

FLSA 101: Fact Sheet

FLSA BACKGROUND

The DOL issued final rules under the Fair Labor Standards Act (FLSA) that will substantially increase the minimum salary requirement for certain exempt employees effective December 1, 2016.

Non-exempt employees receive overtime pay past 40 hours per week at 1.5 times their regular rate of pay.

Exempt employees are salaried employees and are “exempt” from receiving overtime pay.

CHANGES TO THE SALARY-LEVEL TEST

- Minimum salary requirement is increasing from \$455 per week or \$23,660 annually, to \$913 per week or \$47,476 annually.
- Requirements are set at the 40th percentile of full-time, non-hourly paid employees as per the lowest wage census region (the South).
- Minimum salary requirement for highly compensated employees (HCEs) exemption is increasing from \$100,000 to \$134,004 annually.
- Requirement is set at the 90th percentile of full-time, non-hourly paid employees nationwide.
- Further, for regular employees (not HCEs) non-discretionary bonuses, incentive payments, and commissions that are paid at least quarterly can now satisfy at least 10% of the minimum salary requirement.
- Automatic updates to these minimum salary requirements will commence every three years beginning January 1, 2020, and notification will be provided 150 days before the effective date.

DUTIES TEST

Exempt employees must pass the below tests and earn at least \$913 per week on a salary basis.

Highly compensated employees are exempt if they perform even one of the exempt duties of an executive, administrative, or professional employee outlined below.

Executive Employee:

- Primary duty managing the enterprise, department or subdivision of the firm.
- Directs the work of two or more employees or their equivalent.
- Has authority to hire or fire and/or make recommendations that carry weight.

Administrative Employee:

- Primary duty performing office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers.
- Exercises discretion and independent judgment with respect to matters of significance.

Learned Professional Employee:

- Primary duty performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.
- Advanced knowledge was obtained by completing an academic course of study resulting in a four-year college degree or leading to certification.

Creative Professional Employee:

- Primary duty performing work requiring invention, originality, or talent in a recognized field of artistic endeavor such as music, writing, acting, and the graphic arts.
- Requires more than intelligence, diligence, and accuracy; requires talent.



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Computer Professional Employee:

- Primary duty is application of system analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications.
- Design, development, documentation, analysis, creation, testing or medication of computer systems or programs including prototypes, based on and related to user or system design specifications.
- Design, testing, documentation, creation or modification of programs related to machine operation systems.
- A combination of the aforementioned duties requiring the same level of skill.

Outside Sales Employee:

- Primary duty is making outside sales.
- Regularly works away from the company's place of business.
- Sells tangible or intangible items, such as goods, insurance, stocks, bonds or real estate, or obtains order or contracts for services or the use of facilities.

WHAT IS NOT CHANGING

No changes to the salary-basis test or the duties tests.

HANDLING THE SWITCH

- Employers must pay exempt employees a salary of at least 90% of the minimum salary level each workweek (\$821.70, or \$42,728.40 annualized). Based off of the 10% non-discretionary compensation.
- At quarter end, the employer must make up any shortfall to the total \$47,476 requirement in the first pay period of the next quarter.
- Certain state laws require employees receive advance notice of 7 to 14 days for changes in pay.
 - It is suggested to provide as much time communicating these modifications as possible. Certain states mandate 30 days or more.

OPTIONS FOR COMPLIANCE

Employees who are currently exempt (not being paid overtime) and are not paid the new minimum salary requirements will need to either:

- Be reclassified as non-exempt and be paid overtime for hours worked over 40 hours per week.
- Or, have their salaries increased to meet the new requirement, so as long as the duties test is satisfied.
- For employees currently earning close to the current \$23,660 minimum that rarely work overtime, it might make sense to reclassify them as non-exempt and pay overtime when it is incurred.
- However, if an employee is earning a higher wage and often works overtime, then it might make sense to leave them as exempt and raise their salary to the new minimum of \$47,476, assuming their role is deemed exempt.
- Also, remember to include any nondiscretionary bonuses for up to 10% of the new salary threshold.
- If raising salaries, review job descriptions and ensure fair wages compared to industry standards and compared to internal ranges.
- And, keep in mind this process will be revisited every three years as the thresholds are raised.

RECLASSIFICATION BEST PRACTICES

- Identify employees who need to be reclassified.
- Check salaries versus requirements.
- Conduct a full job duty review; sometimes salary is not the trigger.
- Develop new compensation plan for reclassified employees.
- Review wage-hour policies and processes.
- Communicate changes to employees and management.
- Train reclassified employees and their managers.

CORRECTING PREVIOUS MISCLASSIFICATIONS

- Employees that are misclassified as exempt are entitled to back overtime pay, and the employer may be subject to fines and damages. There could be up to a three-year look-back period.
- Legal counsel is recommended to discuss misclassifications.



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AVOID LITIGATION—CLASSIFICATION DUE DILIGENCE

- An easy way to avoid classification issues is to track the hours of all employees, exempt and non-exempt.
- If an employee is classified incorrectly and needs to be reclassified as non-exempt, a record of their hours worked is required by the court.
- The law permits tracking of all employees via time sheet or punching a time clock.

PREPARING FOR DOL AUDIT

If an employee reports an employer to the DOL and an audit is scheduled, the employer should immediately conduct their own internal audit.

- Compare overtime laws with your processes and ensure compliance.
- Review job descriptions in question.
- Interview managers to ensure employee job descriptions are accurate.
- Determine employees' job duties and review timekeeping records.
- Assess current exempt employee roles to identify amount of time allocated on all tasks performed.
- Confirm employees perform their jobs as assigned and work the hours designated.
- Check overtime records to ensure pay consistency and to uncover discrepancies.



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