

The New Wage and Overtime Rules

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“Overtime Modernization”

- **Obama executive order** issued to the U.S. Department of Labor in March 2014
- **Notice of Proposed Rulemaking** issued by U.S. Department of Labor July 2015, comments until Sept. 2015
- **Final Rule** issued May 18, 2016
- **Compliance** required December 1, 2016

Overview

- The Basics of the FLSA
- FLSA changes happening 12/1/2016: “Overtime Modernization”
- What has NOT changed in the FLSA
- Strategies for Compliance
- Special Situations

FLSA: the Basics

FLSA Basics

- Fair Labor Standards Act (FLSA)
 - 29 USC § 201 et seq; regulations: 29 CFR Part 541.
 - Federal law passed 1938
 - Established minimum wage and overtime pay requirements
 - “Executive, administrative, and professional” employees exempt from the law
- Enforced by U.S. Dept. of Labor, Wage & Hour Division
- Largely unchanged until 1975, then 2004, now 2016

FLSA Basics

Who is covered?

- “Employer”
 - Very broad definition
- “Employee”
 - “Independent Contractor” not covered

FLSA Basics

- **Non-exempt:** employees covered by FLSA's overtime, minimum wage, and recordkeeping requirements
 - a/k/a “Overtime eligible”
- **Exempt:** employees exempt from these requirements

FLSA Basics

Non-exempt – a/k/a “overtime eligible” employees

- Must be paid **minimum wage** for all hours worked
 - State or federal, whichever is higher – MI: \$8.50/hr
 - Pay for all hours employee was “suffered or permitted to work”
 - Including breaks below 30 minutes, early clock-in, late clock-out
- Must be paid **overtime**
 - 1.5 x wages for all hours over 40 worked in a “work week”
 - No averaging across work weeks
 - “Workweek”, not day, is the measurement for overtime
- **“Workweek”**: fixed, regular 7 consecutive 24 hour-periods (168 hours), set by employer. Need not be Sunday - Saturday.

FLSA Basics

Exempt employees

- **Not paid minimum wage or overtime**, no matter how many hours worked in a workweek
- **2-part test** to be “exempt”:
 1. Paid on a **salary** basis:
 - until 12/1/2016: paid salary at least \$455/week (\$23,660)
 - **after 12/1/2016: paid salary at least \$913/week (\$47,476)**

-and-

2. Perform certain **duties**: to meet “executive”, “administrative”, or “professional” “white collar” classifications. Others: “computer employees” “outside sales”, or “highly compensated”.

FLSA changes

FLSA Changes

Double the salary level test for exempt employees

- Salary must be at least \$913 per week, or \$47,476 per year
- Up from current \$455 per week or \$23,660 per year (last set 2004)

Automatic updates to the salary level test

- Every 3 years – next update: 1/1/2020

Allow up to 10% of the salary level for exempt employees to be made up of nondiscretionary bonuses, incentive payments, and commissions (must be paid at least quarterly)

Increase the salary threshold for “highly compensated” employee classification to \$134,004 (up from current \$100,000). Also updated every 3 years.

FLSA Changes

Results of the changes:

- Initial transition costs for employers (audits, lawyers, accountants, consultants)
- Administrative costs to employers in reviewing and revising payroll
- At first, fewer employees qualify as “exempt”
 - Automatic increases to salary test every 3 years may change this, depends whether payroll increases keep up with threshold each time it’s changed
- Psychological shift from “salaried” to “hourly” for many

What has NOT changed in the FLSA

Duties test did NOT change

All classifications remained the same:

- Executive
- Administrative
- Professional
 - Doctors, lawyers, teachers – still not subject to the salary test
- Highly compensated
- Computer employees
- Outside sales

Executive Classification

- Compensated on salary basis, meets minimum salary test
- Primary duty is **management** of enterprise in which employee is employed or customarily recognized department or subdivision
- Customarily and regularly directs the work of **2 or more full-time employees**; and
- Hire/fire authority or recommends **hire/fire/change of status** of other employees, which is given **particular weight**
- **Examples:** shop foreman, construction project manager, restaurant manager, deputy fire chief

Administrative Classification

- Compensated on salary basis, meets minimum salary test
- Primary duty is performing office or non-manual work **directly related to the management or general business operations** of the employer or employer's customers; and
- Primary duty includes exercising **discretion and independent judgment** with respect to matters of significance
- **Examples:** office manager/bookkeeper, HR manager, bank vice president, book editor, insurance claims adjuster
- **Almost never:** customer service representatives, secretaries/administrative assistants, realtor assistants, mortgage loan originators, help-desk employees, paralegals.

