

# Preparing For And Complying With The New Fair Labor Standards Act

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# OVERVIEW

1. What is the Fair Labor Standards Act?
2. Which organizations or employees are covered?
3. Qualifying as overtime exempt.
4. FLSA salary threshold rule changes.
5. Compliance options for employers.

# BASICS: THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act (“FLSA”) requires covered, non-exempt employees to be paid minimum wage and overtime for hours worked in excess of 40 in a work week at the rate of one and one-half times the employee’s regular rate of pay.

# COVERAGE UNDER THE FLSA

- Many myths and rumors surrounding FLSA coverage, especially among non-profit organizations.
- Minimum wage and overtime provisions of the FLSA generally apply to employees at most organizations.
  - Enterprise Coverage. All employees of the organization are covered by the FLSA if the entity has annual revenues of \$500,000 or more. Charitable activities do not count toward the revenue requirement, only activities performed for a “business purpose.”
  - Individual Coverage. Even if the organization is not subject to enterprise coverage, all employees who engage in interstate commerce as part of his or her regular work activities are covered by the FLSA. These activities can includes making out of state phone calls, sending interstate mail or e-mail, sending or receiving goods from out of state. Isolated occasions may not count.

# WHO QUALIFIES AS OVERTIME EXEMPT?

To be overtime exempt, must meet salary requirements (salary basis and salary threshold) and satisfy the duties test.

**The Duties Test.** The 2016 changes to the FLSA did not affect the duties test.

- Professional exemption- must primarily perform work that requires advanced knowledge (usually a degree) in a field of science or learning, or that requires invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.
- Administrative exemption - primary duties must be performance of non-manual work related to the management of the employer or its customers. Must exercise discretion and independent judgment.
- Executive exemption - primary duty of managing the organization or a department or subdivision thereof by directing the work of at least two other full-time employees, or the equivalent. Must have authority or significant influence in hiring and firing decisions.

# WHO QUALIFIES AS OVERTIME EXEMPT?

## Basic Requirements for Claiming a White Collar Exemption under the Standard Duties Test

|                            | EXECUTIVE   | ADMINISTRATIVE  | PROFESSIONAL   |
|----------------------------|---|---|--|
| Salary Basis Test          | <ul style="list-style-type: none"> <li>Employee must be paid on a salary basis</li> </ul>   | <ul style="list-style-type: none"> <li>Employee must be paid on a salary or fee basis</li> </ul>  | <ul style="list-style-type: none"> <li>Employee must be paid on a salary or fee basis</li> </ul>   |
| Standard Salary Level Test | <ul style="list-style-type: none"> <li>\$913 per week (\$47,476 per year for a full-year worker)</li> </ul>   | <ul style="list-style-type: none"> <li>\$913 per week (\$47,476 per year for a full-year worker)</li> <li>Special salary level for certain academic administrative personnel</li> </ul>   | <ul style="list-style-type: none"> <li>\$913 per week (\$47,476 per year for a full-year worker)</li> <li>Salary level test does <b>not</b> apply to doctors, lawyers, or teachers</li> </ul>  |
| Standard Duties Test       | <ul style="list-style-type: none"> <li>The employee's "primary duty" must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise (and managing 2 full-time employees as well).</li> <li>Additional requirements provided in 29 CFR 541 Subpart B</li> </ul> | <ul style="list-style-type: none"> <li>The employee's "primary duty" must include the exercise of discretion and independent judgment with respect to matters of significance.</li> <li>Additional requirements provided in 29 CFR 541 Subpart C</li> </ul> | <ul style="list-style-type: none"> <li>The employee's "primary duty" must be to primarily perform work that either requires advanced knowledge in a field of science or learning or that requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.</li> <li>Additional requirements provided in 29 CFR 541 Subpart D</li> </ul> |

# SALARY REQUIREMENTS TO QUALIFY AS OVERTIME EXEMPT

- **Salary Basis-**To qualify as overtime exempt, employees must be paid on a salary or fee basis, rather than hourly.

