



NORTH RISK PARTNERS™

New Final DOL Overtime Rule

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NORTH RISK PARTNERS™

TOPICS

This webinar will cover:

- who is affected by the new final rule;
- updated salary limits for overtime exemptions;
- pros and cons for the new rule; and
- actions steps employers can take to stay compliant.




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Department of Labor Final Rule

Under the Sep. 2019 final rule:


- Workers who do not earn **at least \$35,568 a year** (\$684 a week) would have to be paid overtime, even if they're classified as a manager or professional.
- Nondiscretionary bonuses and incentive payments (including commissions) paid on an annual or more frequent basis may be used to satisfy up to 10 percent of the standard salary level.
- The special rule for highly compensated employees would require workers to earn a total annual compensation of at least \$107,432 (\$684 of which must be paid weekly on a salary or fee basis).



Department of Labor Final Rule

Under the Sep. 2019 final rule (continued):

- Special salary levels would apply to certain U.S. territories and an updated base rate would apply to employees in the motion picture industry.
- No changes to the duties tests.
- The Department of Labor intends to propose updates to the salary threshold regularly to ensure that these levels continue to provide useful tests for exemption. Updates would not be automatic and would continue to require notice-and-comment rulemaking.




Department of Labor Final Rule

Who is affected?

- Executive, administrative and professional (EAP) employees, highly compensated employees (HCEs)
- Employees in the motion picture industry and individuals who work in various U.S. territories.

Meeting the salary threshold doesn't automatically make an employee exempt from overtime pay; the employee's job duties also must primarily involve executive, administrative or professional duties as defined by the regulations.




Complying with the Raised Threshold

Employers should have a plan of action for the new overtime pay threshold. It is recommended that employers take these measures before the new year.


Assess the current situation. Look at the way things are now and then make an action plan. Who will remain exempt, and who will make the switch?

- **Inform employees about all changing policies.** Keep communication open and accessible between employer and employee before, during and after the transition. Concerns affecting morale, compensation and status should be addressed readily and transparently.
- **Monitor all employee hours.** Insight can be gleaned from tracking employee hours, including exempt employees. This can support, clarify and inform businesses on any wage and hour hiccups down the line.
- **Maintain compliance by reviewing state laws.** Many states have higher thresholds and additional criteria for exempt status than under federal law. Note these in detail, verifying compliance and ensuring overtime hours are correctly measured.




Plan Ahead

- **Identify** currently exempt employees who earn less than the new annual threshold of \$ **\$35,568**.
- **Estimate** how much overtime those employees currently work.
- **Analyze** your budget to help assess your compensation options.
- **Review** job descriptions for exempt positions to verify that the duties are accurately listed.




Plan Ahead

- **Ensure** that employees in the same roles aren't classified differently, because that could prompt discrimination claims.
- **Consider** placing restrictions on overtime and explore ways to track nonexempt workers' hours.
- **Determine** whether changes are needed in other policies such as telecommuting and mobile device usage to curtail overtime and working off-the-clock.




Review of "Duties" Test:

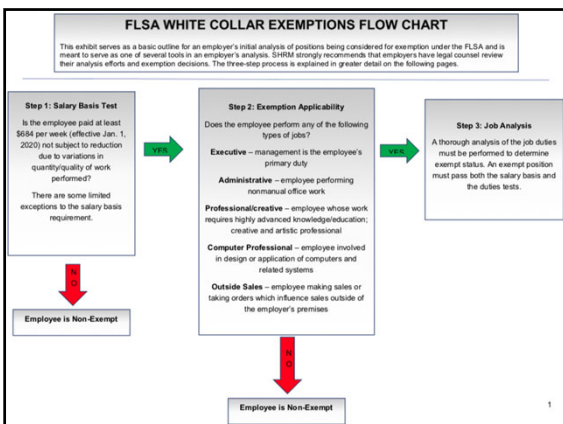
- **Executive exemption.** The employee's primary duty must be managing the enterprise or a department or subdivision of the enterprise. The employee must customarily and regularly direct the work of at least two employees and have the authority to hire or fire workers (or the employee's suggestions and recommendations as to hiring, firing or changing the status of other employees must be given particular weight).
- **Administrative exemption.** The employee's primary duty must be performing office or nonmanual work that is directly related to the management or general business operations of the employer or the employer's customers. The employee's primary duty also must include the exercise of discretion and independent judgment with respect to matters of significance.



