

# New **Overtime** Regulations: What Should Employers Do to Prepare?

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# How Did We Get Here?

## Facts & Figures

- FLSA exemptions last updated in 2004:
  - **Raised** the weekly salary threshold level from \$155 to \$455.
  - **Combined** the long and short duties test into one test.
  - Introduced the **Highly Compensated Employees** (HCE) exemption.
- In 2014, President Obama issued an Executive Order directing the DOL to **update** and **modernize** the FLSA exemption regulations.

# How Did We Get Here?

## Facts & Figures

- › Notice of proposed rule published July 6, 2015
  - Over **270,000** comments received
- › DOL estimates Final Rule will *extend new overtime protections* to **4.2 million workers** (currently classified as exempt)
- › DOL estimates that the “income transfers” from employer to employee will total approximately **\$1.2 BILLION per year** over the first 10 years! (\$12B total)

# Overview of the FLSA Classifications

## “Exempt” vs. “Non-Exempt”

- › **Exempt employees** are generally paid the same salary each week, have to perform certain types of duties, and are **not** eligible for overtime regardless of how many hours they work.
- › **Non-exempt** employees must be paid minimum wage **plus** overtime (1.5 x regular rate of pay) for all hours over 40 in a given workweek.

Employees are **Non-exempt** unless they fall under a *specific exemption*.

# Overview of the FLSA Classifications

## White Collar (EAP) Exemptions

- Under the FLSA, an employee can be considered exempt if he/she fits one of these categories:



# Overview of the EAP Classifications

- ▶ The **Executive, Administrative and Professional** exemptions typically require employees to satisfy a **three-part test**:

1

Salary  
Basis  
Test

2

Salary  
Threshold  
Test

3

Primary  
Duties  
Test

# Highly Compensated Exemption

- To qualify for the **Highly Compensated Exemption**, an employee must:



Meet a heightened **Salary Test**



Perform **office** or **non-manual** work



Customarily and regularly perform at least one the of the duties or responsibilities of an **exempt executive, administrative** or **professional** employee.

# New DOL Rules: What Has Changed?

1. Salary threshold has more than **doubled** for the EAP White Collar Exemptions
2. Salary threshold has **increased substantially** for the Highly Compensated Exemption
3. Salary threshold will now **automatically increase** every three (3) years beginning on January 1, 2020
4. Employers can use **non-discretionary bonuses** as part of the salary threshold for EAP Exemptions (up to a cap)

**Effective Date: December 1, 2016**



# What Has Changed?

## New Salary Thresholds as of December 2016

### White Collar EAP Exemptions

- \$455/week increases to **\$913/week**
- \$23,660 annually increases to **\$47,476 annually**

### Highly Compensated Employees

- \$100,000 annually increases to **\$134,000 annually**

### Educational Institutions

- Many employees will not be affected because of special existing provisions in this sector (*e.g.*, for teachers)
- To the extent the new Rules do apply, same increases for covered positions
- DOL anticipates **limited impact** in this sector

### Non-Profits

- To the extent that the FLSA applies, the new regulations will affect non-profit employees to the same extent as private business
- DOL anticipates **limited impact** in this sector

# What Has Changed?

## Computing a “Salary”

- › For the first time, a portion of the **White Collar EAP Exemption** salary threshold may include:
  - *Non-discretionary* bonuses
  - Incentive payments
  - Commissions
- › **Cap:** Non-salaried pay may account for up to 10% of the salary threshold (*i.e.*, up to \$4,747.60 annually).
- › **Timing:** These payments must be made at least **quarterly** in order to count toward the threshold. Catch-up payments are allowed in the pay period immediately following the end of the relevant quarter.

# What Has Changed?

## Computing a “Salary”

- › For the **Highly Compensated Exemption**, non-discretionary bonuses, commissions and incentive pay:
  - May **not** be used toward the standard salary threshold of \$47,476/yr.
  - **May** be used toward the total compensation requirement *in excess of* the standard salary threshold (*i.e.*, above \$47,476/yr.)
- › **Catch-up payments**: If total annual compensation does not meet the threshold by the last pay period of the 52-week year, employers may make a single “catch up” payment: (i) during the last pay period or (ii) within one month after the end of the year.

