

DOL Announces New Overtime Rules: What You Need to Know (and Do) to Comply

Presented by



Ashley H. Kaplan, Esq.
Senior Employment Law Attorney
Poster Guard Compliance Protection



How Did the Rule Come About?

- In March 2014, President Obama directed the Secretary of Labor to update the overtime regulations
- DOL conducted months of extensive consultations with employers, workers, unions and other stakeholders
- Proposed rule was issued on 7/7/15
- DOL received and reviewed more than 270,000 comments from the public
- President Obama announced the final rule on 5/18/16
- Employers must comply by 12/1/16

What Is the Purpose of the Rule?

According to the DOL, the rule is designed to:

- Clarify who is “exempt” from overtime
- Put more money into the pockets of middleclass workers
- Increase salary threshold above poverty level
- Improve work-life balance and workers’ health
- Reduce on-the-job accidents and injuries
- Help correct current misclassifications
- Increase employment by spreading work and creating jobs
- Increase productivity through improved morale

What Is the Estimated Impact?

According to the DOL:

- New rule directly affects 4.2 million salaried workers who will become eligible for overtime; indirectly affects another 8.9 million misclassified workers
- More than 7.4 million businesses affected
- More income for working Americans; net transfer of \$1.48 billion from employers to workers
- U.S. employers will spend \$592.7 million to comply

What Are the Basics?

FLSA applies to nearly every business and employee

- **Default rule:** Minimum wage, overtime and recordkeeping requirements apply to all workers unless an exemption applies
- **Exempt:** May be paid on a salary basis for all hours of work (no overtime pay required)
- **Non-Exempt:** Must be paid minimum wage and overtime (1.5 x regular rate for more than 40 hours in a workweek) and comply with recordkeeping

Who Can Be Exempt?

- Most common are “white collar” exemptions: executive, administrative, professional, computer, outside sales
- With a few exceptions, exempt status requires:
 1. Minimum salary level
 2. Salary basis of pay (or fee basis)
 3. Job duties test
- It is the employer’s burden to establish an exemption if not keeping time records and paying overtime

What's Changed?

- The minimum salary level for most exemptions increased from \$455/week (\$23,660/year) to \$913/week (\$47,476/year)
- May include up to 10 percent (\$91/week) in nondiscretionary bonuses, incentive pay or commissions, if paid at least quarterly; but salary must be at least \$822/week
- Catch-up payment is permitted only if made in the first pay period following the quarter it's being applied to

What's Changed?

- Minimum salary level for “highly-compensated employee” (HCE) exemption increased from \$100,000/year to \$134,004/year
- Employee must receive at least \$913 a week on a fixed salary or fee basis, and the rest can come from non-discretionary bonuses, incentive payment and commissions
- Catch-up payment permitted only if made within one month after the end of the year it's being counted toward

What's Changed?

- Salary threshold automatically increases every three years, beginning January 1, 2020
- For general white-collar exemptions, increase will be equal to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region
- Estimated increases are \$51,168 (by the year 2020), \$55,108 (in 2023), and \$59,351 (in 2026)
- DOL will announce new rate at least 150 days before each increase takes effect

What Did Not Change?

- Job duties tests have not changed!
 - Employee must meet minimum salary level AND satisfy specific job duties tests to be exempt
 - Tests are based on actual job duties and responsibilities; not title or description
 - This means not everyone making minimum salary of \$47,476 qualifies for exempt status
 - Many highly paid employees will not qualify for exempt status
- FLSA mandatory employee posting has not been updated

What Is the Test for Executive Exemption?

1. The employee must be paid on a salary basis in an amount of at least \$913 per week;
2. The employee's primary duty must be management of the employer's enterprise or a customarily recognized department or subdivision thereof;
3. The employee must customarily and regularly direct the work of two or more other employees; and
4. The employee must have authority to hire or fire other employees, or his/her suggestions and recommendations as to hiring, firing, advancement, promotion or other change of employee status are given particular weight.

What Is the Test for Administrative Exemption?

1. The employee must be paid on a salary basis or fee basis in an amount of at least \$913 per week;
2. The 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; and
3. The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

What Is the Test for Learned Professional Exemption?

1. The employee must receive at least \$913 per week on a fee basis or salary basis;
2. His/her primary duty must be the performance of work requiring advanced knowledge;
3. The advanced knowledge must be in a field of science or learning; and
4. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

What Is the Test for Creative Professional Exemption?