Review of "Duties" Test continued:

- **Professional exemption.** The employee's primary duty must be to perform work requiring advanced knowledge in a field of science or learning that is customarily acquired by prolonged, specialized, intellectual instruction and study.
- **Highly compensated employees** whose total compensation is at least \$107,432 a year are exempt from the FLSA's overtime requirements if they meet a more "relaxed" duties test, as follows:
 1. The employee's primary duty is office or nonmanual work.
 2. The employee "customarily and regularly" performs at least one of the bona fide exempt duties of an executive, administrative or professional employee, as described in the regulations.





► Step 1: Apply the salary basis test

If the employee is paid at least \$684 per week (effective Jan. 1, 2020) that is not subject to reduction due to variations in quantity/quality of work performed, continue to step 2. Computer professionals may be paid a salary basis OR \$27.63 per hour. Other exceptions to the minimum salary requirement include outside sales employees, teachers, doctors, lawyers, business owners, administrative employees in educational establishments, employees in America Samoa and motion picture production industry employees.

► Step 2: Determine which exemption applies

Executive – Employee whose primary duty is to manage the business or a recognized department/identity and who customarily directs the work of two or more employees. Also includes individuals who hire, fire or make recommendations that carry particular weight regarding employment status. Examples: executive, director, owner, manager, supervisor.

Administrative – Employee whose primary activities are performing office work or nonmanual work on matters of significance relating to the management or business operations of the firm or its customers and which require the exercise of discretion and independent judgment. Examples: coordinator, administrator, analyst, accountant.

Professional/creative – Employee who primarily performs work requiring advanced knowledge/education and which includes consistent exercise of discretion and independent judgment. The advanced knowledge must be in a field of science or learning acquired in a prolonged course of specialized intellectual instruction. Creative professionals perform work requiring invention, imagination, originality and/or talent in a field of artistic endeavor. Examples: attorney, physician, statistician, architect, biologist, pharmacist, engineer, teacher, author, editor, composer, musician, artist.

Computer professional – Employee who primarily performs work as a computer systems analyst, programmer, software engineer or similarly skilled work in the computer field performing a) application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications; or b) 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; or c) design, documentation, testing, creation or modification of computer programs based on and related to user or system design specifications; or a combination of the duties described above, the performance of which requires the same level of skills. Examples: system analyst, database analyst, network architect, software engineer, programmer.

Outside sales – Employee who performs sales work off the company's premises and whose primary duties include making sales or obtaining order or contracts for services or for the use of facilities for which the client or customer pays. This employee is customarily and regularly away from the company's place of business while performing such duties. Examples: sales representative, account manager, business development representative.

► Step 3: Conduct job analysis

If the employee passes BOTH the salary test and the preliminary exemption criteria review, then a thorough job analysis of the duties actually performed by each employee becomes the key in determining exempt status. **An exempt position must pass both the salary basis and duties tests.** Job titles are insufficient to determine exempt status.

Job analysis should include the following actions:

1. Review minimum qualifications established for the job, including education, on-the-job training and experience.
2. Review prior job descriptions, job questionnaires and related documentation.
3. Confirm with managers that duties and qualifications are accurate.
4. Conduct workflow reviews—useful tool in ascertaining job functions, processes, job boundaries and organizational operations. Schematics and charts can also prove to be helpful.
5. Gather organizational charts for departments and positions being reviewed.
6. Review policy manuals to determine functional autonomy of positions.
7. Gather prior performance reviews which document duties and responsibilities.

If little is known regarding the history of a position or it has been inadequately documented, an employer should consider conducting a review of the position to bring it up to date. Recommended activities may include direct job duty observation, work function or work breakdown analysis, group or peer review of occupant's sharing the classification, job banding/job progression plans, and work log analysis and job metrics.

► Ancillary issues

1. Review state wage/hour laws for those states in which the organization operates to ensure there is no conflict with state laws
2. Capture payroll costs and budgetary needs and evaluate whether costs and budgetary considerations will be best met by raising incumbent salaries to retain exempt status (provided duties test is met), budgeting for overtime costs or hiring additional staff to eliminate the need for overtime.
3. Ensure HRIS systems are updated to accurately reflect employee's exempt/nonexempt classifications.
4. Review and honor collective bargaining agreements, where possible.


State Overtime Laws

The FLSA provides minimum wage and hour standards, and does not prevent a state from establishing its own protective standards. If a State establishes a more protective standard than the provisions of the FLSA, the higher standard applies in that State.




Overtime

- The term "overtime" generally refers to work that is performed in excess of 40 hours per workweek and may also refer to premium pay that an employer pays to an employee when an employee works in excess of 40 hours in a workweek. Unless specifically exempted from state or federal laws governing overtime compensation, covered employees are entitled to receive overtime pay.
- **Exempt employees**, because of their rate of pay and type of work that they do, are not eligible for overtime pay for hours worked over 40 in a workweek. **Nonexempt employees** must be paid time and half for any hours worked more than 40 in a workweek.
- The cost of noncompliance is growing. Class actions and "mass actions" have become more prevalent, brought by both private law firms and the enforcement division of the U.S. DOL.
- You will want to ensure that written policies accurately reflect the legal requirements, that procedures follow the written policies and that required wage and hour notices are posted.



