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Department of Administrative Services
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Human Resources
Administration

FLSA Overtime Final Rule

This advisory provides an update on release by the U.S. Department of Labor (USDOL) of a final rule on Fair Labor Standards Act (FLSA) overtime regulations on September 24, 2019. The final rule becomes effective January 1, 2020, meaning employers have a little over three months to make changes to comply. While the final rule updates regulations related to the FLSA overtime provisions, it does not in any way impact state compensatory time. For the policy related to state compensatory time, refer to [Joint OPB / DOAS Statewide Policy 7](#).

What does the final rule say?

The final rule focuses primarily on extending overtime protections by increasing the salary and compensation levels needed for white collar employees to be classified as FLSA-exempt. The FLSA requires employers with more than 50 employees to pay a minimum wage and overtime compensation at a rate of not less than one and one-half times the employee's regular rate for hours worked over 40 in a workweek. The FLSA provides exemptions to the overtime

requirement for executive, administrative, professional, outside sales, and highly compensated employees, as well as certain employees in computer-related jobs. For the EAP exemptions (executive, administrative, and professional) to apply, employees must be paid on a salary basis, meet a salary test of making at least the set standard salary, and meet certain requirements as to their duties (duties test). Note that certain professional employees, such as doctors, lawyers, and teachers, are not subject to either the salary basis or salary level tests.

The final rule's key provisions

1. The standard salary level is set at the 20th percentile of weekly earnings for full-time salaried workers in the lowest-wage Census region. The new standard salary level is \$684 per week, or \$35,568 annually. This is an increase of approximately 50% over the current salary threshold of \$455 per week, or \$23,660 annually.

2. The final rule allows nondiscretionary bonuses, incentive payments, and commissions, paid at least annually, to be used to calculate up to 10% of the standard salary level. The final rule permits employers to meet the salary level requirement by making a catchup payment within one pay period of the end of the 52-week period.

3. The total annual compensation requirement needed to exempt highly compensated employees (HCEs) is set at the annualized value of the 80th percentile of weekly earnings of full-time salaried workers. The new total annual compensation for HCEs is \$107,432 annually, an increase from the current level of \$100,000.

4. In addition, the final rule contains a statement of the USDOL's intent to

update the standard salary level and HCE total annual compensation threshold more regularly in the future using notice-and-comment rulemaking. This is a change from the automatic updates proposed in 2016.

How can we prepare for these changes to become effective?

Changes in the regulations will require most agencies to reclassify a significant number of employees from exempt to nonexempt status if they currently have employees classified as exempt with annual salaries below the new salary threshold. Reclassification will have several implications, including compensating these employees for overtime worked and tracking hours worked. We encourage agencies to take action now to prepare for the effective date of January 1, 2020. Agencies will not receive additional funding to manage any financial impact that arises due to changes in the FLSA regulations. Financial liabilities that must be managed within your approved budgets include overtime pay, penalties, fees, or back pay.

Steps employers should take now

To help you prepare, we recommend the following steps:

Step 1) Identify all employees earning less than \$35,568 per year that are currently classified as exempt.

Step 2) Consider tracking hours for all employees falling below the new threshold that will be reclassified as nonexempt. Doing so will help estimate the number of hours these employees currently work that will be considered overtime once reclassification occurs. Consider whether any hours over 40 can be managed to a minimum for purposes of overtime or if work can be redistributed to reduce overtime hours.

Step 3) Review employment conditions for employees needing reclassification and whether current practices may need to be changed. All hours worked for these new nonexempt employees must be tracked, and employees must be compensated for any overtime. Some current practices to review include:

- Do these employees currently have laptops they take home to work during weekends or after normal work hours;
- Do these employees have agency issued cellphones on which they check work emails after hours; or,
- Are these employees required to ask permission to work over 40 hours per week?

Step 4) Create a timeline for change management activities to ensure compliance with the effective date, January 1, 2020. Agencies have a little over three months to ensure that all employees needing reclassification are treated as nonexempt by that date. The amount of time that these changes will take your agency to implement may depend on the volume of employees needing reclassification.

Step 5) Prepare managers and supervisors. It is important to train managers and supervisors to answer any questions employees may have prior to communication to employees of the upcoming changes. Managers and supervisors should also be trained not to assign work after hours to staff who will be reclassified, including scheduling meetings or sending emails or texts, unless your organization plans to compensate employees for this work time. Additionally, consider whether any managers and supervisors themselves may be reclassified to nonexempt status because they will no longer meet the minimum salary threshold.

