



## **New Rule and New Reality: Unpacking the New Overtime Rule\***

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## Sources of Federal Authority for Wage/Hour Matters

1. **Fair Labor Standards Act** – Comprehensive federal statute covering most full and part time employees of private businesses and governmental entities (with certain exceptions)
2. **U.S. Department of Labor** – Administers and enforces FLSA, including through DOL regulations implementing FLSA
3. **Courts** interpreting FLSA or DOL regulations

## **U.S. Department of Labor – Administers and enforces FLSA, including through DOL regulations implementing FLSA**



## Rulemaking and Compliance Timeline

- **March 13, 2014** President Obama issues a presidential memorandum instructing DOL to update its regulations regarding which white collar workers are protected by FLSA's minimum wage and overtime requirements.
- **2014-2015** DOL conducts listening tour and drafts proposed rule.
- **July 6, 2015** Proposed rule is published in the Federal Register with 60-day comment period.
- **September 4, 2015** Comment period ends.



## Rulemaking and Compliance Timeline

- **May 18, 2016:** Announcement of publication of the Final Rule in the Federal Register (162 pages).
- **December 1, 2016:** Final Rule goes into effect; compliance must occur by this date.



## What does this mean for my organization?



**STEP ONE: Determine or confirm whether FLSA applies to the *organization* or the *employee*.**



## Ways that FLSA can apply:

### 1. Enterprise Coverage:

- Organizations with annual revenues (i.e. volume of sales made or business done) of at least \$500,000. Caveat: non-profit organizations need to look at the source of revenue to determine whether this standard is met.
- “Named Enterprises” include hospitals, institutions primarily engaged in care of other adults and people with disabilities who reside on the premises; schools for children who are mentally or physically disabled or gifted; federal/state/local governments; and preschools, elementary and secondary schools, and institutions of higher education.

Source: USDOL Guidance for Non-Profit Organizations on Paying Overtime Under FLSA, available at <https://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf>



## Ways that FLSA can apply (continued):

2. Even if an enterprise is not covered, individual employees may be covered who engage in interstate commerce or in production of goods for interstate commerce. “Employees whose work involves or relates to the movement of persons or other things across state lines are also considered engaged in interstate commerce.”
  - Exception: If such activities occur only on *isolated occasions* and involve only an *insubstantial amount* of time USDOL will not assert FLSA coverage.
  - Note: USDOL states that it generally focuses enforcement efforts on enterprise coverage situations.

Source: USDOL Guidance for Non-Profit Organizations on Paying Overtime Under FLSA, available at <https://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf>

**STEP TWO: Identify affected employees.  
(Not all employees are impacted by this new rule!)**



## **Categories of Potentially Affected Employees:**

1. Executive
2. Administrative
3. Professional
4. Highly compensated
5. Certain computer professionals

## New Rule: Executive Exemption

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

USDOL Fact Sheet #17(b):

[http://www.dol.gov/whd/overtime/fs17b\\_executive.pdf](http://www.dol.gov/whd/overtime/fs17b_executive.pdf)

## New Rule: Administrative Exemption

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than **\$913** (previously \$455) 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.

USDOL Fact Sheet #17(c):

[http://www.dol.gov/whd/overtime/fs17c\\_administrative.pdf](http://www.dol.gov/whd/overtime/fs17c_administrative.pdf)

## New Rule: Learned Professional Exemption

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than **\$913** (previously \$455) per week;
2. The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
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.

USDOL Fact Sheet #17(d):

[http://www.dol.gov/whd/overtime/fs17d\\_professional.pdf](http://www.dol.gov/whd/overtime/fs17d_professional.pdf)

## New Rule: Creative Professional Exemption

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than **\$913** (previously \$455) per week; **and**
2. The employee's primary duty must be performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

USDOL Fact Sheet #17(d):

[http://www.dol.gov/whd/overtime/fs17d\\_professional.pdf](http://www.dol.gov/whd/overtime/fs17d_professional.pdf)