1. The employee must receive at least \$913 per week on a fee basis or salary basis; and
2. The employee's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor (such as music, writing, acting, or the graphic arts).

What Is the Test for Computer Employee Exemption?

1. The employee must receive at least \$913 per week on a fee basis or salary basis, or at least \$27.63 per hour; and
2. The employee's primary duty must consist of:
 - a. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - b. 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;
 - c. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - d. A combination of the aforementioned duties, the performance of which requires the same level of skills.

What Is the Test for Highly Compensated Employee Exemption?

1. The employee must receive total compensation of at least \$134,004 per year;
2. The employee must receive at least \$913 per week on a salary basis;
3. The employee's primary duty must involve office or nonmanual work; and
4. The employee must customarily and regularly perform at least one of the exempt duties or responsibilities of an executive, administrative, or professional employee.

What Are the Exceptions?

Some overtime exemptions still exist that do not require a minimum salary; meaning you're not required to pay these employees overtime even if they do not meet the new minimum salary level

- Law
- Medicine
- Teaching
- Computer employees if paid at least \$27.63/hour
- Outside sales
- Inside/commissioned sales

What Is the Test for Outside Sales Exemption?

1. The employee's primary duty must be making sales or obtaining orders/contracts for services for which a consideration will be paid by the client or customer; and
2. The employee must be customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

What Is the Test for Inside/Commissioned Sales Exemption?

1. The employee must be employed by a retail establishment (75% of the establishment's gross annual dollar volume of sales or services is not for resale, or is provided to the end user);
2. The employee must receive more than half of his/her compensation in a representative period of no less than a month from commissions; and
3. The employee must receive at least one and one-half times the minimum wage for all hours worked.

Note: This is a partial exemption that only impacts the requirement of paying overtime compensation. Inside/commissioned salespersons must keep time records to ensure that they receive at least one and one-half the minimum wage for all hours worked.

What Do the Rules *REALLY* Mean to Employers?

Employers can either: (1) Increase employees' salaries to at least the new salary threshold; (2) Convert them to hourly pay with overtime and pay the overtime premium for extra hours worked or (3) Limit their work to 40 hours in a week

Anticipated impact:

- **Increased payroll costs:** Salary increases and overtime premiums
- **Lost productivity:** Eliminating overtime means less work gets done
- **Increased staffing:** Forced to hire temps or part-timers to cover extra work
- **Restructuring:** Shifting work internally or outsourcing
- **Morale issues:** Stigma associated with “hourly” pay
- **Increased turnover:** Unhappy workers with pay changes and restructuring

What Do the Rules *REALLY* Mean to Employers?

Administrative Burden:

- Management time spent to evaluate and restructure
- Changing payroll status
- Employee notifications and communication
- Policy revisions
- Manager and employee training
- Increased supervisory responsibilities
- Additional timekeeping and recordkeeping requirements

What Do the New Rules *REALLY* Mean to Employers?

Risk of liability:

- FLSA litigation has increased year over year since 2000 and is already #1 class action in federal court
 - In 2015, class-action settlements reached \$463.6 million
 - DOL recovered \$246 million in back wages for 240,340 workers
- More employees questioning their status
- Opens floodgate for challenging exempt status
- Risk associated with OT calculations for non-exempt

What Are My First Steps?

1. Initial employee communication

- Acknowledgment of the law change
- This is a federal law change; not a company initiative
- December 1 effective date
- Some employees may be affected (e.g., “hourly” vs. “salary” may change)
- New salary level is not the only factor
- Management will follow up with affected workers

What Are My First Steps?

2. Identify affected employees

- Start with salaried employees earning less than \$50,000
- Keep in mind salary threshold increasing in three years (estimated to be \$51,168 in 2020)
- Include employees over the threshold in similar positions
- Consider all employees close to the range; salary compression issues (upstream and downstream effects)
- Organize data; categorize by job position within each business unit

What Are My First Steps?

3. Gather information on affected employees

- Designate a company leader to oversee and coordinate
- Engage managers and supervisors
- Interview employees if necessary
- Confirm actual job duties
- Determine average hours per week and how much “overtime” is currently being worked (consider at-home work, travel, on-call, etc.)

What Are My First Steps?

