January 1, 2020
 - HCEs will also automatically increase based upon the 90th percentile of full-time salaried workers nationally
 - Used Bureau of Labor Statistics <http://www.bls.gov/data/>
- Updated wages posted at least 150 days before the January 1st effective date
 - Federal Register, DOL Wage and Hour Division Website

Changes to Salary Basis Test

- Up to 10% of minimum salary requirement can be met with nondiscretionary bonuses, incentive payments, and commissions
- **These forms of compensation must be paid at least quarterly**
- If minimum not reached by end of quarter when factoring in the above, true up first pay period after quarter

Salary Basis- HCEs

- HCEs must receive at least the standard salary amount (\$913/week) paid on a salary basis
- Can use nondiscretionary bonuses, incentive payments, and commissions to count toward the total annual compensation requirement (\$134,004), but cannot use these to satisfy the standard salary amount
 - For HCE's, nondiscretionary bonuses, incentive payments, and commissions cannot even count toward 10% of the standard salary amount
 - If bonuses and incentive payments are insufficient to reach the total annual compensation, employer can true up within one month after the end of the year (i.e., true up in January)

Example of Salary Basis Under New Rule

- Employee A is paid \$850 per week regardless of variations in the quality or quantity of his work. He receives an additional incentive payment every quarter in the amount of \$10 per widget produced that quarter. Employer produced 100 widgets in Q1 but only 70 widgets in Q2, and paid Employee A accordingly in the first pay period following each Q.
- Employee A meets the salary basis and salary level test for Q1. For Employee A to meet these tests for Q2, Employer will have to pay Employee A at least an additional \$119 (in addition to the incentive payment and salary) in the first pay period following Q2.
- To be exempt, Employee A will also have to meet the duties test.

Example- Salary Basis

- Same example, except Employer produces 2,500 widgets each quarter, making Employee A's total annual compensation \$144,200. Is he an HCE?
- NO. While his annual compensation is sufficient, he has to be paid at least \$913 a week without regard to non-discretionary bonuses, incentive payments, or commissions to be an HCE. The ten percent rule does not apply to HCEs.

Purpose of New Rule

- Express Purpose
 - “ensure that the FLSA’s intended overtime protections are fully implemented”
 - simplify identification of nonexempt employees
 - 2004 salary level “was too low to effectively screen out from the exemption overtime-eligible white collar employees”
 - Automatic update is “to prevent these [salary level] thresholds from becoming outdated”
- DOL has estimated that 70% of employers are violating FLSA in some way

Does the new rule simplify identification of exempt employees?

- Notably, the new rule does not change the duties test, which is the most subjective test
- The DOL states that the new rule meets the President's directive of simplification because it reduces the number of workers for whom employers must apply the duties test
- Higher salary means more likely to meet the duties test:
 - "The salary level requirement was created to identify the dividing line distinguishing workers who may be performing exempt duties from the nonexempt workers whom Congress intended to be protected by the FLSA's minimum wage and overtime provisions.

Table A--Weekly Salary Levels for Exemption

Date enacted	Long test			Short test (all)
	Executive	Administrative	Professional	
1938.....	\$30	\$30
1940.....	30	50	\$50
1949.....	55	75	75	\$100
1958.....	80	95	95	125
1963.....	100	100	115	150
1970.....	125	125	140	200
1975.....	155	155	170	250
Standard Test				
2004.....		\$455		

Population Affected

- Estimated 159.9 million wage and salary workers in U.S. in 2017
- Of those, DOL estimates 22.5 million to be the actual number of truly exempt EAP workers under new rule
- Estimated 4.2 million workers are currently exempt, meet the standard duties test, and earn between \$455 and \$913/week, meaning they will become non-exempt (absent intervention)
- Estimated 8.9 million employees are paid between \$455 and \$913/week who do not meet the standard duties test and “will now face a lower risk of misclassification” according to the DOL

Population Affected (cont.)

