

Implementing the new Fair Labor Standards Act Regulations

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FLSA Overtime Regulations

- Proposed Rule & Request for Comments June 29, 2015
 - 1st update to regulations since August 2004
 - Called for increasing the salary threshold to \$50,440
- Comment period officially ends September 4, 2015
- Finalized May 18, 2016
- Effective date December 1, 2016

FLSA Overtime Regulations

Currently, to be exempt under the White Collar (Administrative, Executive, Professional) Exemptions the employee **MUST**:

1. Be paid on a salary basis;
2. Receive guaranteed salary (or other guaranteed pay) of at least \$455/week (\$23,660/year); AND
3. Meet the job duties test.

The regulations only change component #2....

Polling Question #1

How confident are you in explaining how your exempt positions meet one of the six duties tests?

- a. Very confident. I have completed exemption worksheets many times.
- b. Somewhat confident. I know the exemption worksheets exist but I haven't completed any.
- c. Not confident. What do the duties tests contain?
- d. Don't know.

What Tasks are “Exempt”?

- What tasks are recognized as exempt?
 - Administrative
 - Executive
 - Professional
- What tasks are recognized as nonexempt?

KEY = PRIMARY DUTY

The Duties Tests will remain unchanged but the regulations change the salary threshold requirement.

White Collar Exemptions

Basic Requirements for Claiming a White Collar Exemption under the Standard Duties Test

	EXECUTIVE	ADMINISTRATIVE	PROFESSIONAL
Standard Duties Test	<ul style="list-style-type: none">The employee's "primary duty" must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise (and managing 2 full-time employees as well).Additional requirements provided in 29 CFR 541 Subpart B	<ul style="list-style-type: none">The employee's "primary duty" must include the exercise of discretion and independent judgment with respect to matters of significance.Additional requirements provided in 29 CFR 541 Subpart C	<ul style="list-style-type: none">The employee's "primary duty" must be to primarily perform work that either requires advanced knowledge in a field of science or learning or that requires invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.Additional requirements provided in 29 CFR 541 Subpart D

What Do the Regulations Change?

New minimum guaranteed pay:

- \$913 per week (\$47,476 per year)
 - *Around 40th Percentile of full time salaried employees, nationwide*
- Regs also increase threshold for Highly Compensated Employee exception from \$100,000 to \$134,004 – *but doesn't apply in Illinois*
- Expect increases every three years with first change coming in 2020. (Some projections suggest it could raise to \$51k at this time.)
- Allows employers to use nondiscretionary bonuses, quarterly incentive payments and commissions to satisfy up to 10% of the new standard salary requirement.

DOL Sees Four Major Options

What are some options
for responding to changes to the salary level?

**Raise salaries
to maintain
exemption**

**Pay
current salaries,
with overtime
after 40 hours**

**Reorganize
workloads, adjust
schedules or spread
work hours**

Adjust wages

Exempt status not affected for some

- While more employees will be eligible for overtime, salaried employees in the following fields will not be affected even when paid less than the minimum salary:
 - Teachers
 - Doctors and lawyers
 - Computer workers earning at least \$455 per week or \$27.63 per hour
 - Outside sales employees

Final FSLA Overtime Regulations

- ***Steps to take in anticipation of new regulations:***
 - Identify exempt employees making salary or commissions <\$47.5k/year
 - Weigh financial and cultural impact of pay increase vs transition to non-exempt
 - Consider using change in regulations as opening to change status of questionably-classified employees
 - Consider incentive compensation opportunities if not already available
 - If realistic incentive opportunity of 10% is available then the salary could be as low as \$821.70 per week (90 percent of \$913)
 - If at the end of the quarter the employee has not received the equivalent of \$91.30 per week in incentive pay, the employer has one additional pay period to pay the employee a lump sum (no greater than 10% of the salary level) to raise the employee's earnings for the quarter to the standard salary level.

Specific Applications

Key Questions:

1. Which positions currently have incumbents who are considered exempt paid below the expected new minimum salary threshold?
2. Which major option does the organization select?
 - Automatically raise the exempt incumbents' salaries to the new minimum (option 1)
 - Or raise the salary to at least \$43,250 and offer realistic opportunity to earn 10% in incentive pay
 - Reclassify employees to non-exempt (option 2)
3. What are the consequences for each option?
 - Which option would cost more?
 - Which option has greater risk?
 - How best do we make and implement this decision?

