



## FLSA Overtime Final Rule

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### FLSA overtime final rule

This advisory provides an update on the release by the U.S. Department of Labor (USDOL) of a final rule on Fair Labor Standards Act (FLSA) overtime regulations on April 23, 2024. The final rule becomes effective July 1, 2024, meaning employers have a little over a month 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 minimum salary threshold, 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 current salary threshold of \$684 per week, or \$35,568 annually, will be increased in two phases. Effective July 1, 2024, the salary level will be \$844 a week, or \$43,888

2. The final rule does not make any changes to the treatment of bonuses. Employers may use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary test requirement, provided that such payments are paid on an annual or more frequent basis. In addition, employers may use nondiscretionary bonuses and incentive payments earned during a 52-week period to satisfy the HCE total annual compensation threshold, but such bonuses and incentive payments cannot be used to satisfy the weekly standard salary level portion of the HCE test.

3. The total annual compensation requirement needed to exempt highly compensated employees (HCEs) will be increased in two phases. Effective July 1, 2024, the total annual compensation for HCEs will be \$132,964 annually, including at least \$844 per week paid on a salary or fee basis. Effective January 1, 2025, the total annual compensation for HCEs will be \$151,164, including at least \$1,128 per week paid on a salary or fee basis. These are larger increases than originally proposed and significant increases over the current level of \$107,432 annually.

4. The final rule further provides that the salary threshold will be automatically updated every three years, starting on July 1, 2027.

### **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. While there is a current legal challenge to the new rule, employers should not wait for the challenge to be resolved before assessing the rule's impact on their operations and considering potential changes. We encourage agencies to take action now to prepare for the effective date of July 1, 2024. Agencies are expected to manage any financial impact that arises due to changes in the FLSA regulations within their existing budgets. 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) To prepare for the salary threshold effective July 1, 2024, identify all employees earning less than \$43,888 per year that are currently classified as exempt. To prepare for the threshold effective January 1, 2025, identify employees earning less than \$58,656 annually and are currently classified as exempt. Guidelines for determining exemption status are found in [Appendix 1](#) to the Statewide Overtime Policy (Policy 7). Although the general guidelines and checklists remain applicable, they contain current salary thresholds.

Step 2) Consider tracking hours for all employees falling below each 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:

- whether these employees currently have laptops they take home to work during weekends or after normal work hours,
- whether these employees have agency issued cellphones on which they check work emails after hours, and
- whether these employees are 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, July 1, 2024. Agencies have a little over a month to ensure that all employees needing reclassification are treated as nonexempt by that date. The time required for your agency to implement may depend on the number 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 about 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.

### **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.

### **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 timesheet, 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 back wages and overtime compensation, penalties for willful violations can also be assessed. 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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