Fair Labor Standards Act (FLSA) “Overtime” Final Rule
Effective Date: December 1, 2016

What Does the Overtime Final Rule Mean

- FLSA overtime rule determines whether employees are eligible or exempt for overtime pay. **Exempt employees**, because of their rate of pay and type of work that they do, are not eligible for overtime pay for hours worked over 40 in a workweek. **Nonexempt employees** must be paid time and a half for any hours worked more than 40 in a workweek.

- This rule modernize the regulations governing the exemption of executive, administrative, and professional (“EAP”) employees from the minimum wage and overtime pay protections of the Fair Labor Standards Act (“FLSA” or “Act”).

  **This rule ONLY affects Salaried Employees not Hourly Employees who are considered White Collar Workers**

- Currently, the threshold value for overtime salary is currently $455 per week ($23,660 per year). Starting in December 2016, the salary threshold to avoid paying overtime will move to $913 per week (an annual salary of $47,476) at least $27.63 an hour.

- Exempt employees also must primarily perform executive, administrative or professional duties, as defined in the **duties test**.

Duties Tests, established in the 2004 regulations
(established duties test are not changed under 2016 rules)

Employees who meet the revised salary test must also meet the “duties test” to be considered exempt.

Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for those employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees from overtime.

FLSA Link to learn more: [https://www.dol.gov/whd/overtime/fs17a_overview.pdf](https://www.dol.gov/whd/overtime/fs17a_overview.pdf)

Are there exemptions to the Rule?

To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week (updated to **$913 under the new rules** – see next slide for chart). **Job titles do not determine exempt status**.

For an exemption to apply, an employee’s specific job duties and salary must meet all the requirements of Labor's regulations.
Detailed Explanation of each of the Five Exemption Categories

The specific requirements for exemption as a bona fide professional employee are summarized below. There are two general types of exempt professional employees: learned professionals and creative professionals.

1. Executive exemption


To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $455 per week (updated to $913 under the new rules);
- The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

2. Administrative exemption

To Learn More: https://www.dol.gov/whd/overtime/fs17c_administrative.pdf

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week (updated to $913 under the new rules);
- 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
- The employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

3. Professional exemption

*There are two general types of exempt professional employees: learned professionals and creative professionals

To Learn More: https://www.dol.gov/whd/overtime/fs17d_professional.pdf

Learned professional exemption

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week (updated to $913 under the new rules);
• The advanced knowledge must be in a field of science or learning; and
• The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Creative professional exemption
To qualify for the creative professional employee exemption, all of the following tests must be met:

• The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week (updated to $913 under the new rules);
• 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.

Teachers
Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers. The salary and salary basis requirements do not apply to bona fide teachers.

Practice of Law or Medicine
An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession. The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine.

4. Computer-related professional exemption

To Learn More: https://www.dol.gov/whd/overtime/fs17e_computer.pdf

To qualify for the computer employee exemption, the following tests must be met:

• The employee must be compensated either on a salary or fee basis at a rate not less than $455 per week (updated to $913 under the new rules)
• The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
• The employee’s primary duty must consist of:

The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
5. **Outside Sales Exemption**

To Learn More: [https://www.dol.gov/whd/overtime/fs17f_outsidesales.pdf](https://www.dol.gov/whd/overtime/fs17f_outsidesales.pdf)

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee’s primary duty must be making sales (as defined in the FLSA), 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; and
- The employee must be customarily and regularly engaged away from the employer’s place or places of business.

Note: *The salary requirements of the regulation do not apply to the outside sales exemption*.

