



UNDERSTANDING THE NEW OVERTIME REGULATIONS

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Major Changes Effective Dec. 1, 2016

- New salary limits
- Some non-discretionary bonus may now be included
- Salary thresholds – automatically increased every 3 years

What Did Not Change

- Exempt categories to determine exempt status
 - Executive, Administrative, Professional, Computer, Outside Sales
 - Any employees making over \$913/week still must qualify in an exempt category
- Overtime rate – Nonexempt employees entitled to time-and-a-half for each hour they **work** over 40 hours per week
- Calculations are based on work week – NOT pay period

Does Your Organization Have to Comply?

- 1st Test – Enterprise coverage
- 2nd Test – Individual coverage
- 3rd Test – Employees who make under \$47,476/year
- 4th Test – Employees who make over \$47,476/year
- 5th Test – Employees who fall into an Exempt classification

Enterprise Coverage

Under the Fair Labor Standards Act (FLSA)

- Enterprise is subject to FLSA regulations if it has annual revenues from *ordinary commercial activities* of \$500,000 or more
- Nonprofits with ordinary commercial activities producing revenues of at least \$500,000
 - Thrift store, gift shop

Enterprise Coverage - General Rule for Nonprofits

- Are **not** covered enterprises unless they engage in *ordinary commercial activities* that result in sales made or business done of more than \$500,000
- Activities that are *charitable* in nature are not considered ordinary commercial activities – contributions, membership fees, grants, etc.
- However, Individual Coverage **may** apply

Individual Coverage

- The *individual employee* at the nonprofit regularly engages in interstate commerce or the production of goods for interstate commerce.
 - Making out-of-state phone calls
 - Receiving/sending interstate mail or email
 - Ordering/receiving goods from an out-of-state supplier
 - Handling credit card transactions or performing the accounting or bookkeeping for such activities
- Domestic service – including home care

New Salary Thresholds for Overtime Purposes

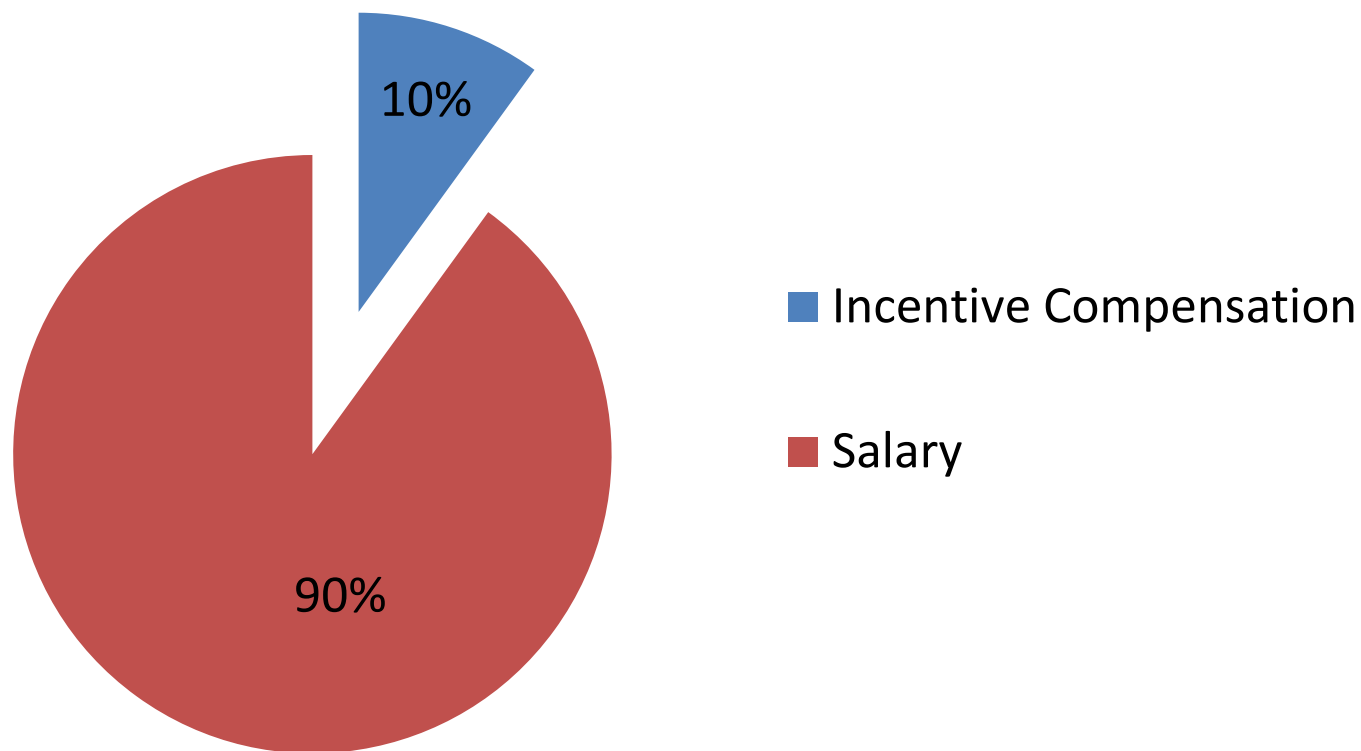
	New	Old
Salary per Year	\$47,476	\$23,660
Salary per Week	\$913	\$455
Highly compensated employees (annual)	\$134,004	\$100,000

