



**Lowenbaum
Law**

Fair Labor Standards Act Part 541 “Overtime” Final Rule

Presented by:

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 - Job Duties Test for exempt status
 - Other Exemptions – not affected (e.g., outside sales, computer employees paid on hourly basis)

Exemptions and Exceptions

- There are numerous exemptions and exceptions from the minimum wage and/or overtime standards of the FLSA.
- The most common FLSA exemptions from overtime pay requirements are the administrative, executive, and professional employee exemptions, though there are many others.

“White Collar” Exemptions

“White Collar” Exemptions

The most common FLSA minimum wage and overtime exemption – often called the “EAP” or “white collar” exemption – applies to certain:

- Executive Employees
- Administrative Employees
- Professional Employees

Three Tests for Exemptions

- Salary Basis
- Salary Level
- Job Duties

In order to fall under one of these exemptions, the employee must be paid on a salary or fee basis – not an hourly basis – and the level must be at the rate specified in the regulations (currently \$455/week but **moving to \$913/week as of 12/1/16**) and the employee must meet the “job duties” test, which has not changed.

Highly Compensated Employees

- There is also a “highly compensated employee” exemption (HCE); currently the required annual salary for this exemption to apply is \$100,000; this will increase to \$134,004 effective 12/1/16.
- To qualify, the employee must perform office or non-manual work (this has not changed).

New Overtime Rule – Changes

- Salary Level Increases
- Nondiscretionary Bonuses – can now be used to “make up” part of the required weekly salary
- Automatic Updates to salary levels

New Overtime Rule – Standard Salary Level and Highly Compensated Employees

- Standard salary level – pursuant to 29 CFR 541.600
 - Current \$455
 - Effective 12/1/2016
\$913 per week
- Highly Compensated Employee (HCE) – pursuant to 29 CFR 541.601
 - Current \$100,000
 - Effective 12/1/2016
\$134,004 per annum

New Overtime Rule – Nondiscretionary Bonuses

- Nondiscretionary bonuses and incentive payments (including commissions) are forms of compensation promised in advance to employees (e.g., bonuses for meeting set production goals, retention bonuses, and commission payments based on a fixed formula).
- These nondiscretionary payments, under the new regulations effective 12/1/16, may be used to satisfy up to 10% of the standard salary level.
 - Minimum of 90% (approximately \$822) of standard salary level must be paid as a weekly salary.
- Payments must be paid on a quarterly or more frequent basis.

New Overtime Rule – Catch-Up Payments

- If an employee does not earn enough from the nondiscretionary bonus, commission, or incentive payment in a given quarter to meet the standard salary level, an employer may make a “catch-up” payment within one pay period of the end of the quarter.
- Any such “catch-up” payment will count only toward the prior quarter’s salary amount and not toward the salary amount in the quarter in which it is paid.

New Overtime Rule – Highly Compensated Employees (HCE)

- HCEs must continue to receive at least the full standard salary level amount each pay period on a salary or fee basis without regard to the payment of nondiscretionary bonuses and incentive payments (no change to this principle).
- Nondiscretionary bonuses and incentive payments (including commissions) may be counted towards the highly compensated employees' total annual compensation requirement (no change to this principle).
- The HCE test does not allow employers to credit nondiscretionary bonuses or incentive payments (including commissions) towards the standard salary level weekly requirement. THIS MEANS THE HCE MUST RECEIVE A SALARY OF AT LEAST \$913/WEEK.

New Overtime Rule – Automatic Updates

- Every three years beginning January 1, 2020, the standard salary and annual compensation levels will be automatically updated.
- At least 150 days before the effective date, the Secretary will publish a notice in the Federal Register of the updated salary and total annual compensation amounts that will be required.

New Overtime Rule – Updating the Standard Salary Level

Standard salary level – updated to equal the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region, which is in the South.

New Overtime Rule – Updating HCE Compensation Level

Highly compensated employees – updated to equal the 90th percentile of annualized earnings of full-time salaried workers nationally.

Salary Basis Test

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis).
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed.
- If the employer chooses to use nondiscretionary bonuses and incentive payments to meet the standard salary level, the employee must be paid at least 90% of the standard salary level for any week in which the employee performs **any** work. This means the minimum salary requirement for professional, executive, and administrative employees is \$822/week if the employer will be adding bonuses/commissions quarterly or more often.
- Need not be paid for any workweek when no work is performed.

Deductions From Salary

- An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the business.
- If the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

No Salary Requirements

- The salary level and salary basis tests do not apply to:
 - Outside Sales Employees
 - Doctors
 - Lawyers
 - Teachers
 - Employees in certain computer-related occupations paid at least \$27.63 per hour

New Overtime Rule – No Changes

No Changes:

- The Final Rule did not make any changes to the Duties Tests.

Executive Duties

- The employee's primary duty must be management of the enterprise or of a customarily recognized department or subdivision.
- The employee must customarily and regularly direct the work of two or more other full-time employees (or the equivalent of two full-time employees).
- The employee must have the authority to hire or fire other employees or make recommendations as to the hiring, firing, advancement, promotion, or other change of status of other employees that are given particular weight.