## New Rule: Computer Employee Exemption

1. The employee must be compensated either on a salary or fee basis at a rate not less than **\$913** (previously \$455) per week or, if compensated on an hourly basis, at a rate not less than **\$27.63** (no change!) per hour;
2. 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; **and**
3. 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**
  - 4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

USDOL Fact Sheet #17(e):

[http://www.dol.gov/whd/overtime/fs17e\\_computer.pdf](http://www.dol.gov/whd/overtime/fs17e_computer.pdf)





## **New Rule: Highly Compensated Employee Exemption**

1. The employee earns total annual compensation of \$134,004 (formerly \$100,000) or more, which must also include at least \$913 (formerly \$455) per week paid on a salary or fee basis – non-discretionary bonuses and incentive payments (including commissions) can be used to satisfy remainder of compensation;
2. The employee's primary duty includes performing office or non-manual work; and
3. The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

USDOL Fact Sheet #17(h):

[http://www.dol.gov/whd/overtime/fs17h\\_highly\\_comp.pdf](http://www.dol.gov/whd/overtime/fs17h_highly_comp.pdf)

## Additional Info: Salary Basis

### § 541.602: Salary Basis

[T]he employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work. An employee is not paid on a salary basis if deductions from the employee's predetermined compensation 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.

## **Additional Info: Salary Basis (continued)**

### § 541.602: Salary Basis – Exceptions

1. Full sick days (if company policy);
2. Full personal days;
3. *Offset* for jury duty, military service, attendance as witness;
4. Imposition of penalties in good faith for infractions of safety rules of major significance;
5. Unpaid disciplinary suspensions;
6. First and last weeks of employment – proportional to work;
7. FMLA leave – proportional amount of time actually worked;

## **Additional Info: Fee Basis**

§ 541.602: Fee Basis (Note: Does not apply to Executive Employee)

a) Administrative and professional employees may be paid on a fee basis, rather than on a salary basis. An employee will be considered to be paid on a “fee basis” within the meaning of these regulations if the employee is paid an agreed sum for a single job regardless of the time required for its completion. These payments resemble piecework payments with the important distinction that generally a “fee” is paid for the kind of job that is unique rather than for a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis.

## Additional Info: Fee Basis (continued)

§ 541.602: Fee Basis (Note: Does not apply to Executive Employee)

(b) To determine whether the fee payment meets the minimum amount of salary required for exemption under these regulations, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least **\$913** (previously \$455) per week if the employee worked 40 hours. Thus, an artist paid \$500 for a picture that took 20 hours to complete meets the minimum salary requirement for exemption since earnings at this rate would yield the artist \$1,000 if 40 hours were worked.

## New Rule: Additional Changes

1. Includes a mechanism that will automatically update the salary and compensation levels every three years to maintain levels at the desired percentiles and ensure that the exemption tests remain useful. The first adjustment date will be **January 1, 2020**.
2. Allows employers to use non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the new salary level. (Note: This standard is different for HCE, as discussed above.)

USDOL Announcement:

<https://www.dol.gov/whd/overtime/final2016/>

## New Rule: General Information

1. Job title does not determine FLSA exemption status. In addition, the duties tests have not changed.
2. Some salaried “white-collar” workers are *not* subject to the EAP salary level test: teachers, academic administrative personnel, physicians, lawyers, judges, and outside sales workers.
3. EAP exemptions do not apply to “manual laborers or other ‘blue collar’ workers who perform work involving repetitive operations with their hands, physical skill and energy.”
4. Also does not apply to police firefighters, paramedics, and other first responders.

USDOL Fact Sheet #17:

[http://www.dol.gov/whd/overtime/fs17a\\_overview.htm](http://www.dol.gov/whd/overtime/fs17a_overview.htm)

## Special Note: Other Issues

- USDOL solicited comments from public on “whether the standard duties tests are working as intended to screen out employees who are not bona fide white collar exempt employees.” Could signal a future change to duties tests, but not at this time.
- USDOL received significant feedback during its listening tour regarding use of electronic devices after work hours by employees who may be newly entitled to overtime due to this rule. Expect guidance on this issue.