Calculating New Salary Limits

- It is a week-by-week test!
- Consider an employee non-exempt in the week they earned less than \$913
 - Pay OT at 1.5 times if worked for that week

Calculating New Salary Limits

Salary Limits



Calculating New Salary Limits

- Up to 10% of a *nondiscretionary* bonus, incentive payments or commissions now count
 - **MUST** be paid at least quarterly or more frequently
 - Think \$822/week with \$91 bonus

What is a Nondiscretionary Bonus?

- Types of comp promised to employees to induce them to work more efficiently or to remain with the company
 - Individual or group production bonuses
 - Bonuses for quality and accuracy of work

Incentive Payments Including Commissions

- Generally based on a prior contract or understanding
- AND employee has a right to the commission promised

Bonus Short-Fall

- Employee doesn't earn enough bonus in a given week
 - Pay OT for that week if worked
 - Pay a "Catch-Up" bonus no later than next pay period after end of quarter
 - Catch-Up payment **only** counts toward prior quarter's salary

Discretionary Bonuses DON'T Count!

- Decision to pay the bonus is at employer's discretion
- No contract or promise to pay
 - Unannounced year-end bonus
 - On-the-spot awards

Who is Exempt? (After Meeting \$913/Week Test)

- Status based on actual duties performed
 - Job titles **never** determine exempt status
- Receiving a set salary every pay period doesn't determine exempt status
- MANY salaried, white-collar employees are entitled to OT

Job Descriptions Are Critical!

- Courts look at these to prove exemption
- List main essential functions
- List what positions this job supervises
- Keep them up-to-date and accurate
- List physical requirements of the job

Exempt Categories

- White Collar exemptions
 - Executive
 - Administrative
 - Professional and Creative/Artistic Professionals
- All “white collar” exempt employees (except outside sales people, certain computer professionals, lawyers, and doctors) must be paid a salary in a specified minimum amount and must be primarily engaged in duties meeting the test of the exemption sought.

Executive Exemption

- Management activities require some kind of supervisory authority involving the oversight of personnel or business operations or a department or subdivision, and usually entails the exercise of some degree of discretion.
- Directs the work of and supervises at least 2 full-time equivalents

Executive Exemption

- Examples of main duties:
 - Interviewing, selecting, training, evaluating employees,
 - Setting and adjusting rates of pay and hours of work,
 - Directing/planning employees' work, and
 - Apportioning work among employees

Administrative Exemption

- Has authority to formulate, affect, interpret, or implement policies/practices.
- Carries out major assignments in conducting the operations of the business.
- Performs work that affects business operations to a substantial degree, even if employee's assignments are related to a particular segment of the business.

Administrative Exemption

- Has authority to commit organization in matters that have significant financial impact
- Has authority to waive or deviate from established policies/procedures without prior approval
- Has authority to negotiate and bind organization on significant matters
- Provides consultation or expert advice to management

Administrative Exemption

- Involvement in planning long- or short-term business objectives
- Investigates and resolves matters of significance on behalf of management
- Represents organization in handling complaints, arbitrating disputes, or resolving grievances

(Learned) Professional Exemption

- Primary duty must be the performance of
 - Work requiring advanced knowledge
 - in a field of science or learning
 - that is customarily acquired by a prolonged course of specialized intellectual instruction

(Learned) Professional Exemption

- “Specialized academic training” is necessary to meet the educational requirements of this exemption
- Accounting clerks, bookkeepers, and other employees who normally perform a great deal of routine work generally will not qualify as exempt Professionals

Creative Professional Exemption

- Work that requires invention, imagination, originality or talent
- In a field of artistic or creative endeavor (music, writing, acting, and graphic arts)
- Reliance on a creative power to express a concept

Computer Related Exemption

- Earn \$913/week, or all compensation should be at a rate not less than \$27.63 an hour
- Perform one or more of the following:
 - The application of systems analysis techniques and procedures including consulting with users to determine, hardware, software, or systems functional specification;
 - Design, development, documentation, analysis, creation, testing, or modification of computer systems, programs or prototypes, based on system design specifications;
 - Design, documentation, testing, creation, or modification of computer programs related to machine operating systems.

Outside Salesperson Exemption

- Exempt from minimum wage and overtime requirements
- Primary duty is making sales or contracts for services
- Customarily and regularly engaged away from the employer's place of business

Misconceptions

- You don't have to pay non-exempt employees an hourly rate
 - Can be paid a salary
 - Still have to pay OT if work more than 40 hours in a week
- You don't have to change the pay of employees who don't work OT – i.e. part time employees
- No concessions for non-profits in the new rule

START NOW!!

