

HR Alert

From: HRHelp-John Perkins [mailto:hrhelp@cox.net]

Subject: What Tests have to be met for a job to be Exempt from FLSA Overtime Provisions?

The question below ("Will Exempt employees need to meet both the minimum salary AND duties requirements, or one or the other?") is one that has been submitted many times since the issue of raising the Salary Level threshold began last year (2015).

As you will read below, the FLSA requires a job to meet ALL three (3) tests (Fixed Salary Test, Salary Level Test, AND Job Duties Test) to be Exempt from the overtime and minimum wage provisions of the Act.

11. What is the difference between hourly-paid versus salary-paid employees? Between Exempt and Non-Exempt employees?

The Fair Labor Standards Act (FLSA) defines employees as either exempt from the overtime payment provisions of the Act or non-exempt from the provisions of the Act. Non-exempt employees can be paid either hourly or by salary.

NOT ALL EMPLOYEES PAID ON A SALARY BASIS ARE EXEMPT; JUST BECAUSE AN EMPLOYEE RECEIVES A SALARY DOES NOT MAKE HIS/HER JOB POSITION EXEMPT FROM OVERTIME.

To be exempt, jobs also must meet **ALL** three (3) of the tests established by the Dept. of Labor:

- the Fixed Salary Test; **AND**,
- the Salary Level Test; **AND**,
- one of the Job Duties Tests (Executive, Administrative, Professional, Outside Sales, or Computer-related occupation).

The current Salary Level threshold (i.e., the minimum salary level for an employee to be EXEMPT) is \$455/week, regardless of the number of hours the Exempt employee works. **Effective December 1, 2016, the Salary Level threshold will increase to \$913/week (annual equivalent = \$47,476).**

Exempt employees are those who meet the FLSA fixed salary test, **AND** the salary test, **AND** the job duties test for one of the following categories:

- Computer-related occupations;
- Professional;
- Outside Sales;
- Executive; or,
- Administrative.

NOTE: Many job positions that are treated as Exempt (because they meet the Fixed Salary test and the Salary Level Test) are NOT exempt because they fail to meet one of the Job Duties Tests.

Exempt employees do not have to be paid overtime for hours worked that exceed 40 hours in a workweek.

ALL EMPLOYEES IN NON-EXEMPT JOBS MUST BE PAID OVERTIME FOR THEIR HOURS WORKED THAT EXCEED 40 HOURS IN A WORKWEEK, WHETHER THEY ARE REGULARLY PAID BY THE HOUR OR BY SALARY.

The Act requires employers to establish a consecutive 168-hour period (7 days x 24 hours/day) as a workweek. The workweek may begin on any day and at any time of the day. (Employers often start the workweek at 12:01 a.m. each Monday and end the workweek at 12 midnight the following Sunday.)

Non-exempt employees must be paid overtime for all hours worked over 40 in the workweek. For hourly employees, payment must be at least 1½ their regular hour rate for overtime hours. Non-exempt salaried employees must, in addition to their regular salary, be paid at least ½ times their hourly equivalent rate for overtime hours.

Payment for overtime must be made with the paycheck for the payroll period in which the overtime was worked. **COMP TIME (COMPENSATORY TIME OFF) CANNOT BE PROVIDED TO NON-EXEMPT EMPLOYEES IN LIEU OF PAYMENT FOR OVERTIME. AN EMPLOYER CANNOT REDUCE THE NUMBER OF HOURS AN EMPLOYEE WORKS IN A SUBSEQUENT WORKWEEK TO "make-up" FOR OVERTIME WORKED IN A PREVIOUS WORKWEEK.** E.g., if Joe works 50 hours in workweek A and 30 hours in workweek B, he has to be paid overtime for the 10 hours of overtime in workweek A even though he is only paid for the 30 hours worked in workweek B; if the payroll period covered workweeks A + B, Joe would be paid the equivalent of 85 hours: 40 + (10 x 1.5 = 15) + 30. It would be a violation of the FLSA to only pay Joe a combined 80 (50 + 30) hours in a payroll period that covered weeks A + B.

The Salary Level threshold is absolute; it cannot be pro-rated based on the number of hours/week the employee is scheduled to work. E.g., an employee is hired or reassigned to a job that is scheduled for only 20 hours per week; the job normally pays \$807.69/week (\$42,000 annually for a full-time, 40 hour/week employee). The now part-time employee is paid a pro-rated amount \$403.85 (50% or 20/40 times \$807.69). The job does NOT meet the current \$455/week minimum salary level. Thus, the cannot be considered as an Exempt job unless the employee is paid a salary of at least \$455/week (the current Salary Level threshold).