## **STEP THREE: Consider possible caveats to the new rule.**



## New Rule: Some Caveats

USDOL has broad discretion regarding enforcement of the rule. In particular, it has the option to target specific areas of *non-enforcement*. Currently there is one area of non-enforcement for “providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds. This non-enforcement period will last from December 1, 2016, to March 17, 2019.” There are no other areas of targeted non-enforcement.

Source:

<https://www.dol.gov/whd/overtime/final2016/nonenforcement-faq.htm>

## **New Rule: Some Caveats (continued)**

On March 17, 2016 proposed legislation called the “Protecting Workplace Advancement and Opportunity Act” was introduced in both the U.S. Senate and House of Representatives.

- <https://www.congress.gov/bill/114th-congress/senate-bill/2707>
- <https://www.congress.gov/bill/114th-congress/house-bill/4773>

The Senate bill is sponsored by Sen. Tim Scott (R) of Alabama, with 45 co-sponsors. The House bill is sponsored by Rep. Tim Wahlberg (R) of Michigan, with 189 co-sponsors.

## **New Rule: Some Caveats (continued)**

If passed into law, the Protecting Workplace Advancement and Opportunity Act will:

- Block the new overtime rule from taking effect;
- Require USDOL to conduct a comprehensive economic analysis of the proposed rule on small businesses, non-profits, and public employers;
- Prohibit the implementation of any automatic increases in the salary thresholds; and
- Require that future changes to the duties test be subject to notice and comment.

## **New Rule: Some Caveats (continued)**

On July 14, 2016, new legislation was introduced in the U.S. House of Representatives which would phase in the new requirements over time (using a graduated salary threshold).

- <https://www.congress.gov/bill/114th-congress/house-bill/5813>

The bill is sponsored by Rep. Kurt Schrader (D) with four cosponsors.

## New Rule: Some Caveats (continued)



There will be legal challenges to this new rule which may seek injunctive relief to prevent the rule (or portions of it) from being implemented, but it is not clear that there is any strong basis to seek such relief.

**STEP FOUR: Plan ahead on the assumption that the new rule will be implemented.**



## Big Question: Why does this all matter?

Short Answer: Improper classification of exempt and non-exempt employees can lead to significant liability under FLSA and companion state laws. Anticipated increase in regulatory oversight in wake of new rule.

Liquidated  
Damages

Attorney Fee  
Awards



Legal Fees

Prejudgment  
Interest



## Who will be impacted?

- **Which employees?** Employees meeting all other applicable elements for an affected exemption status who earn *at least* \$455/week (\$23,360/year) but *less than* \$913/week (\$47,476/year). USDOL estimates that up to 4.2 million workers could be impacted.
- **Which employers?** Any employer otherwise subject to FLSA who employs at least one employee described above.
  - USDOL estimated annualized direct costs to employers in connection with new rule: \$239.6 and \$255.3 million
  - USDOL estimated new income resulting from new rule: \$1.18 and \$1.27 billion

USDOL FAQ:

<http://www.dol.gov/whd/overtime/NPRM2015/faq.htm>



# Be proactive

— Examine the potential impact on your organization and its employees *before* the implementation date.

## Be proactive (continued)

Case Study: USDOL position on case managers and Administrative Exemption.



Source:

[https://www.dol.gov/whd/opinion/FLSA/2007/2007\\_02\\_08\\_07\\_FLSA.pdf](https://www.dol.gov/whd/opinion/FLSA/2007/2007_02_08_07_FLSA.pdf)

## Be Thoughtful

- Identify employees who may or will be impacted by this new rule. Understand the full scope and impact of this rule on your organization.
- Consider and plan for the “ripple effect.”  
**Example:** Employee A has been at Company for 7 years and makes \$920/week. Employee B has been at Company for one year and makes \$850/week. Both employees routinely work 50 hours/week.
- Compliance date is December 1 – a Thursday! Best practice may be to begin tracking compliance at the start of the affected workweek.

## Be Thoughtful (continued)

- Consider and plan for strategic implementation. Some broad options to consider:
  - (a) Pay affected employees more to meet exemption threshold (higher cost; allows employer to maintain existing workload assignments).
  - (b) Keep pay the same and limit hours to prevent overtime (may reduce productivity or require additional hiring = higher costs in salary and benefits).
  - (c) Explore COMPLIANT options to reduce additional costs.