# SALARY REQUIREMENTS TO QUALIFY AS OVERTIME EXEMPT

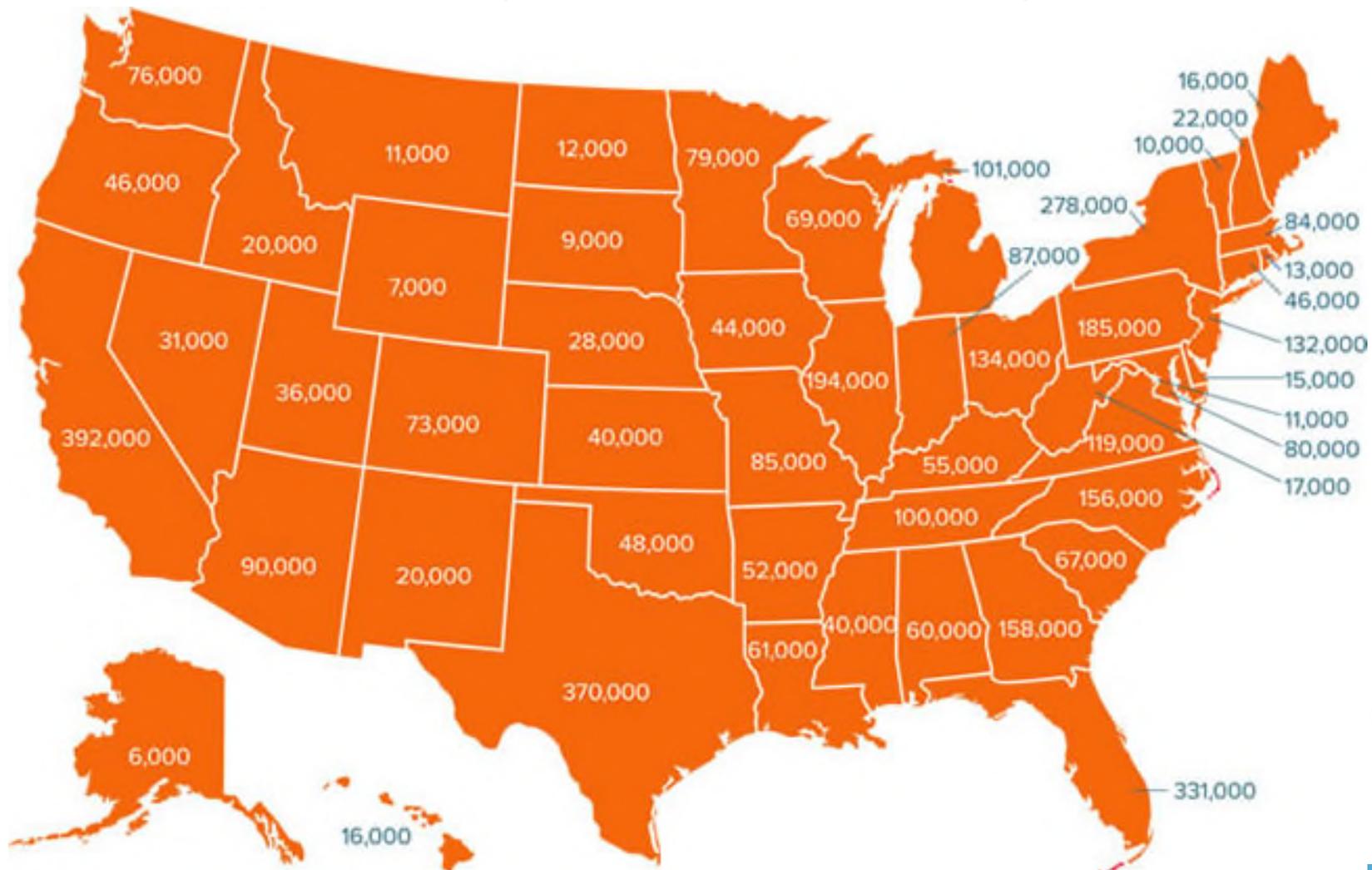
- **Salary Level-** The salary level (or threshold) was the subject of significant changes to the FLSA rules in 2016.
  - The FLSA rule change was a regulation that was amended by the Department of Labor, not legislation enacted by Congress.
  - Although there have been legislative attempts to change or nullify the Rule, there hasn't been much momentum.
  - At this point, it seems unlikely that Congress can or will take any action that affects the DOL's final rule before it becomes effective on December 1, 2016.

