



OVERTIME COMPENSATION GUIDE FOR NY EMPLOYERS

Due to a federal court injunction, this Guide was revised on 11-29-2016 to omit discussion of the proposed federal FLSA rates (and jurisdiction analysis)

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INTRODUCTION

Competing state and federal labor practices and regulations are expected to be a source of confusion for New York’s nonprofit employers for years to come with respect to the proper classification of workers as it relates to overtime compensation entitlements. Each the federal government, with the Fair Labor Standards Act (“FLSA”) and New York State, (“NYS”), via the Minimum Wage Act (“MWA”), regulate labor practices, including the minimum wage, overtime considerations and numerous other workplace considerations. Under the United States Constitution, individual states are free to adopt labor standards that exceed—but, not fall-below—baseline standards established by the federal government.

The November 2016 [injunction](#) against the proposed FLSA rate increases means that NY employers should now, **until further notice**, use only the NY rules for their exempt employee classifications.

Effective 12/31/16, NYS intends to implement a regionally-based, progressively increasing minimum salary standard for so-called exempt employees. This new salary standard will hike the current \$35,100 statewide annual minimum of \$35,100 (\$675.00 weekly) to somewhere between \$37,830 and \$42,900 (\$727.50–\$825.00 weekly) depending on number of employees and region, as fully described in the chart set forth below.

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Chart of NYS-only Minimum Wage and OT-Exempt Classification Salary Component Increases

Interpretation:

- All values in dollars (\$). For OT-exempt values: the required weekly pay is listed, then the annual equivalent in brackets.
- Whole years are listed for accessibility, but technically the new NY rates become effective the day before the start of every calendar year (thus expire on Dec. 30th of the year they were in effect).
- NY in 2022: until reaching \$15, the exact increase will be published by the Labor Commissioner by 10/1 preceding the start of the next year; the increases will be a factor of CPI and other indices.
- NY will adopt the federal minimum wage (at \$7.25 since 2009) **IF** it exceeds the applicable NY minimum wage in the future.

Establishment type	2016		2017		2018	
	Min. Wage	OT-exempt salary component	Min. Wage	OT-exempt salary component	Min. Wage	OT-exempt salary component
NYC- Large Employers (11 or more employees)	9	675 [35,100]	11	825 [42,900]	13	975 [50,700]
NYC- Small Employers (10 or less employees)	9	675 [35,100]	10.50	787.5 [40,950]	12	900 [46,800]
Employers in Nassau, Suffolk, and Westchester Counties	9	675 [35,100]	10	750 [39,000]	11	825 [42,900]
All other NYS Employers	9	675 [35,100]	9.70	727.5 [37,830]	10.40	780 [40,560]
	2019		2020		2021	
	Min. Wage	OT-exempt salary component	Min. Wage	OT-exempt salary component	Min. Wage	OT-exempt salary component
NYC- Large Employers (11 or more employees)	15	1,125 [58,500]	15	1,125 [58,500]	15	1,125 [58,500]
NYC- Small Employers (10 or less employees)	13.50	1,012.5 [52,650]	15	1,125 [58,500]	15	1,125 [58,500]
Employers in Nassau, Suffolk, and Westchester Counties	12	900 [46,800]	13	975 [50,700]	14	1050 [54,600]
All other NYS Employers	11.10	832 [43,264]	11.80	885 [46,020]	12.50	937.5 [48,750]
	2022					
	Min. Wage	OT-exempt salary component				
NYC- Large Employers (11 or more employees)	15	1,125 [58,500]				
NYC- Small Employers (10 or less employees)	15	1,125 [58,500]				
Employers in Nassau, Suffolk, and Westchester Counties	15	1,125 [58,500]				
All other NYS Employers	TBD	937.5 [48,750]				

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HOW DO YOU DETERMINE WHETHER AN EMPLOYEE MIGHT BE EXEMPT?

An individual employee may be exempt from NYS overtime compensation obligations if your organization can answer “yes” to **Questions 1, 2 & 3**:

1. **Salary Basis Test**: Does the employee receive a predetermined salary?

- Don’t forget the obvious. To be classified as “exempt” from NYS wage entitlements, employees must be paid the same predetermined salary each pay period for any week in which work is performed, without regard to actual hours, quality of work, etc.

2. **Salary Threshold Test**: Does the employee’s salary exceed the applicable required threshold?

- Exempt employees must receive a predetermined salary that exceeds the appropriate NYS minimum thresholds.
 - i. NYS: \$37,830-\$42,900 annually (\$727.50–\$825.00 weekly) variable by number of employees and location, proposed to become effective 12/31/16 and annually increasing thereafter.

3. **Job Duties Test**: Does the employee primarily perform job duties that qualify for exemption?

- In general, in the nonprofit community, only employees who primarily perform “executive,” “administrative” or “professional” job duties will satisfy criteria required for exemption.
 - Position titles and job descriptions do *not* determine exempt status; only the actual day-to-day job duties of the employees are relevant.
 - ‘Primary duty’ refers to the employees most important function, not necessarily what they spend the majority of their work hours performing.
- a. Executive: An employee might be considered to have “*executive*” job duties if his/her responsibilities:
 - i. “primarily relate to management of the nonprofit or a recognized department or subdivision thereof;”
 - ii. “customarily and regularly require the employee to direct the work of two, or more, employees;” &
 - iii. generally mandate or imply “the authority to hire or terminate other employees or to offer suggestions and recommendations as to such considerations, as well as this concerning the advancement, promotion or any other change of status of other employees.”
 - This is the [Executive FAQ](#) issued by NYSDOL offers additional clarification.
- b. Administrative: An employee might be considered to have “administrative” job duties if his/her responsibilities include:
 - i. “whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general operations of such individual's employer;
 - ii. who customarily and regularly exercises discretion and independent judgment;
 - iii. who regularly and directly assists an employer, or an employee employed in a bona fide executive or administrative capacity (e.g., employment as an administrative assistant); or who performs, under only general supervision, work along specialized or technical lines requiring special training, experience or knowledge;”
 - An [Administrative FAQ](#) from NYSDOL further clarifies applicable criteria.