Administrative Duties

- 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.
- The employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

Administrative Duties (cont'd)

- Work “directly related to management or general business operations” includes, but is not limited to, work in functional areas such as tax, finance, accounting, budgeting, auditing, human resources, legal and regulatory compliance, and similar activities.
- Discretion and independent judgment means that the employee has authority to make an independent choice, free from immediate direction or supervision.

Professional Duties

- Learned Professional: The employee's primary duty involves work which is predominantly intellectual in character and which includes duties requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction;

Professional Duties (cont'd)

- Artistic Professional: The employee's primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

Computer-Related Occupations

To qualify for the computer employee exemption, the employee must receive either:

- A guaranteed salary or fee of \$913 per week or more, or
- An hourly rate of not less than \$27.63 per hour (this has not changed), and
 - Must be employed as an analyst, computer programmer, software engineer, or other similarly skilled, and
 - The primary duty must be in design, development, creations, systems analysis, etc. (as defined in the regulations).

Outside Sales

- Primary duty is
 - Making sales, or
 - Obtaining orders or contracts for services or facilities for consideration paid by customer, and
- Customarily and regularly engaged away from the employer's place(s) of business in performing such primary duty.
- No compensation test. This has not changed.

Issues Specific to State and Local Governments

- Compensatory Time: The new regulations do not change the ability of state and local governments , pursuant to an agreement with employees or their representatives, to have non-exempt employees earn comp time instead of payment for overtime hours.
- The agreement may be evidence by simply a written policy or notice stating that comp time will be paid in lieu of overtime pay.

Issues Specific to State and Local Governments

- As always, comp time must be provided and one and one-half hour for each overtime hour worked.
- Most state and local government employees may accrue up to a total of 240 hours of comp time; law enforcement, fire protection and emergency response personnel, as well as employees engaged in seasonal activities may accrue up to 480 hours of comp time.
- Employees must be allowed to use comp time on the date requested, unless doing so would unduly disrupt the operations of the agency.

Issues Specific to State and Local Governments

- Fire and Police small-agency exemption. The FLSA provides an exemption from overtime for fire protection or law enforcement employees, if they are employed by an agency that employs fewer than five fire protection or law enforcement employees, respectively.
- “Work periods” rather than “workweeks” for fire protection or law enforcement employees. Employees engaged in fire protection or law enforcement may be paid overtime on a “work period” basis; a “work period” may be from 7 to 28 days in length. The rules and regulations governing this aspect of the FLSA have not changed.

Options for Compliance with New Regulations

- Raise Salaries: For employees who meet the duties test for either the administrative, executive or professional employee exemptions, and who regularly work overtime, but who fall below the \$913/weekly pay rate, one alternative is to increase the weekly salary rate to \$913/week, which is a fairly comfortable alternative when the employee's current salary is close to this rate.

Options for Compliance with New Regulations (cont'd)

- Pay Overtime at the employee's regular rate.
- For example, if an employee meets the duties test for one of the exemptions, but is paid only \$700/week, the employer may pay the employee at the hourly rate of \$17.50.
- When the employee exceeds 40 hours in a single workweek, the employee must be paid at the rate of \$26.25 for each hour or portion thereof worked in excess of 40.
- Using this method, the employer then would only need to pay the employee for hours actually worked, resulting in a savings when the employee works fewer than 40 hours per week.

Options for Compliance with New Regulations (cont'd)

- Salaried Basis of Payment for Employees working in excess of 40 hours/week; non-exempt salaried basis of payment.
- If an employee who otherwise meets the test for exempt status but is being paid less than the weekly minimum regularly works 50 hours/week, the employee may be paid only an additional half-time for the overtime hours up to 50 and 1-1/2 times his regular rate for hours over 50 in a single workweek.

Options for Compliance with New Regulations (cont'd)

- By way of example, assume Joe is an HR manager earning \$44,200 per year (\$850/week) and is regularly scheduled to work 50 hours per week.
- If Joe works 50 hours in a workweek, and the employer uses the salaried non-exempt method of payment, the employer will owe Joe the additional half-time on the overtime hours for a total of \$935 ($\$850/50 \times .5 \times 10$ plus \$850).

Options for Compliance with New Regulations (cont'd)

- If Joe works in excess of 50 hours, he must receive time and one-half for all such hours. If he works 55 hours, he must be paid a total of \$1,026.50 $((\$850/50 \times .5 \times 10) + (\$850/50 \times 1.5 \times 5))$ plus \$850).
- NOTE: Using this method of payment, the employer MUST pay Joe his full weekly salary of \$850.00 even in workweeks when he does not work a full 40 hours – the benefit to the employer is that less overtime pay is owed and the benefit to the employee is that he is paid full weekly salary (using the standard salaried basis of payment rules).

Options for Compliance with New Regulations (cont'd)

- Reorganize workloads, adjust schedules, or spread work hours.
- Redistribute work or hire new employees to avoid employee overtime for those who will no longer qualify as exempt due to pay rate.
- Adjust Wages: An employer can adjust the amount of an employee's earnings to reallocate it between regular wages and overtime so that the total amount paid to the employee remains largely the same.

QUESTIONS

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