Step 6) Begin to communicate these upcoming changes to impacted employees. Make a list of the changes, how your organization will respond to the changes, any new expectations, and impacted employees. Determine the communication techniques suitable for your type of workforce, hours of business, and locations. Because some employees may perceive the changes to negatively impact their workplace flexibility or prestige, determine how you will manage this potential drop in employee morale. You may wish to explain that these changes are federal law mandates to all employers.

SAO automated solution

The State Accounting Office (SAO) is automating an opt-in process to convert the FLSA status from exempt to nonexempt for employees currently coded with executive, administrative, or professional exemptions with a salary under \$35,568 annually. SAO and HRA will provide additional information concerning the automated process in the near future.

What are some expected effects of these changes?

Potential increase in compensation owed

Some employees that previously were not compensated for time worked over 40 hours per week will be owed compensation at a rate of time and one-half. The final rule does not change the special provisions applicable to state and local government permitting the use of compensatory time off in lieu of cash payment for overtime hours. Because compensatory time does create a liability, however, agencies will want to determine whether to: 1) allow longer work hours to continue and the liability to accrue; 2) manage down work hours to 40 hours per week; or 3) redistribute work. Agencies must manage any financial

overtime liabilities within their approved budgets. Additional funding will not be provided for overtime pay or penalties and fees incurred by agencies in connection with FLSA regulation changes.

New monitoring responsibilities for employers

Many employees previously classified as exempt will now have timekeeping responsibilities upon reclassification. The FLSA and final rule do not specify how hours must be tracked, but all hours actually worked by these employees must now be reported. Some state employers track hours manually, using paper timesheets. Others use various types of automated timekeeping. Take steps now to create clear instruction for employees that will be newly classified as nonexempt to ensure they understand how your organization tracks time and when these new responsibilities begin.

If your organization permits nonexempt employees to telework, you must take care to manage the risk that nonexempt employees may underreport hours actually worked and later make claims for back pay of overtime hours. While there is no rule against nonexempt employees teleworking, it is important to have a policy that supports accurate reporting of hours worked to mitigate this risk. It will be important that reclassified employees understand the change in expectation, monitoring, and reporting of teleworking hours.

Exempt employees may also be accustomed to eating lunch at their desks. This practice poses a risk for nonexempt employees because of the probability that their meal period will be interrupted by work activity. For a meal period to be unpaid, a nonexempt employee must be completely relieved from duty for at least 30 minutes. Therefore, your organization should ensure that nonexempt employees are properly relieved to take meal breaks. These new employer

responsibilities have potential to create employee morale issues. Click [here](#) for tips on managing nonexempt employees' work time.

Both exempt and nonexempt in same job

Another likely effect of the final rule is that employees working in the same job code may now have differing FLSA exemption statuses even though they perform the same work function. While this effect certainly may create employee relations issues, it is supported by federal law. FLSA exemption classification decisions are made on an employee-by-employee basis. With limited exceptions, an employee must meet three criteria to be FLSA-exempt: the duties test, the minimum salary threshold, and payment on a salary basis. Employees in the same job, performing the same function, may all meet the duties test, and they may all be paid on a salary basis. However, those employees who do not meet the salary threshold will not be FLSA-exempt.

It should be noted that there will be cultural change not only for employees reclassified but also for employees who must meet differing requirements, such as completing a time sheet, based on new FLSA status. Agencies should be prepared to address employee relations issues that result from these differing requirements. During these communication efforts, it is important for employees to understand that these changes are driven by federal regulation rather than a decision by the agency or the State.

No Effect on Salary Basis

It is the State's practice to pay regular employees, whether exempt or nonexempt, on a salary basis. Reclassification of an exempt employee to nonexempt based on no longer meeting the threshold does not mean that the employee would change from salaried to hourly.

What are the consequences of not complying with the Final Rule?

The USDOL has focused significant resources on identifying and penalizing the misclassification of employees. In addition to owing back wages and overtime compensation, attorney's fees and penalties for willful violations can also be assessed. It is important to note that if even one hour of owed overtime compensation is proven in litigation, attorney's fees of the opposing party will be owed. Agencies must manage these financial liabilities within their approved budgets. For these reasons, we recommend that you consult with your normal legal counsel to assist with and work toward administering these changes to facilitate compliance with the final rule.

If you have questions about the information in this advisory, please contact the HRA helpdesk at 404-656-2705 or 1-877-318-2772 or a member of the HRA Policy Team.



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