



The Final Overtime Rule – Is It Really That Simple?

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Meet the Presenters



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Welcome

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Today's Agenda

- How Did We Get Here?
- The Overtime Rule: Four Changes You Must Know
- Misunderstandings About the Final Rule
- Opposition to the Final Rule
- Seven Steps Employers Should Take Now

HOW DID WE GET HERE?

Fair Labor Standards Act Background

- FLSA establishes federal minimum wage and overtime protections
- FLSA does not preempt state law
- All employees are presumed overtime eligible
- Exceptions for various types of employees
- Last revised in 2004

Final Overtime Rule – Keep It Simple!

- March 13, 2014, President Obama issued a **Presidential Memorandum** to update overtime regulations (Section 541) under the Fair Labor Standards Act.
- The Memorandum specifically directed the Secretary of Labor to “**propose revisions to modernize and streamline the existing overtime regulations.**”
- In doing so, the Secretary of Labor is required to “**simplify the regulations** to make them easier for both workers and businesses to understand and apply.”

What does this “simplification” mean for your business?

Scope of Final Overtime Rule

The EAP Exemptions

- Executive
- Administrative, and
- Professional

Exempt Status Under the Final Rule

Three tests to claim exempt status under the Final Rule:

- Salary basis test
- Salary level test
- Job Duties test

THE FINAL OVERTIME RULE: FOUR CHANGES YOU MUST KNOW

CHANGE NO. 1: SALARY LEVEL TEST

Changes No. 1: Salary Level Test

Old: \$455/week, \$23,660

New: \$913/week, \$47,476/year

**CHANGE NO. 2:
CHANGE TO THE HIGHLY
COMPENSATED EMPLOYEE SALARY
LEVEL**

Changes to Highly Compensated Employee Salary Level

OLD: \$100,000/year or more, which includes at least \$455 per week paid on a salary basis.

NEW: \$134,004/year or more, which includes at least \$913 per week paid on a salary basis

**CHANGE NO. 3:
AUTOMATIC INCREASES EVERY
THREE YEARS**

Automatic Increases

- First time in the history of the FLSA
- Every 3 years
- Updates will be published 150 days in advance
- Expected on January 1, 2020 –
 - EAP salary level: \$51,168
 - HCE salary level: \$147,524

**CHANGE NO. 4:
USE OF NON-DISCRETIONARY
BONUSES**

Salary Level Test: Non-Discretionary Bonuses

- Employers may use nondiscretionary bonuses and incentive payments, including commissions, to meet the salary basis test
- Does not apply to the HCE exemption
- Capped at 10 percent of the weekly salary basis level (\$91.30/week)
- Must be paid on a quarterly or more frequent basis
- Catch up payment allowed for EAP exemptions
- Many unanswered questions

Catch Up Payment - Example

- Assume standard salary basis of \$913/week
- In January, February and March, employee must receive:
 - \$821.70 each week in salary (90% of \$913)
 - \$91.30/week in **non-discretionary** bonuses/incentives/commissions paid at least quarterly
 - At end of quarter, **one pay period** to pay a lump sum, no greater than 10 percent of the salary level to raise earnings for the quarter to the standard salary basis.

Duties Tests for EAP Exemptions

No changes! Why??

Summary of Final Overtime Rule Changes

	Current regulations (2004 until effective date of Final Rule, 2016)	NPRM	Final Rule
Salary Level	\$455 weekly	\$970 weekly (if finalized as proposed) 40th percentile of full-time salaried workers nationally.	\$913 weekly 40th percentile of full-time salaried workers in the lowest-wage Census region (currently the South)
HCE Total Annual Compensation Level	\$100,000 annually	\$122,148 90th percentile of full-time salaried workers nationally	\$134,004 90th percentile of full-time salaried workers nationally
Automatic Adjusting	None	Annually, with requests for comment on a CPI or percentile basis	Every 3 years, maintaining the standard salary level at the 40th percentile of full-time salaried workers in the lowest-wage Census region, and the HCE total annual compensation level at the 90th percentile of full-time salaried workers nationally.
Bonuses	No provision to count nondiscretionary bonuses and commissions toward the standard salary level	Request for comment on counting nondiscretionary bonuses and commissions toward standard salary level	Up to 10% of standard salary level can come from non-discretionary bonuses, incentive payments, and commissions, paid at least quarterly.
Standard Duties Test	See WHD Fact Sheet #17A for a description of EAP duties.	No specific changes proposed to the standard duties test. Request for comment on whether the duties tests are working as intended.	No changes to the standard duties test.