- Estimated 6.5 million white collar employees who fail the standard duties test will still earn at least the new salary level
- Estimated 732,000 white collar workers currently make between \$455 and \$913 who do not meet the duties test are not receiving overtime pay because they are misclassified
- 65,000 HCE would no longer be exempt under new rule

Estimated Employer Cost

- Direct Employer Cost
 - Year One - \$677.9 million
 - Year Two - \$208 million
 - Year Ten - \$284.2 million
 - Average Annualized Value - \$288 to 295.1 million
- Factors considered
 - Costs to understand regulation
 - Adjustment costs
 - Managerial costs
- Factors not considered:
 - Decrease in litigation cost
 - 2000 cases in 2001 to 8000 in 2012

Transfer of Income

- “The [new rule] will also transfer income from employers to employees.”
 - Year 1 - \$1,285.2 million
 - Year 2 - \$936.5 million
 - Year 10 -\$1,607.2 million
 - Average annualized transfers- \$1,189.1 million over 10 years

What did not change

- Overtime only paid for hours worked over 40 in a workweek
- Overtime remains payable at 1 ½ regular rate of pay
- Definition of regular rate of pay remains the same
- Nonexempt Employees
 - Hours worked over 40 per workweek
 - Defined as any fixed or regularly recurring period of 168 hours or seven consecutive 24 hour periods
 - No limit on hours worked by employees 16 years of age and older
 - Rate of not less than one and one-half times the regular rate of pay

Efforts to Overthrow New Rule

- 21 states, including South Carolina, have filed a lawsuit in Texas federal court challenging the new rule
 - Do not assume the courts will change the new rule- proceed as planned
- The US HOR passed a bill, H.R. 6094, that would delay the effective date of the new rule 6 months- until June 1, 2017. HOWEVER, this bill has a significant uphill battle before it becomes law.
 - Must go to the Senate, be passed in the Senate, and avoid presidential veto.
 - Again, proceed as planned for December 1st date

Job Duties

- Did not change under new rule
- Varies amongst EAP exemptions
- Common source of problems due to subjectivity
 - Determination is case by case, highly fact specific; can't rely on job title
 - Employees are presumed to be non-exempt; employer has burden of proving exempt status
- Lesser showing for HCE: If an employee meets the salary level and salary basis tests for a HCE, he/she is deemed exempt if he or she customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee

Job Duties- Executive

- Primary duty must be management of the enterprise or of a customarily recognized department or subdivision
- Customarily and regularly directs the work of two or more employees; and
- Authority to hire or fire other employees or whose recommendations as to hiring, firing, promotion, or other status change are given “particular weight.”

Executive- Primary Duty

- The principal, main, major or most important duty that the employee performs. Factors:
 - Relative importance of the exempt duties;
 - Amount of time spent performing exempt work;
 - Relative freedom from direct supervision; and
 - Relationship between the employee's salary and the wages paid to other employees for the same kind of non-exempt work.
- Employees who spend more than 50% of time performing exempt work generally satisfy this requirement, but 50% is not a necessary requirement

Executive Exemption- Management Requirement

- Interviewing, selecting, and training employees
- Setting and adjusting pay and work hours
- Maintaining production or sales records
- Appraising employee productivity
- Handling employee complains and grievances
- Disciplining employees
- Planning and apportioning work among employees
- Directing manner of work and/or tools, etc. to be used
- Planning and controlling the budget

Executive- Department or Subdivision Requirement

- The phrase “a customarily recognized department or subdivision” is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs versus a unit with permanent status and function.

Executive- “Particular weight” Requirement

- Factors include but are not limited to:
 - Whether hiring / firing suggestions are part of the employee’s job duties
 - Frequency of recommendations made and frequency employer relies on recommendations
 - The employee need not have authority to make the ultimate decision, but making occasional suggestions regarding status changes of co-workers does not meet the “particular weight” standard

20% Owner Executives

- Executive exemption also includes employees who
 - Own at least a bona fide 20% equity interest in the enterprise; and
 - Are actively engaged in management of the enterprise
- Salary basis and salary level requirements do not apply to 20% owners.

Job Duties- Administrative Exemption

- The administrative employee's primary duty must be the performance of office or non-manual work directly related to the **management or general business operations** of the employer or the employer's customers
- Primary duty must also include the exercise of **discretion and independent judgment** with respect to **matters of significance**

Management or General Business Operations

- The employee must perform work directly related to assisting with the running or servicing of the business as distinguished from, for example, working on a production line or selling a product in a retail or service establishment
- Examples: tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, HR, labor relations, public relations, government relations, IT, legal compliance, and similar activities
- *the key question is whether an employee's duties involve the running of a business, as opposed to the mere day-to-day carrying out of the business's affairs*

Discretion and Independent Judgment

- The exercise of discretion and independent judgment “involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.”
- Must be exercised with respect to matters of significance, which refers to the level of importance or consequence of the work performed
- Decisions may be subject to review at a higher level and, upon occasion, be revised or reversed, but the employee has to have authority to make an independent choice free from supervision