# What Has Not Changed?

## › Duties Test

- **No changes** to any of the “Duties Tests”.
- Employees still must fulfill duties requirements. Not enough to be paid the minimum salary!

## › Areas Where Salary Requirements **Do Not** Apply:

- Certain Occupations:
  - Doctors
  - Lawyers
  - Teachers
  - Outside Sales Employees
  - Employees in certain computer related occupations paid at least **\$27.63/hr**.

## › Fee Basis

- Employees may continue to be paid on a fee basis.
- However, the new threshold of **\$913/week** will apply.

# Other Exemptions to Keep In Mind

## Not Impacted by the New Salary Threshold

### › Outside Sales Employees

- To qualify an employee must meet **ALL** of the following criteria:
  - Primary duty: Making sales or obtaining purchase orders/contracts.
  - Performs his/her duties **off site** on a consistent basis.

### › Computer-Related Occupations

- To qualify an employee must meet **ALL** of the following criteria:
  - Hourly rate of at least \$27.63 (*more than new threshold*)
  - Primary duty includes one of the following:
    - Systems analysis, design, development, documentation, analysis, creation, testing or modification of computer systems or programs; or
    - A combination of these duties, the performance of which requires the same level of skills.

# **What Do the New Regulations Mean for You and Your Employees?**



## Audit: Who is Newly Eligible for Overtime?

➤ Identify all employees who are in the **RED ZONE**:

- Employees who make between **\$23,660** and **\$47,476** annually and are currently classified under **EAP exemption**.
- Employees who make between **\$100,000** and **\$134,000** annually and are currently classified under **HC exemption**.

**Retain exemption or convert to non-exempt?**



## Audit: Who is Newly Eligible for Overtime? (cont'd)

- Review **job responsibilities** for those in **RED ZONE:**
  - Do they meet the Primary Duties Test for the applicable exemption?
  - If not, use this as an opportunity to reclassify.
  - Remember ...
    - Salary level is not enough to qualify for an exemption
    - Job title is not enough to qualify for an exemption





## Audit: Who is Newly Eligible for Overtime? (cont'd)

For Employees Whose Job Duties **DO**  
Meet the “Primary Duties” Test:

- **Gather data** on how much overtime the employee actually works or might be expected to work.
- Assess workloads:
  - Can OT hours be limited?
  - Can work be reassigned to P/T or salaried workers?
  - More economical to hire additional workers for overflow?
- Can salaries and/or bonuses be restructured to neutralize the impact of the new salary requirements?
- **Evaluate options based on data** [economic + morale] and develop **communication plan**.



# Facts & Figures

- According to the U.S. Department of Labor, of the employees who will be impacted by the New Rule (*i.e.*, employees in the **RED ZONE**):
  - **60%** do not currently work overtime
  - **20%** regularly work overtime
  - **19%** occasionally work overtime



## Options for Addressing the New Overtime Rules

➤ **OPTION 1:** Increase employee's salary to meet the new threshold (assuming the duties test is satisfied) and maintain exempt status.

*\*Remember you will need to revisit every 3 years\**

- Within job classifications, have a consistent threshold at which you “bump up” salaries vs. reclassifying employees.
- Within job classifications, consider eliminating and/or reducing existing discretionary bonuses/fringe benefits to control costs.



## Options for Addressing the New Overtime Rules

### ➤ **OPTION 2: Maintain employee's current salary & reclassify as non-exempt.**

- Decide whether to pay hourly or salary.
- Consider the fluctuating workweek.
- Consider reducing hourly rate (provided employee still earns at least minimum wage) to replicate current salary with balance of straight and OT pay.
- Consider restricting OT.
- Consider changing work hours/workweek.
- Consider eliminating or reducing fringe benefits.