## Be Thoughtful (continued)

- Government entities may, in certain circumstances, offer compensatory time in lieu of overtime pay. Accrual is limited by law, depending on employee type.
- Consider new ability to use non-discretionary bonuses to satisfy up to 10% of salary level:
  - (a) Make sure bonus is truly non-discretionary (e.g. payments meant to induce an employee to remain with the organization or work more efficiently; incentive payments and commissions are generally included);
  - (b) Quarterly or more frequent basis;
  - (c) Any required “catch-up” payment must be made within one pay period after the applicable quarter ends.

Source: USDOL’s Small Entity Compliance Guide to FLSA’s “White Collar” Exemptions” (link provided at end)

## Be Thoughtful (continued)

- Less common option: If suitable, consider possibility of using “fixed salary for fluctuating hours” provision of FLSA. (29 CFR 778.114)
- Warning: Can be difficult and complicated to correctly track and implement; not frequently used.
- Basics:
  - Employees not otherwise exempt from minimum wage/overtime;
  - Clear understanding and agreement between employer/employee;
  - Employee’s workweek hours will fluctuate but never exceed a specific threshold (e.g. 50 hours);
  - Pay an agreed salary each week which never varies;
  - Never result in payment below minimum wage;
  - For any time worked over 40 hours in a week, pay half of the employee’s regular rate for that week (in addition to base salary).

## Be Thoughtful (continued)

- CAUTION: Most standard salary-type deductions are not allowed (including attendance-related); other potential pitfalls to consider
- Example of fluctuating workweek in practice:  
Sam earns \$600/week and enters into fluctuating workweek payment arrangement. He typically works 35-45 hours per week.

Week 1 = 38 hrs. (\$600 base)

Week 2 = 42 hrs. (\$600 base + 14.30 = 614.30)

$600 / 42 = \$14.29/\text{hour} / 2 = 7.15 \times 2 = \$14.30$

Week 3 = 45 hrs. (\$600 base + 33.33 = 633.33)

$600 / 45 = \$13.33/\text{hour} / 2 = 6.67 \times 5 = \$33.33$

Sources:

<https://www.law.cornell.edu/cfr/text/29/778.114>

[https://www.dol.gov/whd/opinion/FLSA/2006/2006\\_05\\_12\\_15\\_FLSA.htm](https://www.dol.gov/whd/opinion/FLSA/2006/2006_05_12_15_FLSA.htm)



## Be practical

Assess infrastructure (payroll, time entry, etc.) to ensure ability to accurately track time of affected workers and achieve compliance.





## Be practical (continued)

Examine both direct and indirect costs of new rule:

Direct = Additional income to employees;

Indirect = Administrative costs of implementation  
(e.g. tracking time, calculating overtime, employee  
time spent in analyzing and shifting workloads)

## Be Holistic

This is a good time to generally review payroll and worker classification practices. Misclassification can come in many forms, not just in relation to the new overtime rule. Some estimates claim that up to 70% of employers are noncompliant in some way with wage/hour laws.



## **Be Resourceful**

- Consult reputable, reliable sources regarding new developments in rulemaking and any challenges to the rule once implemented.
- Evaluate current HR/payroll service provider to determine ability to assist in compliance activities.
- When in doubt regarding compliance-related issues, seek guidance from counsel.

## RESOURCES:

- USDOL FAQ regarding new rule:  
<https://www.dol.gov/whd/overtime/final2016/faq.htm>
- USDOL Wage and Hour Division Compliance Assistance for Employers:  
<http://www.dol.gov/WHD/foremployers.htm#ca>
- USDOL's Small Entity Compliance Guide to FLSA's "White Collar" Exemptions"  
<https://www.dol.gov/whd/overtime/final2016/smallbusinessguide.pdf>
- USDOL's *Handy Reference Guide to the Fair Labor Standards Act*  
<http://www.dol.gov/whd/regs/compliance/hrg.htm>

## Questions?