# SALARY REQUIREMENTS TO QUALIFY AS OVERTIME EXEMPT

- Raises salary level from previous amount of **\$455 per week** (\$23,660 annually) to **\$913 per week** (\$47,476 annually).
  - The updated salary level matches the 40th percentile of earnings of full-time salaried workers in the lowest wage earning region in the U.S. (the South).
- The salary level will automatically update every 3 years, the first occurring in 2020.
  - This part of the rule change may be the most likely target for legal challenges.
- What is the significance of this change? Employees paid below the updated salary level will be entitled to overtime, even if they otherwise meet the “duties test” and “salary basis test.”

# EMPLOYEES AFFECTED BY THE RULE CHANGES

The Department of Labor estimates that 4.2 million currently exempt workers under the 2004 salary level will become newly entitled to overtime protection.



Map provided by the Department of Labor (available at: <https://www.dol.gov/featured/overtime>)



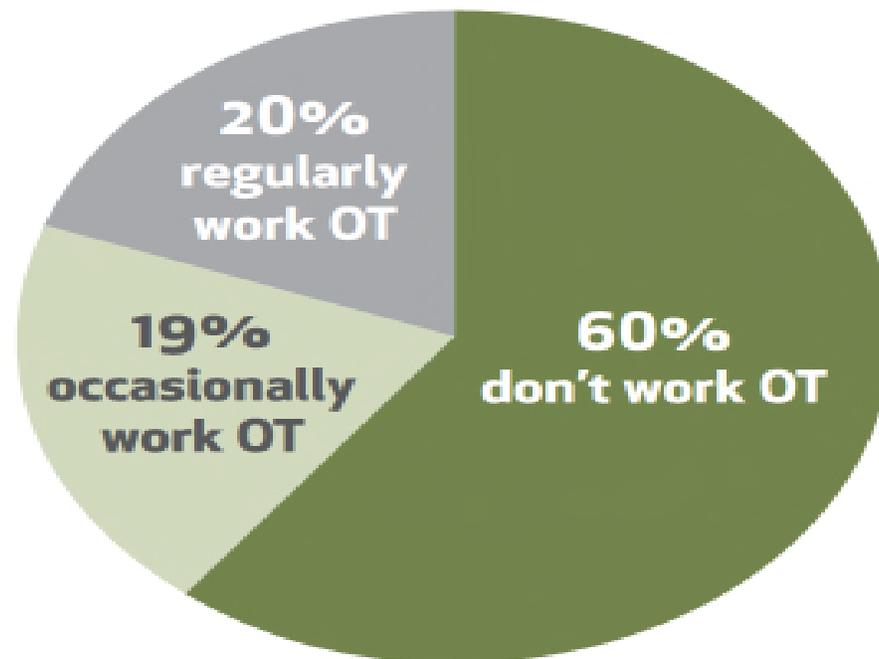
# COUNTING BONUSES TOWARD THE NEW SALARY THRESHOLD

- Perhaps the only “win” for employers in the new FLSA rule.
- Previously, bonuses and incentives could not be counted toward the salary threshold at all.
- Ten percent of the salary level (or \$4,747.60) can be nondiscretionary bonuses, incentive payments, and commissions that are paid at least quarterly.
- Employers can make a “catch up” payment to maintain the exemption if an employee did not receive enough in nondiscretionary bonuses to remain exempt.
- **Caution!** Nondiscretionary bonuses paid to non-exempt employees must be included in non-exempt employees’ regular rate of pay for purposes of calculating overtime pay.

# COMPLIANCE OPTIONS FOR EMPLOYERS

The Department of Labor says its data indicates that the majority of affected employees rarely or never work more than 40 hours per week.

**Most affected employees  
do not work overtime (OT)**



*\*Totals don't sum to 100 due to rounding.  
For more information, please see Section VI of the Final Rule.*

# COMPLIANCE OPTIONS FOR EMPLOYERS: MAINTAIN CURRENT SALARIES BELOW THE THRESHOLD AND PAY OVERTIME

- For employees who rarely work overtime, employers may continue to pay employees their current salary, even if lower than \$47,476, and pay overtime when employees work more than 40 hours in a work week.
- This will require additional recordkeeping obligations. The FLSA requires employers to maintain records of how many hours overtime-eligible employees work.
  - No specific requirements on how daily hours are tracked, that decision is up to the individual organization.

# COMPLIANCE OPTIONS FOR EMPLOYERS: RAISING SALARIES

- For employees making slightly less than \$47,476 per year that regularly work overtime, it might make the most financial sense for employers to increase these employees' salaries.
- Conduct an internal audit of the amount of overtime paid to determine whether there may be cost savings associated with this option.