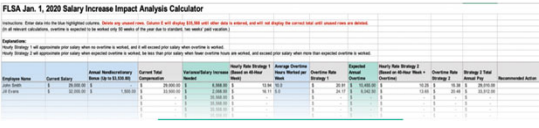

Impact Analysis

To prepare for these changes, employers can use the below guide to review their exempt positions currently paid below \$684 per week and determine the best strategy to adopt to remain in compliance.



Impact Analysis Calculator

Use the provided spreadsheet to calculate the financial impact based on the options below for all your affected employees.

Impact Analysis : OPTION 1


Position remains exempt. Salary is increased to \$684 per week or above.

Pros:

- This method is efficient when current salary is near \$684 per week.
- Likely no morale issues will arise with affected employee.
- There will be no loss of employee benefits eligibility.
- Saves employer time by eliminating need to track, record and report hours worked.

Cons:

- There are budget constraints, including increased benefits costs to employer, such as life insurance premiums, long-term disability, etc.
- This method may cause salary-compression issues.
- There may be morale issues with employees who do not receive an increase.



Impact Analysis : OPTION 2

Position converts to nonexempt, and overtime is paid. Federal and state minimum-wage rates must be met.


Strategy 1: Compute hourly rate on a 40-hour workweek by dividing current total annual compensation by 2080. This rate pays the equivalent of the current salary when only 40 hours are regularly worked per week (40 hours x 52 weeks = 2080 hours). If your standard workweek is less than 40 hours, multiply your workweek by 52.

Pros:

- If little or no overtime is worked, this method maintains prior salary amount with a slight potential increase in pay due to overtime.
- Employee pay is not reduced.
- Salary compression is not an issue.

Cons:

- Frequent overtime will increase pay by possibly more than if the position remained exempt and the salary was increased.
- There would be a possible loss of benefits eligibility due to nonexempt status.



Impact Analysis : OPTION 2 continued


Strategy 2: Compute hourly rate on total hours worked per week, including overtime. Divide current total annual compensation by the total annual hours worked, counting each overtime hour as 1.5 hours (total comp / (2080 + (annual overtime hours x 1.5))). This rate pays the equivalent of the current salary when all expected overtime is worked, less than the current salary if less overtime is worked, and more than the current salary if more than expected overtime is worked.

Pros:

- If expected overtime is worked, this method maintains the prior salary amount, including overtime worked.
- Even if overtime is increased, pay may be less than the employee would earn if the position remained exempt and the salary was increased.

Cons:

- If less than expected overtime is worked, pay will be less than the employees' prior salary.
- Morale issues may develop as affected employees realize they need to work overtime or receive less pay.
- There may be loss of benefits eligibility due to nonexempt status.




Impact Analysis : OPTION 2 continued

Strategy 3: Pay a salary plus overtime. A nonexempt employee's pay may be expressed as a weekly salary, but overtime must still be paid at 1.5 times the equivalent hourly rate. Because of this, errors in pay may be more likely, and in some cases, deductions for absences may not be allowed.

Options include:

- **Pay the same as the current salary.** This is the same concept and has the same pros and cons as Strategy 1.
- **Pay less than the current salary to account for overtime.** This is the same concept and has the same pros and cons as Strategy 2.




May an employer classify an employee as nonexempt, even if the employee's duties qualify for an exemption?

Yes. There is no requirement to ever make any position exempt. Employers need not automatically designate as exempt employees who clearly perform the primary duties of the job functions described under one of the exemptions. Employers who maintain strict control over requests for overtime work, for example, or who need to keep track of all employee hours for billing reasons may find that payment on an hourly basis works best for them. In such cases, the workers will most likely be nonexempt by default, simply because they are paid on an hourly basis, as many of the Fair Labor Standards Act (FLSA) exemptions require an employee to be paid on a salary basis to qualify as exempt.

Another way to think of this issue is to remember that employees typically are presumed nonexempt until proven to be exempt, meaning that all employees are covered by the FLSA's minimum wage and overtime requirements until an employer chooses to prove they meet the special criteria for one of the exemptions.

The advantage of using the exemptions, of course, is the ability to avoid the cost of overtime pay for additional hours of work. However, if an employer cannot clearly show that a particular employee's duties and pay qualify for exempt status, the employer should classify that person as nonexempt.




