



FLSA Overtime Final Rule: What You Need to Know

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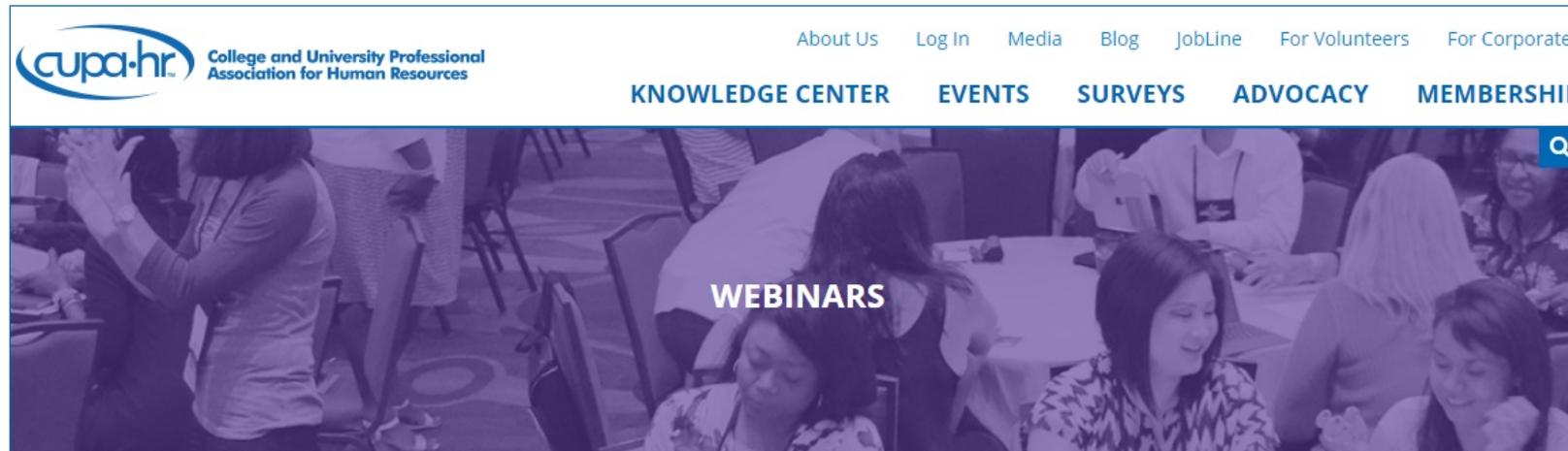
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The New Rules

What Do They Say?



Standard Salary Level Increased

- **New annualized salary level will be \$35,568**

This is \$684/week

Slightly up from proposal in NPRM

Represents 20th percentile of full-time salaried workers in South and/or in retail sector nationally.

- **Allows up to 10% of the minimum salary to be met by non-discretionary bonuses, incentive pay or commissions, if made at least on annual basis**
- **Room and Board Still Excluded**



No Automatic Update to Salary Level

- Rejected 2016's decision to automatically update salary level required for exemption **every three years**
- Committed to reviewing more frequently via notice-and-comment rulemaking.



Highly Compensated Employee Salary Level Increased

- **New Highly-Compensated Salary Level will be \$107,432**
 - Considerably less than \$147,000 identified in NPRM
 - Represents 80th percentile of full-time salaried workers nationally
- Requires payment on a salary basis of at least \$684/week
- Additional payments to bring to new level can include:
 - Commissions
 - Nondiscretionary bonuses
 - End-of-year catch-up payment



No Changes to the Duties Tests

- In the NPRM, DOL asked several questions regarding the duties tests – particularly the primary duty test – but did not propose specific language
- In the Final Rule, DOL does not make any changes to the duties tests
- Nor are there any changes to the salary basis test
- As under the existing regulations, there still are no exceptions or allowances for:
 - part-time employees
 - employees of non-profits, colleges or universities, or public entities



Employers Have About Three Months to Comply

- Effective date is January 1, 2020
- Any upward salary adjustments must be in place before that date to ensure continued application of exempt status
 - Note that January 1 is a Wednesday
- For bi-weekly pay, employers will need to adjust pay for pay period that includes January 1, 2020

Specific Issues for Higher Ed



Specific Positions/Exempt Status

- Interns/Residents
- Veterinary Interns/Residents
- Coaches
- Resident Directors
- Postdocs
- Admissions Counselors

Remember: Job Titles are Not Dispositive

DOL Guidance Remains in Effect:
<https://www.dol.gov/whd/overtime/whdfs17s.pdf>



Part-Time Exempt Employees

- Except for limited circumstances (doctors, lawyers, teachers, certain academic administrators), FULL salary level is required
- Means anyone earning below \$35,568 is NONEXEMPT
 - Track hours
 - Regular rate
 - Overtime pay
- What about “fee” basis?