Polling Question #2

How prepared are you in communicating the FLSA OT Exemption Rule changes?

- a. Very prepared. Our organization has already been communicating to those employees impacted.
- b. Somewhat prepared. We've talked about who to talk with and what we would say.
- c. Not prepared. We're still trying to figure out what to say and to whom.
- d. Don't know.

Communication is Vital

- Critical conversations addressing undesired change
- Consistent conversations to maintain accuracy and policy compliance
- Prepared communications to ensure quality messaging
- FAQs and a single source as the point of contact for questions.

FAQs that may apply to in a reclassification situation

- Why is my position being reclassified?
- What do these changes mean to me?
- Is this a demotion?
- How do I record my time?
- How is overtime calculated?
- When will I begin receiving overtime pay?
- My job hasn't changed, if I'm getting overtime now, shouldn't I always have gotten it?

FAQs continued

- How does this reclassification impact my benefits?
- How does this impact my bonus or incentive compensation?
- Who can I talk to about my follow-up questions?
- Will I receive less pay?
- Can I work as much overtime as I want (or as I usually do)?
- What if I want comp time instead of overtime pay?

Other Questions/Concerns That May Arise?

- Will I receive back pay for the extra hours I've worked in the past (i.e. week, month, year...)?
- How will this change be communicated to my peers, direct reports, and/or the company in general?
- How will this affect my career aspirations at this organization?

Polling Question #3

Have you read the guidance offered by the Department of Labor (DOL), Wage and Hour Division (WHD)?

- a. Yes. I've checked out their website and read all their guidance.
- b. Seen some of it in the business press.
- c. No. I haven't had time.
- d. What guidance?

WHD Guidance for NFPs

- Ten-page document issued May 18, 2016 by DOL see <https://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf> for more details.
- Key Reminders:
 - Non-profit organizations are NOT covered enterprises under the FLSA UNLESS they engage in ordinary commercial activities that result in \$500K or more in sales made or business done. For example, managing a gift shop is a ordinary commercial activity. Providing free charitable services are not. An example of a hybrid organization is a non-profit organization that provides work for the homeless such as operating a sandwich shop. If it generates revenue of at least \$500k a year then the restaurant employees are protected by the FLSA.



WHD Key Reminders continued

- Non-profit organizations that don't generate \$500k in sales revenue may still have some employees who are individually covered under the FLSA. For example:
 - Employees whose work involves movement of people or things across state lines are considered to be engaged in interstate commerce. Specifics include:
 - Making out-of-state phone calls;
 - Receiving/sending interstate mail or electronic communications;
 - Ordering or receiving goods from an out-of-state supplier; and
 - Handling credit card transactions or performing the accounting or bookkeeping for such activities.



WHD Administrator Dr. David Weil speaks at SHRM Conference.

WHD Key Reminders continued

- Generally, volunteers serve on a part-time basis and **SHOULD NOT** displace employees or perform work that would otherwise typically be performed by employees.
- Additionally, paid employees may not volunteer to provide the **SAME TYPE** of services to the non-profit organization that they are otherwise typically employed to provide. For example:
 - Office manager who handles office operations and procedures should be paid for time spent on race day working to register runners for a fund-raising 5k fun run.

WHD Key Reminders continued

- The minimum wage and overtime provisions of the FLSA generally apply to employees at non-profit agencies. This is not a change.
- Overtime exemptions are considered as a loss of overtime pay protection rights for employees so employers are required to justify that loss.
- Non-profit organizations are able to use the white collar exemptions in the non-profit context.
- For additional information, visit dol.gov/whd.

Polling Question #4

How prepared is your employer for dealing with a DOL audit?

- a. Very. We've been audited before and stay on top of employment law changes.
- b. Somewhat. We read the journals and attend webinars.
- c. Not yet, but we will get started now.
- d. Don't know.

In Summary, Employers should

- Identify those currently exempt employees below the salary threshold
- Analyze the cost of options including raising salary to new threshold or paying overtime premiums
- Consider non-financial implications affecting employees
- Consider impact on retirement plans, incentive compensation and bonuses
- Formulate a compliance, communications and implementation strategy

Audience Question

Would you like someone from Crowe to contact you?

- a. Yes
- b. No thank you.

Thank you

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