MISUNDERSTANDINGS ABOUT THE FINAL RULE

Misunderstandings About the Final Rule

1. Does not apply to:

- Professional exemption –teachers, doctors, and lawyers
- Outside sales employees
- Employees in certain computer-related occupations that are paid an hourly basis of at least \$27.63
- Other exemptions

2. Applies to higher education

3. Applies to non-profit organizations

Non-Profit Organizations

- DOL guidance recognizes there is confusion about FLSA application to nonprofit organizations
 - Enterprise coverage
 - Individual coverage
 - Named enterprises

Non-Enforcement Policy – Medicaid Funded Services

- The DOL will not enforce the salary level test until March 17, 2019.
- DOL's policies may not prevent civil lawsuits.
- Think hard before you choose noncompliance.

OPPOSITION TO THE FINAL OVERTIME RULE

Opposition to the Final Overtime Rule

- **Protecting Workplace Advancement and Opportunity Act (S. 2707 and H.R. 4773) – Introduced March 2016**
 - “The Obama Administration’s new overtime rule will have swift and damaging impacts on hard working American families, as well as small businesses, non-profits and colleges and universities,” said **Senator Tim Scott, a member of the Senate Labor Committee.** “This president and his administration continue to disregard the full economic realities of their policies, and their lack of foresight is clearly evident in the final overtime rule. Our nation’s economy, which is still struggling to recover, simply cannot afford to have the Obama administration continue to implement more damaging rules and regulations. Bureaucrats in Washington cannot create jobs, but they certainly can destroy them.”

Opposition to the Final Overtime Rule

- **Congressional Review Act Likely Inapplicable**
 - The CRA states that if a major rule is submitted to Congress with fewer than 60 session days remaining on the legislative calendar, then the next Congress will have a similar 60-day period to consider the rule.
 - But, the DOL appears to have released the Final Rule in time, so it appears that the CRA will not interfere because President Obama would veto any Congressional disapproval.

SEVEN STEPS EMPLOYERS SHOULD TAKE NOW

Compliance or Enforcement?

- The DOL has not commented on when it will actively pursue enforcement.
- Secretary Perez has stated he is focused on the DOL's compliance assistance phase.
- Be ready on December 1, 2016.

Seven Steps Employers Should Take Now

Step 1

Identify exempt employees making less than \$47,476 per year (\$913/week)

Seven Steps Employers Should Take Now

Step 2

Determine hours worked per workweek

Seven Steps Employers Should Take Now

Step 3

- Determine the hourly rate for affected exempt employees
 - Example:
 - Susan's current salary is \$30,000, hourly rate of \$14.42, overtime rate of \$21.63
 - You determine that Susan works 48 hours per workweek
 - The 8 hours of overtime will cost the Company \$8,998 each year.
 - What are your options for Susan?

Seven Steps Employers Should Take Now

Step 4

Consider your options

1. Raise Susan's salary to \$47,476 (\$913/week) to maintain exempt status (assuming that her job duties are also exempt)
2. Consider the catch up option – but be careful here, do not risk losing the exemption by improperly applying the catch up payment option
3. Reclassify Susan to non-exempt (until her compensation increases to the new salary basis)

Seven Steps Employers Should Take Now

Step 4

Consider your options

4. Reclassify Susan to non-exempt – but, adjust her hourly rate to reflect anticipated overtime hours
5. Reclassify Susan to non-exempt and do not allow her to work overtime
6. Treat Susan as salaried nonexempt employee

Seven Steps Employers Should Take Now

Step 4

Consider your options

7. Other long-term options

- Hire more part-time workers
- Reduce overtime hours by shifting work to other employees

Seven Steps Employers Should Take Now

Step 5

Communicate with affected employees

Seven Steps Employers Should Take Now

Step 6

Track Hours of Affected Employees

Step 7 Repeat

Get ready to do this all over again in three years!

Positive Effect of the Changes

- The rule provides the opportunity to reclassify workers who are misclassified.
 - Opportunity is now to review all exempt employees' classifications and whether their job duties are properly classified.
- Reclassification without a reason for it, can bring about DOL complaints and/or lawsuits

Challenges for Employers

- ❑ Compensable time for “new” non-exempt employees
 - ❑ Use of electronic devices
 - ❑ After hours e-mails
 - ❑ After hours texts, telephone calls
 - ❑ Travel time
- ❑ Tracking time of work performed at home
- ❑ Loss of flexibility for impacted workers
- ❑ Loss of a steady income if employees are change to hourly
- ❑ Employee concerns about “punching the clock”

Challenges for Employers

- Overtime estimates may not be reliable if you have not tracked time for exempt workers in the past
- Pay compression
- Less clear lines between management and staff
- Will benefits change? E.g., paid time off benefits
- Will bonus eligibility change?
- Hiring of additional workers to cover the overtime hours
- Possibility of two people performing the same job – one is exempt and one is non-exempt

Your Takeaways

- Review all job classifications to create your strategies for complying (Steps 1-6)
- Train managers and “new” non-exempt employee on compensable time and timekeeping practices
- Reconsider your telecommuting and travel policies
- Develop employee communications
- Consider a wage and hour audit

Questions? Contact Us.



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