Professional Classification

- Compensated on salary basis, meets minimum salary test
 - Except teachers, lawyers, doctors no min. salary
- Primary duty is performing work requiring:
 - Advanced knowledge in a field of science or learning customarily acquired by prolonged, specialized intellectual instruction (“**learned professionals**”);
- or-
- Invention, imagination, originality or talent in recognized field of artistic or creative endeavor (“**creative professionals**”)

Examples: funeral director, chef, journalist, pilot, actor, professor, social worker, engineer

“Highly Compensated” Classification

Employee is highly paid, plus performs some combination of executive, administrative, or professional duties along with non-exempt duties

- Annual salary of
 - Until 12/1/2016: at least \$100,000
 - After 12/1/2016: at least \$134,004
- “Customarily and regularly” perform one or more of the exempt duties of an executive, administrative, or professional; office/non-manual work only

Examples: Company CEO, working supervisor

Computer Employee Classification

- Compensated on salary basis, meets minimum salary test **OR** paid hourly at least \$27.63/hour; and
- Performs **complex work** as primary duty:
 - Systems analysis, including consulting with users, to determine hardware, software or system functional specifications;
 - 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;
 - Design, documentation, testing, creating, or modification of computer programs related to machine operating systems; or
 - Combination of the above

Not an IT Support person who installs and troubleshoots applications, networks, and hardware: *DOL Wage & Hour Opinion Letter FLSA 2006-42 (October 2006)*

Outside Sales Classification

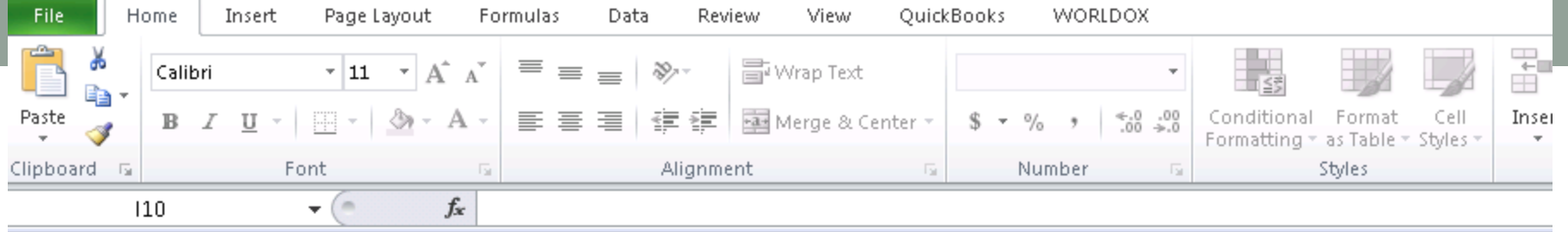
- No salary requirement; typically commissions
- Primary duty: **making sales or obtaining orders** or contracts for employer
- Customarily and regularly performs duties **away from employer's location** – typically at the customer's place of business
- In-person sales, not internet/telephone salespersons

Example: radio advertising salesperson, sales representative for mattress manufacturer

Strategies for Compliance

What to do now: Assess the likely impact

- Identify employees at/near the new thresholds (\$47,476 minimum, \$134,004 highly comp'd)
- Review job descriptions, compare to reality
- Identify possible job modifications
- **Identify jobs where after-hours work is essential** (travel, conferences, meetings, access to systems, essential use of e-mail): top priority to keep exempt?
- **...and jobs where after-hours work is happening but is NOT essential**



Calculate the Impact of the DOL's FLSA Final Rule

Learn more about the FLSA and new overtime rules: <http://sbshrs.adpinfo.com/flsa>

This Overtime Calculator is designed to help you assess the potential impact of the new overtime rules on your exempt employees' pay.

The calculator is based on the federal Fair Labor Standards Act (FLSA) and the regulations issued by the Department of Labor (DOL). It does not take into consideration state and local laws. Additionally, this calculator does not factor in nondiscretionary bonuses (bonuses announced to employees in advance and tied to certain criteria). If you provide your employees with nondiscretionary bonuses, refer to the [DOL's guidance on making this calculation](#).

