

The New Overtime Rules Are Coming - Are You Ready?
Changes to FLSA Overtime Exemptions and How Employers Should Prepare
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What are the proposed changes?
How employers prepare?



What are the proposed changes?

Currently, there is an exemption for employees in "white collar" jobs:

- Executives
- Administrators
- Professionals
- Computer Employees
- Outside Salespersons
- Highly Compensated Employees





To be exempt from overtime payment, these employees must currently meet at least two criteria:

1. They must perform certain duties as determined by tests for their specific exemption classifications.
2. They must meet a minimum salary threshold, which is currently \$455 per week.



Note: the minimum salary requirements for highly compensated employees are different - those employees must earn at least \$100,000 currently. This presentation mainly covers the other categories of exemption, however.

The \$455 per week threshold is \$23,660 per year, and unlike the level of compensation envisioned for "white collar" administrative and professional employees.

In 2014, the president instructed the Department of Labor to reevaluate overtime standards.

On July 6th, the DOL published a Notice of Proposed Rulemaking in the Federal Register (80 FR 38515) that significantly revised the salary test for exempt employees.

Instead of the set \$455 figure, the DOL proposes to raise the level of the exemption to the 40th percentile of all salaried workers, currently \$921 a week (\$47, 892 per year).

The DOL estimates this will affect nearly five million employees in the first year alone.



The salary threshold for highly compensated employees will be set at the 90th percentile, currently \$122,148.

The standard salary level will also be updated on a regular basis, although the DOL is seeking comment on how to do this.

The two methods being considered are keeping the levels current with the 40th percentile of salaries or tying the salary levels to changes in the Consumer Price Index for All Urban Consumers (CPI-U), a measure of inflation.



The DOL accepted comments until September 6th, 2015, and is estimating the release of the final rule during 2016. It is likely not going to give employers very long to achieve compliance with the new regulations, however, so preparation should begin now.

How can employers prepare?



First, determine how many of your employees make salaries below the new salary threshold.





This is not exactly as easy as it sounds, however.

The threshold will no longer be a set dollar amount, but rather a line currently drawn at the 40th percentile of salaries which will change often, depending on which methodology the DOL ultimately adopts.

For instance, the 2015 numbers are \$921 per week, but the regulation is unlikely to come into effect until at least 2016, when the Department of Labor estimates the 40th percentile of salaries will be at \$970 per week (\$50,440 per year).



For safety, pick a salary number higher than \$50,440 to set as your threshold for evaluation of employee salaries. The increase between the 2015 and 2016 40th percentile salaries is \$2548, so choose a number that gives you a few years of likely breathing room, such as around \$55k or \$60k.

Assume that employees with those salaries will eventually be excluded from the overtime exemption.

For each employee with a salary less than the anticipated threshold (and who meets the duties tests for overtime exemptions), employers will have to decide to do one of two things:

1. Raise the salary of those employees enough above the proposed threshold to keep them exempt from overtime regulations.
2. Determine how to track the hours of those employees to properly credit them with overtime pay.

2

Reevaluate the job descriptions of all exempt employees, making sure that they comply with current duties tests.





The Notice of Proposed Rulemaking notably does NOT contain changes to the current duties tests.

It does, however, seek comment on whether the current duties tests are effective at determining who should be exempt.

3

Review your policies regarding "off the clock" or other after-hours work.



In the modern world, the line between work time and non-work time can get blurry, but this can be dangerous for employers where non-exempt employees are concerned.



Take into consideration every form of "work" done on behalf of your organization and whether it should be compensated.

Compensable?

• Reading/Responding to Work Emails/Texts



• Taking Work Phone Calls

• Traveling for Business



• Time Spent On Call



**Evaluate the system
you use to track
employee hours and
calculate overtime.**



The dangers of misclassification of employees are great, and with such a wide swath of employees soon eligible for overtime pay, a more robust and compliant method of tracking employee hours may be necessary.



**Budget for the changes
now.**

What are the dangers of misclassification?

Under Section 216(b) of the Fair Labor Standards Act, any employer who violates the law regarding overtime pay is liable for both the back pay owed as well as liquidated damages, and some penalties can include taxes, interest and attorney's fees.

Misclassify several employees for several years, and these figures can really add up.

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Our Region has recently started more aggressively pursuing the liquidated damages.

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- Bankers were misclassified as exempt by a bank, winning a \$22 million suit

Also, the FLSA imposes CRIMINAL penalties for willful violations of overtime exemption laws.

In Minnesota, the president of a sheetrock company was sentenced to two years in prison for intentionally failing to pay overtime to employees and pension/benefit contributions.

The Wage and Hour Division ("WHD") of the DOL conducts investigations of potential FLSA violations. When it finds them, there are several ways back wages can be recovered:

- The WHD can supervise payment of back wages
- Secretary of Labor may bring suit for back wages and an equal amount for liquidated damages
- Employees may file suit for back wages, an equal amount as liquidated damages, and attorney's fees and other costs



There is a two-year statute of limitations on back wages recovery, but it's three years in the event of a willful violation.



Any questions?



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