- c. Professional: An employee might be considered to have “professional” job duties if his/her responsibilities include:
- i. “whose primary duty consists of the performance of work: requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes; or original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination or talent of the employee; and
 - ii. whose work requires the consistent exercise of discretion and judgment in its performance; or
 - iii. whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work) and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.”
- A [Professional FAQ](#) published by NYSDOL further clarifies applicable criteria.

YOU HAVE STAFF WHO WILL BE IMPACTED. WHAT ARE YOUR OPTIONS?

Should you identify a presently exempt employee whose exempt status will be impacted by the NYS regulations, your organization must take immediate action to come into regulatory compliance. There are several available compliance options, which could be applied uniformly or selectively on a case-by-case basis.

1. **Increase Salary to Appropriate Salary Minimum:** You can simply increase the present wage to the new applicable NYS minimum salary threshold or beyond.

- The new regulations only impact covered staff earning less than the applicable minimum salaries. By simply increasing salaries to the new minimum thresholds, you avoid a problem.
 - Note: NYS ([LAB §195](#)) requires that employers provide written notice (and keep signed verifications thereof) to their employees confirming their rate of pay, pay period, pay day, etc. at the time of hiring **or if changes are made thereafter**, and offers associated forms for both [OT-exempt](#) employees and [‘hourly’](#) employees.

2. **Maintain Equivalent of Current Wage by Converting to Corresponding Hourly Rate:** Essentially, convert present salary to an analogous hourly rate—based on estimated, or required, hours worked, even if more than 40-per week (mandating overtime pay)—and requiring you to:

i. *Affirmatively establish the employee’s regular rate of pay:*

- You can establish an employee’s “regular rate” of pay by making educated decisions about the number of hours that the employee customarily works or will be required to work, even if more than 40-per week (for which overtime pay rates will apply). Provided the resulting hourly rate exceeds the applicable NYS Minimum Wage, (which will annually increase for the next several years), this method is legally-compliant.
 - For example, if an employee qualifies as exempt under the 2016 NYS regulations (\$675 per week) and a large NYC employer doesn’t want to increase pay to \$825 per week (\$42,900 annually) for 2017, it can determine a regular rate of pay using assumptions of anticipated weekly overtime...let’s say 5 hours of OT:

$$\$675/[40 \text{ regular hours} + (5 \text{ overtime hours} \times 1.5)] = \$14.21 \text{ per hour.}$$

This rate would only work through 2018 however, as the large NYC employer minimum wage jumps to \$15 for 2019.

ii. *track and record weekly hours worked and pay overtime, if needed:*

- NYS:
 - “[M]inimum wage protections apply for the time an employee is permitted to work, or is required to be available for work . . . and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee.” 12 NYCRR 142-2.1.
 - [“Employees who work](#) a shift of more than six hours starting before 11am and continues until 2pm must have an uninterrupted lunch period of, at least half an hour between 11am

and 2pm.” Meal periods do not count as work time, thus employers need not pay for that time, unless employees perform work during the period. Employers need not provide other “coffee breaks,” etc., but if an employer permits a break (of up to 20-minutes), then they should pay for it as compensable work time.

- NYS mandates certain recordkeeping requirements [[12 NYCRR § 142-2.6](#)].

3. Adjust Operations: Adjust operations and schedules to minimize the likelihood of paying overtime.

- If projects or programs have been compressed into deliverable timeframes that may no longer be feasible because it would require the payment of overtime, consider rearranging projects so that components can be completed in 40-hour week increments or adjust schedules so programs can continue uninterrupted without staff exceeding the 40-hour threshold.
 - It is entirely permissible to restrict hours so that employees are prohibited from working more than 40-hours per week (meaning they will never receive overtime), but you must pay overtime if they work additional hours (including from home) anyway without permission (your only recourse would be discipline or termination).
- By converting salary to an hourly rate, you can permissible pay employees less than current salary for working a short-week or more for working a long-week, possibly including overtime pay.

4. Re-Assign Job Duties: If job duties can be adjusted so that an employee never works more than 40 hours per week, there will never be an obligation to pay overtime

- If the compensation of hourly or salaried staff is simply unaffordable, it may be advantageous to shift certain job duties to other staff who are unlikely to ever work more than 40 hours per week or to current or newly hired part-time employees.

5. Maximize Reliance on a Limited Number of Exempt Staff: If an employee is already exempt, assigning him/or additional duties and responsibilities can come at no additional cost.

- Most nonprofit employers have a significant number of employees who are already exempt, earning salaries beyond applicable NYS minimum thresholds. If forced to reclassify certain presently exempt staff to non-exempt hourly employees without the resources to pay overtime, by transferring some of their current responsibilities to other exempt staff who will not be impacted by the change in standards, you may be able to seamlessly continue current operations without incurring additional cost.

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