Click on the buttons or tabs below to access the calculators.

Individual Employee Calculator

Total Payroll Calculator

This calculator is designed to provide general guidance and estimates only for the purpose of assessing the approximate impact of the new FLSA overtime rules on your business or a given individual, and does not constitute legal or tax advice. The calculator provides an estimate of the cost impact if changes are made to employee pay. It is not meant as any indicator as to whether an employee should be classified as exempt or non-exempt. Please refer to a professional tax or legal advisor regarding specific requirements or concerns. ADP does not recommend any particular option or options, and leaves those decisions to the discretion of your organization. This calculator provides a general assessment based on your current employee classifications and makes no representations as to the accuracy of your current classifications. Actual impact may vary based on differences between the options and assumptions used, and circumstances with your organization or certain individuals. Copyright © 2016 ADP, LLC. ALL RIGHTS RESERVED.



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Wage and Hour Division

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Wage and Hour Division (WHD)

Final Rule: Overtime

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees under the Fair Labor Standards Act



On May 18, 2016, President Obama and Secretary Perez announced the publication of the Department of Labor's final rule updating the overtime regulations, which will automatically extend overtime pay protections to over 4 million workers within the first year of implementation. This long-awaited update will result in a meaningful boost to many workers' wallets, and will go a long way toward realizing President Obama's commitment to ensuring every worker is compensated fairly for their hard work.

In 2014, President Obama signed a Presidential Memorandum directing the Department to update the regulations defining which white collar workers are protected by the FLSA's minimum wage and overtime standards. Consistent with the President's goal of ensuring workers are paid a fair day's pay for a hard day's work, the memorandum instructed the Department to look for ways to modernize and simplify the regulations while

ensuring that the FLSA's intended overtime protections are fully implemented.

The Department published a Notice of Proposed Rulemaking (NPRM) in the Federal Register on July 6, 2015 ([80 FR 38515](#)) and invited interested parties to submit written comments on the proposed rule at www.regulations.gov by September 4, 2015. The Department received over 270,000 comments in response to the NPRM from a variety of interested stakeholders. The feedback

- 3. Establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles and to ensure that they continue to provide useful and effective tests for exemption.

Additionally, the Final Rule amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level.

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.



Informational Webinars on the Overtime Final Rule [Watch a Recording](#)

- [Questions and Answers from the General Information Overtime Webinars](#)
- [Questions and Answers from the Overtime Webinar for the Non-Profit Sector](#)

Additional Information

- [Final Rule](#)
- [Overtime Overview](#)
- [Questions and Answers](#)
- [Fact Sheet: Overtime Final Rule \(PDF\)](#)
- Guidance for Employers
 - [General Guidance for Private Employers](#)
 - [Small Business Guide to White Collar Exemptions](#)
- Guidance for Non-Profits
 - [Fact Sheet](#)
 - [Non-Profit Guidance](#)
- Guidance for Higher Education
 - [Fact Sheet](#)
 - [Guidance for Higher Education Employers](#)
 - [NIH statement on overtime rule and postdoctoral researchers](#)
 - [Huffington Post: "Fair Pay for Postdocs" - Dr. Francis Collins, Director, NIH and Secretary Perez](#)
- Guidance for States and Local Governments
 - [Fact Sheet](#)

Strategies for Compliance

Keep the employee exempt by...

- Increasing salary
 - Up to 10% of the \$47,476 threshold Can be made of nondiscretionary bonuses, incentive pay, and commissions
 - E.g., \$42,729 base + \$4,747 “other”
 - Quarterly “catch-up” payments can be made if incentive payments don’t keep employee on track to meet the annual \$47,476 threshold
- Reducing the employee’s usual bonuses or other benefits to offset higher salary;
- Modifying / adding job duties to justify higher pay.