# CASE STUDY

- › Fast Company has 500 District Managers currently classified as exempt who are now in the **RED ZONE** (*i.e.*, earning between **\$23,660** and **\$47,476** annually).
- › None of these managers keep time records so no way to determine exact number of OT hours worked.
- › Company estimates that at least **50%** of the managers currently work in excess of **40 hours** per week. Best estimate: they average 7 – 10 hours of OT a week.
- › How do you recommend that Fast Company proceed?

# CASE STUDY

(CONTINUED)

## STEP 1

- Confirm that District Managers perform duties that fall into one of the EAP Exemptions.
- If not, this is an opportunity to reclassify them as non-exempt.
- If so, go to **Step 2**.

## STEP 2

- Do a census of the managers to ensure you have all of the relevant data (current salary, non-discretionary bonuses, discretionary bonuses, other fringe benefits).
- Estimate weekly hours worked in excess of 40.\*

## STEP 3

- Analyze data to identify threshold salary at which you would consider “bumping” salaries to get into the **GREEN ZONE** to maintain exempt status (*consider both economic and morale implications*).

# CASE STUDY

(CONTINUED)

## STEP 3 (continued)

### LOW

**\$23,660 (\$17.07 OT rate)**

- Employee would need to work almost **1,400 hours of OT to = 23,816 increase**
- 28 OT hours/week

### MIDDLE

**\$35,000 (\$25.24 OT rate)**

- Employee would need to work almost **500 hours of OT to = \$12,476 increase**
- 10 OT hours/week

### HIGH

**\$42,000 (\$30.29 OT rate)**

- Employee would need to work **180 hours of OT to = \$5,476 increase**
- 3.6 OT hours/week



# CASE STUDY

(CONTINUED)

## STEP 4

- For employees whose salaries are increased to get into the **GREEN ZONE** and retain exempt status:
  - **Perform analysis** to ensure no disparate impact being caused by the change.
  - **Consider options** for neutralizing additional salary costs (*e.g.*, reduce or eliminate discretionary bonuses or other fringe benefits).
  - Consider “converting” up to 10% of salary to **non-discretionary bonus or incentive pay**.
  - Calendar a review in 2.5 years after new salary thresholds are released.



# CASE STUDY

(CONTINUED)

## STEP 5

- For employees whose salaries are **not increased** and will be **newly exempt**:
  - Ensure they are **converted to non-exempt timekeeping processes** and begin to record all hours worked.
  - Consider whether to **reduce** or **eliminate** overtime hours by hiring additional employees or redistributing work to other employees – and **communicate** any OT restrictions to employees.
  - Consider **adjusting wages** so total compensation stays constant, but reallocated between straight and overtime hours.
  - Consider **reducing or eliminating fringe benefits**.



# Prepare for Impact: Newly Classified Employees

Need to create a “new normal”

Define new rate of pay & any changes to benefits

Discuss work hours & any limits on OT

Introduce time tracking system

Document new processes



# Prepare for Impact ...

(continued)

- Reclassification will likely impact **MORALE**:
  - Reclassified employees will need to meticulously track hours (potentially for the first time)
  - Employees will have newly defined/limited work hours ...
    - Texting and email “after hours”
    - Working late on projects
  - Overall flexibility for reclassified employees will suffer
  - Employees may view change to mean they are longer viewed as “professionals”



# Managing the Newly Overtime Eligible

## Review & Update Overtime Policies

- Limit workweek to 40 hours?
- Pre-Approval of Overtime?