**Highly Compensated Employees**

Highly compensated employees performing office or non-manual work and paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

**How to Implement the Updated Salary Level Requirements**

For each affected employee newly entitled to overtime pay, employers may:

- Increase the salary of an employee who meets the duties test to at least the new salary level to retain his or her exempt status;
- Pay an overtime premium of one and a half times the employee's regular rate of pay for any overtime hours worked;
- Reduce or eliminate overtime hours;
- Reduce the amount of pay allocated to base salary (provided that the employee still earns at least the applicable hourly minimum wage) and add pay to account for overtime for hours worked over 40 in the workweek, to hold total weekly pay constant; or
- Use some combination

**Using Nondiscretionary Bonuses and Incentive Payments to Meet Requirements**

- Employers may use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level.
- For employers to credit these payments toward the salary level test, they must be paid on a quarterly or more frequent basis.
- Nondiscretionary bonuses and incentive payments (including commissions) are forms of compensation promised to employees to induce them to work more efficiently or to remain with the company.
Examples include individual or group production bonuses, and bonuses for quality and accuracy of work. Incentive payments, including commissions, are also considered non-discretionary as such payments are generally based on a prior contract or understanding, and employees generally have a contract right to the commission promised.

If an employee does not earn enough of a nondiscretionary bonus or incentive payment in a given quarter to retain his or her exempt status, the Department permits the employer to make a “catch-up” payment no later than the next pay period after the end of the quarter. If such a catch-up payment is not made within the timeframe allotted, the exemption is lost for the prior quarter and the overtime premium must be paid.

How do the current regulations, proposed rule and final rule compare?

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<tr>
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<th>Current rules</th>
<th>New rules (take effect Dec. 1, 2016)</th>
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<tbody>
<tr>
<td>Salary level</td>
<td>$455 weekly ($23,660 per year)</td>
<td>$913 weekly ($47,476 per year)</td>
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<td>(Set at 40th percentile of full-time salaried workers in lowest-wage Census region, currently the South)</td>
<td>(Set at 90th percentile of full-time salaried workers nationally)</td>
</tr>
<tr>
<td>Highly compensated employees (HCE) limit</td>
<td>$100,000 annually HCEs are considered exempt without regard to the duties test</td>
<td>$134,004 annually (Set at 90th percentile of full-time salaried workers nationally)</td>
</tr>
<tr>
<td>Automatic adjusting of salary limits</td>
<td>None</td>
<td>Adjusted every three years, based on the salary levels listed above (40th and 90th percentile)</td>
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<td>Bonuses</td>
<td>Nondiscretionary bonuses and commissions don’t count toward the standard salary level</td>
<td>Up to 10% of standard salary level can come from non-discretionary bonuses, incentive payments and commissions (paid at least quarterly)</td>
</tr>
<tr>
<td>Duties test</td>
<td>See current duties test description at <a href="http://www.theHRSpecialist.com/OTlaw">www.theHRSpecialist.com/OTlaw</a></td>
<td>No changes to the standard duties test</td>
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“Fee Basis”
- Administrative, professional, and computer employees may be paid on a “fee basis” rather than on a salary basis.
- If the employee is paid an agreed sum for a single job, regardless of the time required for its completion, the employee will be considered to be paid on a “fee basis.”
- A fee payment is generally paid for a unique job, rather than for a series of jobs repeated a number of times and for which identical payments repeatedly are made.
- To determine whether the fee payment meets the minimum salary level requirement, the test is to consider the time worked on the job and determine whether the payment is at a rate that would amount to at least $913 per week if the employee worked 40 hours.

Example, an artist paid $500 for a picture that took 20 hours to complete meets the minimum salary requirement since the rate would result in $1,000 if 40 hours were worked.

What Employers Must Do Now?
- Review current salaries for all your exempt employees.
- Determine which employee salaries you can raise to retain exempt status and which you can’t based on your company’s labor budget.
- Analyze how many hours exempt employees now work and what it would cost if their current salary is converted to an hourly figure and they continue to work the same number of hours.
- Decide whether you will lower the hourly rate when you convert from exempt to hourly status so that total earnings remain the same.
- Don’t forget to consider morale if you plan to slash that hourly rate.

All employers must comply with the changes made to the overtime regulations of the Fair Labor Standards Act by Dec. 1, 2016

Need Additional Information and Resources?
Department of Labor (DOL) Resources:

DOL Webinar:
https://www.dol.gov/whd/overtime/final2016/webinars.htm

Frequently Asked Questions (PDF)

Fact Sheet on Proposed Rule (PDF)
https://www.dol.gov/whd/overtime/NPRM2015/factsheet.htm

Small Business Guide