# COMPLIANCE OPTIONS FOR EMPLOYERS: PAYING OVERTIME ABOVE A SALARY

- Pay a straight time salary as compensation for hours that exceed 40 hours in a week, plus a half time overtime premium for the hours above 40 and time and a half for hours beyond what was included in the straight salary. Useful for employees who regularly work more than 40 hours in a work week

*Example:* Jamie, an HR manager at a community loan fund, earns a fixed salary of \$44,200 per year (\$850 per week) for a 50 hour workweek. The salary does not include the overtime premium. Because the salary is for 50 hours per week, Jamie's regular rate is \$17 ( $\$850/50$ ). In a normal 50 hour week, the employer would pay Jamie the additional half time overtime premium for the 10 hours of overtime (\$8.50 per hour). If Jamie worked more than 50 hours in a week, the employer would also owe overtime compensation at time and a half the regular rate ( $\$17 \times 1.5$ ) for hours beyond 50 (because the salary does not cover any payment for those hours).

# COMPLIANCE OPTIONS FOR EMPLOYERS: PAYING OVERTIME ABOVE A SALARY

- Pay a fixed salary for a workweek that exceeds 40 hours, which includes overtime compensation. However, if the employee's schedule changes during the week, the weekly salary must be adjusted. This option is best for employees whose schedule will not change week to week  
*Example: Andre, a program manager at a non-profit organization, has an agreement with his organization where he is paid a fixed salary of \$39,520 per year (\$760 per week) for a 45 hour workweek. The fixed salary includes both straight time for the first 40 hours (\$16 regular rate x 40 hours) and overtime compensation for hours 41-45 (\$24 overtime rate x 5 hours). If Andre's schedule changes in any way for any week, his salary needs to be adjusted to reflect the hours actually worked for that week.*
- These options for adjusting salaries may be implemented for discrete periods of time, such as the period leading up to an event.
- **Caution:** Though allowed under federal law, may not be valid in every state.

# COMPLIANCE OPTIONS FOR EMPLOYERS: ADJUST WORKLOADS AND EMPLOYEE SCHEDULES

- Redistribute work, watch hours and adjust start or ending work times; hire new employees.
- “Comp Time”
  - For employees who may be reclassified from exempt to overtime-eligible, it is important for private-sector employers to remember that overtime obligations cannot be satisfied with the use of “comp time.”
  - Compensatory time, or “comp time,” is paid time off that is earned by an employee in lieu of cash payments for working overtime hours.
  - The FLSA limits the use of comp time to nonexempt employees in the public sector. Comp time cannot be used in place of overtime payments owed to nonexempt employees in private-sector employment.

# COMPLIANCE OPTIONS FOR EMPLOYERS: ADJUST WAGES

- The FLSA allows employers to “reallocate” an employee’s wages between regular and overtime while still ensuring the employee’s hourly wage does not fall below the highest applicable minimum wage (federal, state, or local, whichever is highest).
- This strategy is useful for employees who consistently work a small number of overtime hours.

# COMPLIANCE OPTIONS FOR EMPLOYERS: ADJUST WAGES

*Example:* Assume a fundraising supervisor at a non-profit who satisfies the duties test for the executive exemption earns \$37,000 per year (\$711.54 per week). The supervisor regularly works 45 hours per week. The employer may choose to instead pay the employee an hourly rate of \$15 and pay time and one-half for the 5 overtime hours worked each week.

Alternatively, the employer may choose to pay that employee a salary for 40 hours of \$600 per week and pay the overtime for hours in excess of 40 per week.

**\$600.00 (40 hours x \$15 / hour)**

**+ \$112.50 (5 OT hours x \$15 x 1.5)**

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**\$712.50 per week**

**\$600.00** (salary for 40 hours/week, equivalent to \$15/hour)

**+ \$112.50** (5 OT hours x \$15 x 1.5)

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**\$712.50 per week**

# COMPLIANCE OPTIONS FOR EMPLOYERS: USING VOLUNTEERS

- The FLSA will not classify a volunteer as an employee if the volunteer service is freely provided for public service, religious, or humanitarian objectives, and without contemplation or receipt of compensation.
- Individuals may not volunteer in commercial activities run by a non-profit organization and employees of a for-profit organization may not volunteer his or her services for the same type of work he or she is normally paid to provide.
- Volunteers may not displace employees or perform work typically performed by employees.

QUESTIONS?

# THANK YOU!

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