- Analyze your compensation program and potential financial impact on the organization
- Develop and communicate a strategy to inform employees of your decisions and address morale issues
- Give employees plenty of notice if their pay will change (decrease)

Ways to Comply with New OT Rule

- Identify employees who make less than \$913/week
 - If never work over 40 hrs/week – you don't have to do anything
 - Can continue to pay fixed salary
- Tracking and recording hours for compliance
 - Can use any method you choose
 - Law doesn't require punching a time clock
 - Prior exempts may lose some flexibility they had with exempt status

Be Prepared for Challenges!

- Loss of flexibility as a non-exempt
- Loss of steady income as wages will fluctuate
- Recording time (particularly work outside the office using electronic devices)
- OT estimates are not reliable because you don't have prior history

Options for Responding to Changes to the Salary Level

- Raise salaries of employees meeting a white collar exemption to maintain their exemption
- Identify employees who need to be reclassified to non-exempt status
 - Because of new salary threshold, or
 - Just realized they don't fit one of the exempt categories
- Start tracking hours now for affected employees
 - Be sure to take into consideration hours worked from home

Options for Responding to Changes to the Salary Level

- Reclassify affected employees to non-exempt and adjust their schedule
 - Employee works 8 a.m. to 6:30 p.m. (50 hours/week)
 - Among employee's duties are accepting donations during busiest drop-off time between 4-6 p.m.
 - Previously exempt employee stayed for this – incurring OT
 - Could employee begin work at 10 a.m. instead of current 8 a.m.?

Options for Responding to Changes to the Salary Level

- Hire new employees or redistribute work hours in excess of 40 across current staff by increasing hours of staff who now work less than 40 hours
 - Don't forget – 30+/wk. hours entitles employee to health insurance
- Reclassify affected employees to non-exempt and do not limit overtime
 - Effective for employees who occasionally work OT or OT is minimal

Options for Responding to Changes to the Salary Level

- Reclassify affected employees to non-exempt and prohibit overtime without authorization
 - May reduce number of hours some employees work
 - Could be seen as a benefit
 - May mean affected employees can't accomplish the same amount of work
 - Don't be an ostrich! It is still OT if they do it from home at night!

Options for Responding to Changes to the Salary Level

- For employees who consistently work the same amount of OT each week – Reclassify affected employee to non-exempt and adjust their pay rate to include a certain amount of OT
 - Employee regularly works 50 hours/week for \$40,000/year - \$800/week
 - The salary does not include the OT premium
 - Employee's regular rate is \$16/hour (\$800/50)
 - Pay employee the additional half time OT premium (\$8/hr) for 10 hours of OT - \$80
 - Employee now earns \$880/week (\$80 week or \$4,160/year increase)
 - If employee works more than 50 hours in a week, pay 1.5 x \$16/hour - \$24/hour

Options for Responding to Changes to the Salary Level

- Same as previous slide – Employee consistently works same amount of OT each week – currently earns \$800/week before reclassification
- Reclassify affected employee to non-exempt and
- Adjust their hourly rate down to account for expected OT so reclassification is cost neutral
 - Works 50 hours/week for \$37,960/year - \$730/week
 - Regular rate is \$14.60/hour (\$730/50)
 - Pay additional half time OT premium (\$7.30/hr) for 10 hours of OT - \$73
 - Employee now earns \$803/week (\$730 + 73) (Cost Neutral)
 - If works more than 50 hours in a week, pay 1.5 x \$14.60 - \$21.90/hour

Options for Responding to Changes to the Salary Level

	Hours Worked/Week	Salary/Year	Salary/Week	Hourly Rate	OT Rate	Total Pay/Week	Change in Pay
Exempt	50	\$40,000	\$800	N/A	N/A	\$800	
Non-Exempt Option #1	50	\$40,000	\$800	\$16	\$24	\$880	\$80/Week Increase \$4,160/Year Increase
Non-Exempt Option #2	50	\$37,960	\$730	\$14.60	\$21.90	\$803	\$3/Week Increase \$156/Year Increase

How to Communicate Decision to Reclassify Employees from Exempt to Non-Exempt?

- **Never, ever via email or via memo. NEVER!**
- Do individually – Be Prepared!
- Expect morale issues from exempt to non-exempt status!
 - Seen as demotion or loss of status

Miscellaneous

- Be proactive for next threshold increase –
 - Start tracking hours for exempt employees who are at \$47,476 to \$51,000
- Some employees with same job title – one may now be non-exempt and one exempt
 - Play around with job titles – Level I and Level II

Miscellaneous

- Volunteers should not perform work that would otherwise be performed by employees
- Employees may not volunteer in commercial activities run by a nonprofit
- Be cautious letting an employee volunteer – activity should have no relation to their “job”

Additional Information

- Visit the Wage and Hour Division homepage at
 - <http://www.dol.gov/whd/overtime/final2016/faq>
 - www.wagehour.dol.gov
- Call the WHD toll-free info and helpline at 866-4US-WAGE (866-487-9243)
- Call or visit the nearest Wage and Hour Division Office
- Use the DOL interactive advisor system – ELAWS
- (Employment Laws Assistance for Workers and Small Businesses) at <http://www.dol.gov/elaws>



Thank you!

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