May employers make a catch-up payment in the event that an employee doesn't receive enough in nondiscretionary bonuses and incentive payments (including commissions) in a given year to remain exempt?

Yes, if an employee does not earn enough in nondiscretionary bonuses and incentive payments (including commissions) in a given 52-week period to retain his or her exempt status, the Department permits a "catch-up" payment at the end of the 52-week period.

The employer has one pay period to make up for the shortfall (up to 10 percent of the standard salary level for the preceding 52-week period). Any such catch-up payment will count only toward the prior 52-week period's salary amount and not toward the salary amount in the 52-week period in which it was paid.


If the employer chooses not to make the catch-up payment, the employee would be entitled to overtime pay for any overtime hours worked during the previous 52-week period.



Does the Final Rule change how employers may use bonuses to satisfy the salary level for highly compensated employees (HCEs)?


No, the Department has not made changes to how employers may use bonuses to meet the salary level component of the HCE test. To claim the HCE exemption under the final rule, employers must pay workers at least the standard weekly salary level of \$684 per week on a salary or fee basis, while the remainder of the total annual compensation may include commissions, nondiscretionary bonuses, and other nondiscretionary compensation.

Because employers may fulfill a majority of the HCE total annual compensation requirement with commissions, nondiscretionary bonuses, and other forms of nondiscretionary deferred compensation, the Department determined that it would not be appropriate to permit employers to also use nondiscretionary bonuses and incentive payments to satisfy the weekly standard salary amount.



How the New Overtime Rule Affects Employee Benefit Plans

- Some employers have different benefit tiers for salaried/exempt and hourly/nonexempt workers, or use exempt and nonexempt status to determine benefit eligibility and contribution levels
- Could present challenges as some employees who were exempt from overtime pay are reclassified as nonexempt, while others receive pay hikes to keep their exempt status
- For example; a current exempt employee, participating in benefit plans limited to salaried workers, makes \$475 a week in 2019. Starting in January, that employee, still making \$475 a week, becomes a nonexempt employee and is no longer eligible for the same benefit plans




Retirement Plan Impact

Employers will likely have to make larger retirement plan contributions if their plan uses a definition of compensation that includes overtime pay. Alternatively, if the employer's plan excludes overtime for calculating contributions, employers will have to pay closer attention to nondiscrimination testing results.

If retirement plan sponsors pay more overtime to more employees, both defined-benefit and defined-contribution plans that recognize overtime in their definition of earnings may see increased costs."


Examples of the possible impact of the new law on 401(k) and other defined-contribution plans:

- **Matching contributions.** For plans that recognize overtime pay when calculating employer contributions, a 10 percent increase in earnings will generally produce a 10 percent increase in elective deferrals and matching and other employer contributions. Although the exact cost impact will depend on the employee's deferral rate and the plan's contribution formula.




Retirement Plan Impact continued

- **Nondiscrimination testing.** The accrual rates and deferral/contribution percentages of plan participants who are not highly compensated may fall if the plan excludes overtime from the pay used to determine benefits but includes overtime in the pay used for nondiscrimination testing. Since highly compensated employees' accrual rates and deferral/contribution percentages won't be affected, the overall testing results may suffer, causing more plans to fail the test.
- **Pension plans.** For defined-benefit pensions, the cost increase will depend on the underlying plan formula and the plan's funded status. A 10 percent increase in affected employees' earnings won't necessarily lead to a 10 percent increase in pension costs for those employees. For well-funded [defined-benefit] plans, the Internal Revenue Code's funding requirements may mean the immediate cost impact might even be zero.




Health Plans and Other Benefits Impact

- As some currently exempt employees are reclassified as nonexempt, "employers should check to see if eligibility for any health or fringe benefits (such as adoption or education assistance, employee discount programs, or group term life insurance) is conditioned on an employee's exempt or nonexempt status.
- A change in the population of eligible employees for any particular benefit could affect its cost and effectiveness.



Final Rule by the Numbers:

- **\$684 per week** – salary requirement – up from the currently enforced level of \$455/week (level is equivalent to \$35,568 per year)
- **\$107,432** – total HCE compensation threshold – up from the currently enforced level of \$100,000 annually
- **10%** – amount of the standard salary level the final rule allows employers to cover with nondiscretionary bonuses and incentive payments that are paid annually or more frequently
- **1.3 million** – estimated number of currently exempt workers who the Department estimates will, without intervening action by their employers, become eligible for overtime
- **\$298.8 million** – estimated amount of extra pay workers will receive each year
- **\$455/week** – special salary level for workers in Puerto Rico, U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands
- **\$380/week** – special salary level for workers in American Samoa
- **\$1,043/week** – "base rate" threshold for employees in the motion picture industry



Questions?



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