4. Consider your staffing options

- Can overtime be redistributed among existing workforce?
 - Do employees have capacity to take on more?
 - Can tasks be shifted to other teams or business units?
- Is job restructuring an option?
 - Can duties be eliminated or redistributed?
 - Are employees promotable?
 - Is there potential to create levels within job categories?
- Is overtime consistent or seasonal?
- Can overtime be outsourced?
- Can overtime work be absorbed by temps or part-timers?

What Are My First Steps?

5. Consider other business factors

- Evaluate current company policies and benefit plans
 - Are exempt and non-exempt treated differently for insurance, PTO accruals, benefits, etc.?
 - How will reclassified employees be affected?
- Understand state and local laws for minimum wage, overtime and mandatory meal/rest breaks
- Consider special requirements that might apply under collective bargaining agreements, executive contracts, etc.
 - Are there restrictions or special procedures you need to follow?
- What timekeeping systems do you have in place?

How Should I Handle Affected Employees?

Option 1: Keep them exempt

- For employees close to the salary threshold, consider increasing salary to satisfy exemption
- Compare cost of estimated overtime to cost of increasing salary
- Make sure employee meets the job duties test!
- Adjust responsibilities if needed and update job descriptions
- Consider formal promotions
- Consider trickle-down effect on compensation structure and similar positions

How Should I Handle Affected Employees?

Remember, salary is not the best method of pay for everyone even if they qualify

- It is the employer's choice to pay someone a salary
- Salaried employees get to receive full weekly salary if they perform any work in the workweek
- There are very few exceptions when you can deduct pay from a salaried/exempt employee (see next slide)
- If a salaried employee misses partial days of work, they typically get paid in full
- If you're unsure, it's always safest to classify as non-exempt

What Deductions Are Permitted from an Exempt Employee's Salary?

An exempt employee's salary may be reduced only in these limited circumstances:

- Deductions for absences of a day or more for personal reasons other than sickness or accident.
- Deductions for absences of a day or more caused by sickness or disability, if the company maintains a plan that provides compensation for loss of salary caused by sickness and disability and the employee exhausted his or her "bank" of leave.
- Disciplinary deductions made as penalties imposed for violation of safety rules of major significance.
- Deductions to offset any amounts received by an employee as jury or witness fees or military pay; however, beyond those offsets, deductions may not be made for absences caused by jury duty, attendance as a witness or temporary military leave.
- Deductions for unpaid disciplinary suspensions of one or more full days for breaking workplace conduct rules.
- Deductions for partial weeks worked during the initial or final weeks of employment.
- Deductions made, in some cases, when a salaried/ exempt employee has worked a reduced or intermittent work schedule under the Family and Medical Leave Act.

How Should I Handle Affected Employees?

Option 2: Change status to non-exempt. You have options for paying non-exempt employees:

- Leave “salaried” but prohibit overtime (still need to keep track of hours)
- Pay salary plus overtime based on 40-hour workweek (OT calculated 1.5x at regular rate)
- Convert to hourly rate based on 40-hour week
- Convert to lower hourly rate to account for OT and maintain annual pay level
- Salary + “fluctuating rate overtime”

In all instances, you must comply with recordkeeping and federal, state and local minimum wage requirements



How Should I Handle the Transition?

Converting to Non-Exempt: Communication Plan

- Appoint a contact person to answer employee questions
- Expect a range of emotions: “Now I get overtime!” vs. “This feels like a demotion”
- Reiterate this is required by federal law, not a company initiative
- Explain that the purpose of the law is to fairly compensate employees for all hours of work
- Reassure employees that the change is not a reflection of performance, rank or value to company
- Remind employees salary threshold was only one factor
- Be prepared to discuss any changes in benefits, etc.

How Should I Handle the Transition?

Converting to Non-Exempt: Administration

- Record payroll status change
- Update job descriptions if necessary
- Consider state/local notification requirements
- Implement or upgrade timekeeping system
- Reevaluate rewards, prizes and incentives; all count toward overtime calculations

How Should I Handle the Transition?

Converting to Non-Exempt: Employee Training

- Train newly non-exempt employees on timekeeping policies and procedures
 - Overtime approvals
 - Off-the-clock work
 - Comp time
 - Mandatory meal/rest breaks, if applicable
 - Timekeeping methods
 - Reporting changes to hours worked
- Best practice is to distribute a written policy (e.g. wage and hour rules for non-exempt employees) and require employee signature

How Should I Handle the Transition?