Strategies for Compliance

- Make the employee non-exempt but...
 - Pay hourly and authorize/require overtime
 - Pay hourly and limit hours to avoid overtime
 - Set hourly rate so pay plus overtime equals prior salary
 - Modify / reassign job duties
 - Modify workweek to avoid overtime
 - Hire more (part-time) workers to do the extra work previously done by the exempt worker

Useful tools for implementation

- Changes to written policies
 - Timekeeping rules
 - No unauthorized overtime
- Training for employees
 - A “culture change” for employees going from exempt to non-exempt
- Adjust your employees’ access to technology
 - Remote access (VPN): limit usage periods, create rules
 - Restrict number of company-provided cell phones, computers
 - Software to block access to company network outside of work hours
 - Timekeeping software

Breaking the news to newly non-exempts

- Don't wait until the last minute
- Explain legal compliance, not “demotion”
- Point out the positives
- Address employee concerns about getting the work done within 40 hours/week

Special Situations

Special Situations (Not necessarily new)

- Nonprofit Corporations
- Higher Education
- Governmental Entities

Federalism

- The U.S. Constitution grants the federal government power over issues of national concern; State governments have jurisdiction over issues of domestic concern.
- Federal government powers are limited to those allotted to it in the Constitution.
 - Article I, Section 8 of the Constitution grants Congress the power to levy taxes, mint money, declare war, establish post offices, and punish piracies on the high seas.
 - The federal government can regulate interstate commerce pursuant to the Commerce Clause of the Constitution but has no power to regulate commerce that occurs only within a single state.

Interstate Commerce

- Back to Basics – Which employees are covered by FLSA? Yes, the reach is broad, but some nonprofits may be exempt.
- There are two ways in which an employee can be covered by the law: "enterprise coverage" and "individual coverage."
 - 1) The business is subject to FLSA (enterprise coverage); or
 - 2) The particular worker is covered.

Enterprise Coverage

- Enterprise Coverage applies if the company has at least 2 employees AND:
 - 1) The company produces annual revenues from commercial activities of \$500,000 or more (e.g., sales from thrift shop are commercial, but donations of food and money are not) OR
 - 2) The organization is “named” by the act – hospitals, residential care facilities, schools of any type, and federal, state or local government.

Particular Worker Coverage

- A particular worker is covered if:
- The nature of his or her work involves interstate commerce or the production of goods for interstate commerce.
- Interstate commerce includes: making out-of-state calls, mail or email to recipients out-of-state, ordering or receiving goods from out-of-state, credit card transactions, bookkeeping for out-of-state activities.
- An isolated transaction or insubstantial amount of time on interstate activities will not cause the worker to be covered.

Higher Education

- 1) Schools of any type have Enterprise Coverage, so FLSA applies.
- 2) Teachers, however, are not subject to the salary level requirement.
- 3) Academic administrative personnel, who interact with students, are exempt if they are paid at least as much as an entry level teacher at their institution.
- 4) Postdoctoral fellows, for whom research is their primary duty, are subject to FLSA's overtime rules; but if teaching is their primary duty, they will be exempt and the salary level will not apply.

Higher Education

- 5) Coaches, whose primary duty is teaching the sport, are exempt; but if their primary duty is recruiting, they are subject to FLSA and the new salary level requirements will apply.
- 6) Graduate students, who teach or research, are not subject to FLSA because they are in an educational relationship rather than an employment relationship with the school, whether or not they are paid.
- 7) Residential Assistants are not considered employees.
- 8) Students working in the cafeteria or elsewhere are subject to FLSA's overtime rules.

Municipalities

- Compensatory Time (this also applies to Public Universities and Public Schools) – By agreement the governmental unit may provide 1.5 times compensatory time for each hour of overtime.
- Accrual of up to 240 hours must be permitted. For police, fire, emergency response or seasonal employees, 480 hours of comp time must be eligible for accrual. Use of accrued comp time must be allowed unless it would unduly disrupt the governmental unit.
- Small police or fire agencies (5 or fewer employees) may use a work period of up to 28 days rather than the 7-day week for measuring hours.

Municipalities

- Upon termination of employment, employees must be paid for the unused compensatory time at the higher of—
 - (1) The average regular rate received by such employee during the last 3 years of the employee's employment, or
 - (2) The final regular rate received by such employee.

State Minimum Wage and Overtime

- Michigan wage and hour laws closely mirror FLSA
- Overtime pay at 1½ times the regular rate is required by State law, too.
- The bona fide executive, administrative, or professional exceptions exist in State law *without the compensation change* written into the regulations...yet
- Nonprofit corporations claiming to be exempt from FLSA may only have a reprieve from the compensation changes until Michigan law catches up
- State law details compensatory time rules, too
- TO THE EXTENT MORE STRINGENT, FOLLOW STATE LAW.

Questions & Answers

THANK YOU

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