Partial-Year Employees

- Assume coach works a ten-month schedule, but receives paychecks over a twelve-month period.
 - Amount of the checks may be prorated over the actual period of work (i.e., ten months) to determine whether she is paid at least the salary threshold.
 - If a 9-month employee earns \$33,000 for 9 months, but is paid over 12 months, he would meet the salary requirement because his 9-month weekly salary is \$846.15 ($\$33,000/39$ weeks), even though his weekly paycheck is \$634.61 ($\$33,000/52$ weeks).
 - Similar calculation can be used for 10-month employees.
 - It is critical that the employee perform no work outside of the 9- or 10-month period.

What Happens Next?



Develop a Plan to Reach Crucial Decision Points

- In some cases, increase salaries to \$35,568 and continue to treat employees as exempt
- In other cases, reclassify employees to non-exempt status using a variety of pay options
- And in yet other cases, employers may choose to restructure:
 - Jobs
 - Workforce
 - Operations



Gap Analysis

- Analyze the “salary gap” to determine salary levels for exempt employees and identify any position—not just employee—that falls below the new standard
- Consider the “ripple effect” on upstream and cross-stream jobs
- Analyze the “duties gap,” as well, to determine whether any jobs that are paid at a sufficient salary level might not perform the duties of an exempt role
- Model various compensation plans to determine:
 - Cost of increasing salaries
 - Cost of reclassification



Plan to Reclassify

- Determine working hours of employees who might be reclassified

And how those hours might change as non-exempt employees

- Review records that may be suggestive of hours worked
- Consider how those records may be over- and/or under-inclusive
- Canvass those who manage to-be-converted employees

- Determine potential pay rates and compensation methods for those employees



How to Pay

- Hourly: Straight hourly rate for hours worked up to 40; 1.5 times regular rate of pay for hours worked in excess of 40
- Salary Plus Overtime: Salary for hours worked up to 40 (or some lower number); 1.5 times regular rate of pay for hours worked in excess of 40
- Fluctuating Workweek: Agreement with employee to pay salary for all straight-time hours worked; $\frac{1}{2}$ time of salary divided by hours worked for OT hours
- Fluctuating Workweek/Static OT Rate: Agreement with employee to pay salary for all straight-time hours worked; $\frac{1}{2}$ time of salary divided by 40 for OT hours



What to Pay

- Amount of the newly non-exempt employee's rate?
 - Same as before reclassification
 - Will increase labor costs
 - (Especially when considering bonuses, commissions, incentive pay)
 - Could provide incentive for off-the-clock work
 - May price employee out of the market and lead to no or fewer increases in the future
 - Salary compression with the next grade
 - Lowered to take into account overtime costs
 - Employee will “earn back” the full salary through anticipated overtime
 - But what if overtime isn't worked?
 - What about lowered rate for PTO and holidays?
 - Pay decrease could cause loss in employee morale
 - Communications / employee relations plan is key



CAUTION!

Reclassified employees become NONEXEMPT employees

- This means that, regardless of the method of pay, they are subject to the same wage & hour rules as other non-exempt employees:
 - Must maintain accurate time records (even if no OT worked)
 - Must ensure proper control of employee work, such as:
 - Off-the-clock
 - Meal and rest breaks
 - Travel time
 - Remote access
 - Must pay OT premium for hours work in excess of 40/week
- No method of compensation permits an employer to avoid keeping accurate time records for non-exempt employees



Restructuring

- To justify increased exempt employee salaries, some jobs will need to take on more responsibilities
- To avoid reclassification, some jobs will need to shed nonexempt responsibilities
- Some jobs will need to be split into two or more roles because overtime costs would be too great
- Some jobs and employees will necessarily be phased out
- As predicted by many critics of the new rule, some businesses will need to close locations, departments, and other aspects of their operations



Careful Execution and Communications Strategies Are Crucial

- **Before** you take your first steps:
 - ✓ Identify stakeholders and champions who can help define and reach endgame objectives
 - ✓ Develop a communications plan to engage key players
 - ✓ Determine your process for achieving objectives before January 1
- **After** you have made the important business decisions about whose pay will increase, who will be reclassified, and what roles / operations might need to be restructured:
 - ✓ Develop a detailed implementation and communications strategy

Q&A

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