
DOL Overtime Rule: What You Need to Know

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Fair Labor Standards Act (FLSA)

Background

- Fair Labor Standards Act of 1938
 - 40-hour work week
 - Overtime
 - Minimum Wage
 - Child labor restrictions
- Designed in part to alleviate unemployment
- Overtime premium (time and a half) intended to encourage new hires rather than longer hours

Coverage Issues

- As a federal law, jurisdiction depends on “interstate commerce”
- The FLSA has both enterprise coverage and individual coverage
- Enterprise coverage affects entities with annual sales of at least \$500,000
- BUT, individual coverage is broad – per the DOL, an individual employee who makes interstate calls or purchases is covered

Effect on Nonprofits

- Some nonprofit organizations do not meet the enterprise coverage standard
- Due to individual coverage, however, almost all organizations comply with the FLSA
- The alternative is risky – possible DOL audits and lawsuits
- Note that FLSA rights generally cannot be waived, so employees cannot donate time or agree to forego overtime

Common Misconceptions

- Exempt vs Salaried
 - Certain employees are exempt from overtime pay because they meet the salary and duties tests
 - This is highly regulated – paying the minimum salary is not enough for an employee to be exempt
- Comp Time vs Flex Time
 - Only government employers can use comp time (providing time off instead of paying overtime)
 - Flex time (adjusting hours to keep work week at 40 hours or less) is fine. Each week stands alone.



New Overtime Regulations

Background

- Update to overtime regulations was expected
 - “Salary basis” test was out of date
 - President Obama directed DOL to take action on March 13, 2014
- Proposed regulations issued July 1, 2015
 - Would have increased “salary basis” to \$50,440 per year from \$23,660 per year
 - Highly controversial and opposed by numerous trade organizations

Final Rule

- Published on May 18, 2016
- Increases “salary basis” test to \$47,476 per year (\$913 per week)
- Effective December 1, 2016
- Minimum salary to be adjusted every three years starting January 1, 2020
- Up to 10% of minimum can be made up of bonuses / incentives paid at least quarterly

Final Rule

- No change to the “duties tests” for the various exemptions
 - Executive
 - Administrative
 - Professional / Computer Professional
 - Outside Sales
- Minimum for “highly compensated” exemption raised from \$100,000 to \$134,004 per year

Impact of Final Rule

- Expected to extend overtime eligibility to approximately 4.2 M workers nationwide, 370,398 in Texas
- Despite intense lobbying, the final rule has no exceptions for nonprofit organizations or other low-paying industries
- Legislative attempts to block the change will not succeed this year.

Analyzing Exempt Status

- Regardless of salary, exemptions do not apply to manual work, first responders, etc.
- Job titles do not make a difference
- Salary basis test: as of December 1st, new minimum of \$913 per week must be paid as a weekly, biweekly, semimonthly or monthly salary
- Duties test: in order to be exempt, the employee must also qualify for a specific exemption

Executive Exemption

- Primary duty is management of the enterprise or a department / subdivision thereof
- Customarily and regularly directs the work of two or more full-time employees (or equivalent)
- Has authority to hire and fire employees, or whose suggestions as to hiring and firing, etc. are given particular weight.

Administrative Exemption

- Primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or employer's customers
- Exercises discretion and independent judgment with respect to matters of significance
- The bar is fairly high: examples include HR directors with policymaking authority, purchasing agents with authority to enter into contracts, etc.

Professional and Computer Exemptions

- Professional exemptions include:
 - Employment requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of intellectual instruction
 - Employment requiring invention, imagination or talent in a recognized field of artistic / creative endeavor
 - High-level computer employment such as systems analysis (can be paid hourly at \$27.63 or more)
- No minimum salary for doctors, lawyers, and teachers in an educational institution

Outside Sales Exemption

- Primary duty is making sales or obtaining orders or contracts from customers, and
- Customarily and regularly making sales away from the employer's place of business (i.e. calling on customers to make sales)
- Minimum salary does not apply; often paid on commission
- Inside sales employees (i.e. usually on employer premises) do not qualify for the exemption



What to Do?

Strategies for Compliance

- Identify exempt-level employees affected
- Analyze whether those employees qualify as exempt
- If duties tests are met, exempt status can be kept with a pay raise, with or without a 10% bonus component
- Changing to non-exempt status is also an option
- Newly non-exempt employees must be trained regarding timekeeping, restrictions on overtime, and common problems such as working from home

Final Thoughts

- This is a good time for an HR “audit”
 - Review and update exempt / nonexempt status, salary levels and job descriptions
 - Make sure that accurate time records are kept for all nonexempt employees
 - Update policies and practices to prevent nonexempt employees from working “off the clock”
- When in doubt, check with legal counsel

Questions?

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