Discretion and Independent Judgment

- Factors include whether the employee:
 - has authority to affect/implement management policies or operating practices
 - carries out major assignments
 - performs work that affects business operations to a substantial degree
 - has authority to commit the employer in matters of significant financial impact
 - has authority to waive or deviate from established policies and procedures
 - has authority to negotiate and bind the company on significant matters
 - provides consultation or expert advice to management
 - is involved in planning long or short term business objectives
 - investigates and resolves matters of significance on behalf of management
 - represents the company in handling complaints, arbitrating disputes or resolving grievances

Discretion and Independent Judgment

- Discretion and independent judgment does NOT include:
 - Applying well-established techniques, procedures, or specific standards described in manuals or other sources
 - Clerical or secretarial work
 - Recording or tabulating data
 - Performing mechanical, repetitive, recurrent or routine work

Learned Professional

- Primary duty must be performing work requiring advanced knowledge
- in a field of science or learning
- Customarily acquired by a prolonged course of specialized intellectual instruction

Advanced Knowledge

- Cannot be attained at the high school level
- Intellectual in character and includes work requiring the consistent exercise of discretion and judgment versus routine mental, manual, mechanical or physical work
- The advanced knowledge is generally used to analyze, interpret or make deductions from varying facts or circumstances

Field of Science or Learning

- Generally includes law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, physical sciences, biological sciences, chemical sciences, medicine, pharmacy

Prologned Course of Specialized Intellectual instruction

- Specialized academic training is required
- Appropriate academic degree is the best prima facie evidence, but must be more than:
 - general knowledge acquired by an academic degree in any field
 - Knowledge acquired through an apprenticeship
 - Training in the performance of routine mental, manual, mechanical or physical processes
- Exemption does not apply to occupations in which most employees acquire skill by experience

Computer Employees

- Computer systems analysts, computer programmers, software engineers or other similarly skilled workers may apply for administrative/professional exemption or under separate exemption for such employees (section 13(a)(7))
- To qualify under the separate exemption, he/she must be compensated at the rate of \$27.63 an hour, and, under either exemption, the primary duty must be:
 - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 - The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - A combination of the above.

Outside Sales Employees

- The primary duty must be
 - Making sales or
 - Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer
- The employee must be customarily and regularly engaged away from the employer's place or places of business in performing such primary duty
- Outside sales does not include sales made by mail, telephone, or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters for telephonic solicitation of sales is considered one of the employer's places of business

What's next for Employers?

Action Items

- Evaluate effect to financials caused by the mandatory increase in minimum salaries for exempt employees in their employ.
- Reclassify analysis for exempt and nonexempt
- Communicate reclassification
 - Letter to Employee
 - SCPWA - 7 days advance written notice of any decrease in pay
 - Edit job descriptions



Action Items

- FLSA audit (recommended annually)
 - Who is classified as exempt or nonexempt
 - *Misconception that payment of salary means exempt*
 - Time recorded accurately?
 - Verify calculation of regular rate of pay
 - Bonuses vs. incentives
 - All employees eligible for overtime being paid overtime?
 - Methods being used for Overtime calculations correct?
 - Youth regulations met?
 - Records stored for 4 or more years from date last worked
 - Official poster outlining FLSA requirements
 - Record keeping requirements met

Action Items

- Overtime policies in writing?
- Violations being disciplined?
- Check with managers and IT to identify what access is occurring after hours/remote/smart phones
 - Many managers will not follow policy
 - Many employees will not follow policy
 - Tour plant/office locations
 - Employees working past hours and not recording time?
 - Employees working through lunch when deductions automatic?

Action Items

- If outsourced payroll
 - Sample check records
 - Make sure your agreement with the payroll company is in writing and contains GOOD indemnification language if they make mistake
 - Insure proper time keeping measures are being followed throughout (look into what each department's actual practice is)

Record Keeping

Hourly/Non-exempt

1. Name in full
2. Home address, including zip code
3. Date of birth, if under 19
4. Sex and occupation in which employed
5. Total hours worked each day and each week
 - Fixed schedules
6. Regular rate of pay
7. Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation
8. Total premium pay for overtime hours
9. Total additions to or deductions from wages paid each pay period
10. Total wages paid each pay period
11. Date of payment and the pay period covered by payment



Record Keeping

Exempt/Salaried

1. Name in full
2. Home address, including zip code
3. Date of birth, if under 19
4. Sex and occupation in which employed
5. Total hours worked each day and each week
6. Total wages paid each pay period
 - Basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites
7. Date of payment and the pay period covered by payment



Thank you

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