Converting to Non-Exempt: Manager Training

- Train supervisors on responsibilities when managing non-exempt “hourly” employees and common mistakes to avoid
- What counts as hours worked (e.g., travel, off-the-clock work, checking emails from home, training)
- Handling unauthorized overtime, timesheet errors and corrections
- How to manage mandatory meal/rest breaks
- Retaliation prohibited
- Reminder you cannot prohibit employees from sharing pay information
- Change habits in culture; more “hands on” supervision and time management required

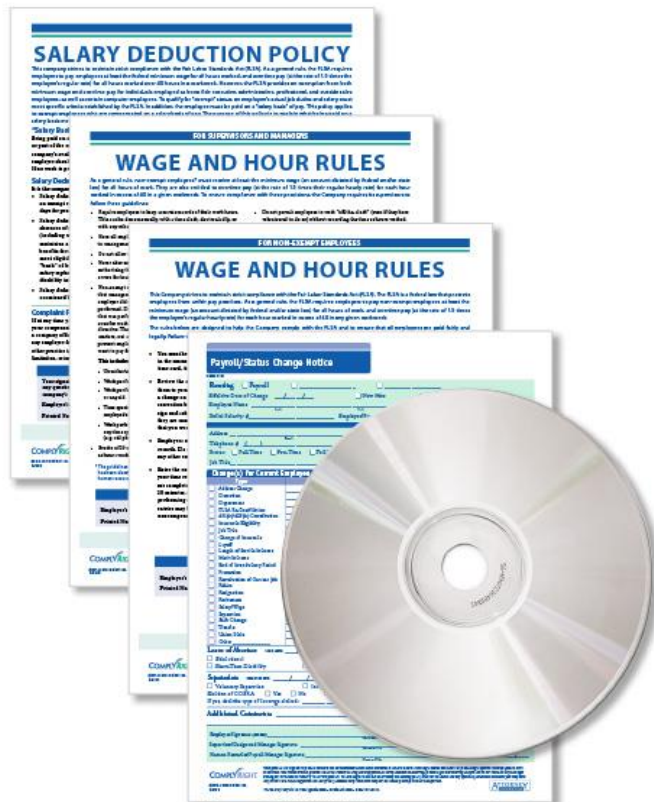
Best practice! Distribute formal policy outlining management obligations



Final Tips

- Take this opportunity to conduct a complete audit and clean up any misclassification errors
- Review all of your exempt classifications (no matter how highly paid)
 - Document basis for exemptions
 - Implement and distribute salary deduction policy
 - Update job descriptions to support classifications
- Conduct general compensation analysis and correct pay discrepancies (e.g., Equal Pay Act, Title VII, ADEA)
- This is the best time to make changes without raising red flags

ComplyRight FLSA Forms & Tools Kit



From a comprehensive guide with plain-English instructions to all the required paper forms necessary to document payroll changes and communicate with affected employees, this kit has everything your business needs to comply.

It includes:

- Initial Employee Notice of FLSA Changes
- Payroll/Status Change Notice
- Salary Deduction Policy
- Overtime Request & Approval Form
- Weekly Timesheet
- Wage & Hour Rules for Managers and Supervisors
- Wage & Hour Rules for Non-Exempt Employees

ComplyRight FLSA Compliance E-Solution



Contains four powerful tools to help you implement changes required by the new law:

1. **FLSA Classification Wizard:** Guides you through a series of questions to quickly determine an employee's exemption status under the new rules
2. **Cost Impact Analysis:** Calculates overtime scenarios for employees converted from salary to hourly pay to help you assess the impact on payroll
3. **Salary to Hourly Conversion Calculator:** Allows you to calculate a fair hourly wage with OT assumptions to maintain an employee's previous annual pay
4. **Salary Plus Overtime Fluctuating Rate:** Calculates weekly overtime for non-exempt employees paid a salary with overtime

PLUS ... includes a comprehensive, plain English guide to understanding the new regulations and all necessary downloadable forms so you can print unlimited copies

Thank You!

Find the FLSA Compliance solutions you need today

HRdirect

Visit www.hrdirect.com/OTrules or call 800-999-9111

COMPLY*RIGHT*