For further information, go to: <http://www.dol.gov/whd/fact-sheets-index.htm> and read the Fact Sheets. The Fact Sheets are listed in alphabetical order; the corresponding Fact Sheet numbers are on the right side of the page.

A number of free publications regarding the FLSA are available from the Wage and Hour Division, U.S. Dept. of Labor; go to: <http://www.osha.gov/pls/epub/wageindex.list>.

Questions regarding who is an exempt employee or a non-exempt employee, definitions of hours worked or not worked for calculating overtime, record keeping requirements, etc. will be answered by the Wage and Hour Division publications or by calling them.

From: Valerie
To: HRHelp-John Perkins <hrhelp@cox.net>
Subject: RE: HR Alert: New Salary Level for FLSA Announced

Will exempt employees need to meet both the minimum salary AND duties requirements, or one or the other? Thank you!

Valerie

From: HRHelp-John Perkins [<mailto:hrhelp@cox.net>]
To: HRHelp-John Perkins <hrhelp@cox.net>
Subject: HR Alert: New Salary Level for FLSA Announced

Date by which employers are expected to be in compliance: December 1, 2016.
New Salary Level Test threshold: \$913/week (\$47,476 annually).
Below is a reprint of the fact sheet on the DOL website.

Wage and Hour Division (WHD)

Final Rule: Overtime

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees under the Fair Labor Standards Act

On May 18, 2016, President Obama and Secretary Perez announced the publication of the Department of Labor's final rule updating the overtime regulations, which will automatically extend overtime pay protections to over 4 million workers within the first year of implementation. This long-awaited update will result in a meaningful boost to many workers' wallets, and will go a long way toward realizing President Obama's commitment to ensuring every worker is compensated fairly for their hard work.

In 2014, President Obama signed a Presidential Memorandum directing the Department to update the regulations defining which white collar workers are protected by the FLSA's minimum wage and overtime standards. Consistent with the President's goal of ensuring workers are paid a fair day's pay for a hard day's work, the memorandum instructed the Department to look for ways to modernize and simplify the regulations while ensuring that the FLSA's intended overtime protections are fully implemented.

The Department published a Notice of Proposed Rulemaking (NPRM) in the Federal Register on July 6, 2015 ([80 FR 38515](#)) and invited interested parties to submit written comments on the proposed rule at www.regulations.gov by September 4, 2015. The Department received over 270,000 comments in response to the NPRM from a variety of interested stakeholders. The feedback the Department received helped shape the Final Rule.

Key Provisions of the Final Rule

The Final Rule focuses primarily on updating the salary and compensation levels needed for Executive, Administrative and Professional workers to be exempt. Specifically, the Final Rule:

1. Sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, currently the South (\$913 per week; \$47,476 annually for a full-year worker);
2. Sets the total annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally (\$134,004); and
3. Establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles and to ensure that they continue to provide useful and effective tests for exemption.

Additionally, the Final Rule amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level.

The effective date of the final rule is December 1, 2016. The initial increases to the standard salary level (from \$455 to \$913 per week) and HCE total annual compensation requirement (from \$100,000 to \$134,004 per year) will be effective on that date. Future automatic updates to those thresholds will occur every three years, beginning on January 1, 2020. Although the Office of Management and Budget (OMB) has reviewed and approved the Final Rule, the document has not yet been published in the Federal Register. The Final Rule that appears in the Federal Register may contain minor formatting differences in accordance with Office of the Federal Register publication requirements. The OMB-approved version is being provided as a convenience to the public and this website will be updated with the Federal Register's published version when it becomes available.

Additional Information

- [Final Rule](#)
- [Overtime Overview](#)
- [Questions and Answers](#)
- Fact Sheet:
 - [Overtime Final Rule \(PDF\)](#)
 - [Final Rule: Non-Profit](#)
 - [Final Rule: Higher Education](#)
 - [Final Rule: States and Local Governments](#)
- Guidance for Businesses
 - [General Guidance](#)
 - [Non-Profit Guidance](#)
 - [Higher Education Guidance](#)
- [Comparison Table: Current Regulations, Proposed Rule, and Final Rule](#)
- [Small Business Guide](#)
- [DOL Overtime Page](#)
- [Overtime NPRM Page](#)
- Blog Posts
 - [DOL Blog: Who Benefits from the New Overtime Rule \(May 18, 2016\)](#)
 - [DOL Blog: Plenty of Options with New Overtime Rule \(May 18, 2016\)](#)
 - [Huffington Post: Fair Pay for Postdocs: Why We Support New Federal Overtime Rules \(May 17, 2016\)](#)
- [Non-Enforcement policy for providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds](#)