## Record Keeping

- Accurate timekeeping records a must
- Use existing systems or implement new method
- Signing/punching in and out is not required

## Update Payroll System and Processes

- Make sure processes are updated/new employees enrolled well in advance of 12.1.16 deadline
- Train all involved employees



# Managing the Newly Overtime Eligible

## Employee Relations

- Morale Issues
- Anxiety about changes
- Feeling demoted/loss of status
- Question whether the company values individual contributions
- Distraction from core business

## Communicating to the Workforce

- Have a plan!
- Be transparent and clear with all impacted employees
- Consider revised offer documents for converted employees
- Can “blame” changes on new legal requirements
- Head off the rumor mill



# Managing the Newly Overtime Eligible

## Explain the Financial Impact

- Give details and be frank (e.g., bonuses will be eliminated/changed/stay the same)
- Speak to each impacted employee about his/her individual situation

## Litigation

- Reclassification may trigger questions about past practices
- Communication is key
- Suspicions & rumors encourage attorney consultations



# Audit Existing Policies, Practices & Benefits

**Are existing policies and programs consistent for all non-exempt workers?**

- Overtime Policies
- Compensation Plans and Bonuses
- Flex-time Arrangements
- Travel Policies
  - What's compensable and what's not?
  - How to track time away from the office.

**Benefit Packages**

- Continued eligibility for certain benefits (e.g., health insurance, life insurance, disability, retirement benefits)



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# Why Employers Should Audit **Now**



# Why Employers Should Audit **Now**

➤ These new regulations create a good opportunity to:

## Review All Wage Practices

- Confirm exempt status of **all** employees ... even those paid more than \$913/week

## Update Job Descriptions

- Match to exemptions to the extent possible

## Reclassify Employees

- Great opportunity to reclassify employees who were possibly misclassified!



# Why Employers Should Audit **Now**

## Strict Compliance Is Critical

- › **Comply with federal & state wage laws to the letter**
  - Courts interpret the criteria for each exemption very narrowly
  - Consider *state-by-state variations*
  - If in doubt, employee should be considered non-exempt
  
- › **Major source of litigation and agency action in recent years**
  - In recent years, FLSA lawsuits outnumber claims under any other federal statute
  - Class actions are a growing trend and increase exposure dramatically
  - Major monetary awards and agency fines



# Why Employers Should Audit **Now**

## Avoid Department of Labor Audits

You **do not want** even a single complaint

Once an auditor is in your office, he or she can request a **wide range** of wage-and-hour related information

Auditors have “**bottom line**” requirements

Auditors tend to **side with employees**



# Why Employers Should Audit **Now**

## Liability and Damages

- Potential damages for wage & hour violations:
  - Back pay
  - Liquidated damages
    - \* *Fixed amount equal to pay owed (in essence, **doubles** back pay owed)*
  - Attorney's fees and costs
  - DOL may impose civil monetary **penalties** for repeat offenses
  - Willful violations may expose employer to a penalty up to **\$10,000** and **criminal imprisonment**
- **2 year statute of limitations, 3 years if willful violation**

# Congressional Efforts to Rollback or Modify the New Regulations

# Proposal to Rollback New OT Rules

## › Protecting Workplace Advancement and Opportunity Act (S. 2707 and H.R. 4773)

- **Would void** the new regulations completely
- **Restores** the white collar exemptions in the current regulations
- **Requires** the DOL to conduct a comprehensive economic impact analysis going forward
- **Prohibits** automatic increases to the salary level
- **Requires** future changes to the duties test to be subject to proposed rulemaking notice and comment period

# Proposal to Rollback New OT Rules

(CONTINUED)

## ➤ Protecting Workplace Advancement and Opportunity Act (S. 2707 and H.R. 4773) (cont'd)

- If the Act passes **after** the December 1, 2016 effective date:
  - DOL cannot enforce the new regulations for the time frame before passage of the Act
  - Employees will not have private cause of action for the same time period
  - Prohibits employers from seeking repayment of wages paid in accordance with the new regulations



# Proposal for Modified Rollout of New OT Rules

**December  
2016**

\$692/week or \$35,984/annually

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**December  
2017**

\$765/week or \$39,814/annually

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**December  
2018**

\$839/week or \$43,645/annually

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**December  
2019**

\$913/week or \$47,476/annually

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# Questions?

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