

OVERTIME FOR SALARIED WORKERS

*What Employers Need to Know
About the 2019 Changes*



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INTRODUCTION

The Obama administration's overtime changes were overturned in 2017 and many employers were left to wonder when or how the issue will be resurrected.¹

After all, it's hard to argue change is inevitable when it comes to staffing your business. In 1975, more than 60% of salaried workers were eligible for overtime. Today, less than 8% of full-time salaried workers are covered by the same regulations.²

The Trump administration has now responded with a new U.S. Department of Labor (DOL) Notice of Proposed Rulemaking. The proposal raises the salary threshold for fulltime workers eligible for overtime pay from \$455 per week to \$679 per week.³

This guide provides a general overview of the proposed changes.

KEY PROVISIONS

THE PROPOSED RULING INCLUDES THE FOLLOWING MAJOR CHANGES:

1. The minimum salary required for an employee to qualify for exemption will rise to \$679 per week (equivalent to \$35,308 per year).
2. The total annual compensation requirement for “highly compensated employees” (HCE) will rise to \$147,414 per year.
3. No automatic adjustments to the salary threshold are proposed, but a commitment to periodically review the salary threshold is, although it would require a notice-and-comment period.
4. Employers can use nondiscretionary bonuses and incentive payments (including commissions) that are paid annually or more frequently to satisfy up to 10 percent of the standard salary level.

EMPLOYEE eXemptions

“Deciding who exactly is affected by the overtime law can be tricky because there are plenty of exemptions.”

Deciding who exactly is affected by the new overtime law can be tricky because there are plenty of exemptions.

Many executive, administrative, professional and outside sales employees are exempt, for example. In order to maintain an exemption, the employee must be compensated on a salary or fee basis at a rate that exceeds the new minimum requirement per week.

Beyond that:

- An executive's primary duty must be managing the enterprise,

or managing a customarily recognized department or subdivision of the enterprise.

The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent and must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

- An administrative professional's

primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and the employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

- A learned professional's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly
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EMPLOYEE ~~e~~xemptions (Cont.)

intellectual in character and which includes work requiring the consistent exercise of discretion and judgment.

This advanced knowledge must be in a field of science or learning and must be customarily acquired by a prolonged course of specialized intellectual instruction.

- A creative professional's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

An outside sales professional does not need to be paid the new weekly base salary (in fact, no set salary is required for this exemption), but does need to meet this duties test: The individual's primary duty must be making sales (as defined by the FLSA) or obtaining orders or contracts for services or for the use of facilities.

The employee must also be customarily and regularly engaged away from the employer's place or places of business when doing so.

Computer professionals may also be exempt, as long as they are:

- Compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than the new weekly minimum or the equivalent hourly basis.

- Employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing such duties as:

- 1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications.

- 2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications.

- 3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems.

- 4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

THE TRACKING MYTH

Since word broke of these changes, many employers have been stressing over how they may affect teleworkers and those with flex schedules. On that front, the news is good.

"The FLSA is a nimble law," says Dr. David Weil, the administrator of the DOL's Wage and Hour Division.

"Employers have flexibility to choose the options that work best for their workplace, including how to keep track of hours. There's nothing that says workers have to punch time clocks.

There's nothing that says workers have to work specific hours or in specific places."⁵

Caroline Valentine of ValentineHR agrees the changes do not mean "punching a time card" is the wave of the future for more employees.

"I can assure you there are payroll and HRIS systems that can track time and handle payroll and many probably integrate into the systems you already have," she explains.

"You needn't fear tracking employee time under new DOL rules... You may find that, instead of getting a lot harder, incorporating these systems into your operations makes life a whole lot easier.

Some of them let all the managers know when an employee logged in and whether they're on task, for example. And many can be managed just using your phone."⁶



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Your Options

Amy Beckstead, a partner at Beckstead Terry PLLC in Austin, explains there are two main options for employers who have people on staff affected by the overtime updates.

1. Consider reclassifying the employee.

For the individuals who are not currently at a the new minimum weekly salary level, this is a great time to review whether the person should really be classified in a non-exempt position.

2. Consider bonuses.

One welcomed addition to the new salary rules is nondiscretionary bonuses and incentive payments (including commissions) may be used to satisfy up to 10 percent of the new standard salary level. To count toward the standard salary level, however, these nondiscretionary bonuses must be paid quarterly or more frequently.⁷

Weil adds, however, those who do not make these types of changes will be left with the options to:

3. Raise the employee's salary and keep them exempt from overtime.

This option works for employees who have salaries close to the new salary level and regularly work overtime.

4. Pay overtime in addition to the employee's current salary when necessary.

This approach works for employees who work 40 hours or fewer in a typical workweek with only occasional overtime.

5. Evaluate and realign hours & staff workload.

This may be a good opportunity to consider hiring additional workers.⁸

Even though the ruling is only in the proposal stage and wouldn't go into effect until at least January 1, 2020, don't wait to figure out how it might affect your employees. Tammy McCutchen, an attorney with Littler in Washington, D.C., told attendees at the 2019 Society for Human Resource Management Employment Law & Legislative Conference that the DOL may give employers little time to bring their pay practices into compliance because it may push to have the final rule in place before the 2020 election.

"Compliance will take more time than you anticipate," she warns, adding that employers should also review workers' job duties and correct any exempt classification errors sooner rather than later.⁹

Note: This guide is for informational purposes only. Consult your business attorney to find out how the changes may affect your organization and for guidance on addressing those issues.

Sources

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