



## The Fair Labor Standards Act (FLSA): The “Overtime” Rule

### Background

The Fair Labor Standards Act first came into being in 1938 to establish worker protections around compensation, especially pertaining to minimum wage and overtime rates. In 2014, President Obama requested new, updated regulations because it had been more than a decade since the last time the minimum salaries were adjusted.

### Final Rule

On May 18, 2016, the Department of Labor issued a Final Rule, the “Overtime” Rule. The Final Rule focuses on distinguishing overtime-eligible employees from those who are exempt. Exempt employees are not eligible for overtime pay.

Here is a brief overview of some key provisions:

- The Rule goes into effect **December 1, 2016**.
- Every three years, the minimum salary and compensation levels will increase through a process called automatic indexing, beginning January 1, 2020.
- The *standard salary level* was increased to \$47,476 per year or \$913 per week.
  - Employees who are paid less than the *standard salary level* are paid overtime for hours worked beyond 40 hours per week.
  - Employees who are paid at or above the *standard salary level* must also pass a job duties test to be considered exempt.
  - Up to 10% of the required salary amount can be non-discretionary bonuses, including incentive payments and commissions. In this case, these non-discretionary means must be paid at least quarterly.
- The *Highly Compensated Employees* (HCE) minimum salary was increased to \$134,004 per year.
  - Salaries must meet the minimum salary level without regards to non-discretionary bonuses.
- Job duties criteria did not change

## The Fair Labor Standards Act (FLSA): Exemptions

### Background

The Fair Labor Standards Act first came into being in 1938 to establish worker protections around compensation, especially pertaining to minimum wage and overtime rates. Later, it was determined that the Rule did not need to apply to everyone and that exemptions were needed. These exemptions are determined by the Secretary and defined by the “[541 regulations](#).” Three tests can impact exemption: the minimum salary test, the salary basis test, and the job duties test.

In 2014, President Obama requested new, updated regulations because it had been more than a decade since the last time the minimum salaries were adjusted. Then, on May 18, 2016, the Department of Labor issued a Final Rule, the “Overtime” Rule. The Final Rule focuses on distinguishing overtime-eligible employees from those who are exempt. Exempt employees are not eligible for overtime pay.

### Exemptions

The burden is on the employer to establish the basis for exemption for each employee. In order to claim a white collar exemption, all three of the tests below must be met:

1. **Salary Basis Test:** employees must be paid on a salary basis, not an hourly basis
2. **Salary Level Test:** employees must meet the \$913 per week or \$47,476 per year
3. **Standard Duties Test:** employees’ duties must fall into one of the categories described below:
  - Executive: may apply to employees who oversee two or more employees and have hiring/firing authority
  - Administrative: may apply to employees who make at least \$47,476 per year, perform non-manual work, and exercise discretion and judgment as primary duty (more than 50% of time)  
*For example: this usually applies to employees in marketing and human resources roles.*
  - Professional:<sup>1</sup>
    - Learned professional: may apply to employees making at least \$47,476 per year in job positions that require advanced knowledge.  
*For example: teachers with an advanced degree can fall into this category if they are employed in a position that requires 4 year degree.*
    - Teacher: may apply to employees teaching, tutoring, instructing or lecturing in area that is specifically defined as in education establishment  
Note: the term “education establishment” is the most important consideration in this description.

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<sup>1</sup> There are many different resources for Head Start programs to consider as they look into this exemption. [Opinion Letter FLSA 2008-13NA](#) offers guidance about whether Head Start programs are “educational establishments” based on source of licensure. For example, in states in which the Department of Welfare, as opposed to the Department of Education, oversees licensure, it is indicated that the state does not consider the program an educational establishment. In [Ramos vs. Lee County School Board](#), Head Start plaintiffs claimed entitlement to overtime payment, but the school board claimed exemption. The Court found that the Head Start teachers were engaged in teaching, tutoring, or instructing and that it did qualify as an education establishment. [Fact Sheet #46](#) says that teachers who take care of only physical needs cannot meet teacher exemption. Federal Unemployment Tax Act similarly addresses whether Head Start programs are educational establishments in [Letter No. 41-97](#) and [Letter No. 40-79](#), saying that Head Start grants operated by a community action or nonprofit do not qualify as an educational institution, but Head Start grants operated by a school district do qualify as an educational institution.



NATIONAL HEAD START ASSOCIATION

## The Fair Labor Standards Act (FLSA): Implementing the “Overtime” Rule

### Final Rule

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### Preparing for Implementation

All programs must be in compliance with the Final Rule by December 1, 2016. Approach the below list as suggestions to consider, but remember that each state and each program will have its own unique circumstances. All final decisions should be made in consultation with an attorney.

- **Update** job descriptions to match actual duties as needed.
- **Review** timekeeping procedures, especially with those who are reclassified, as well as managers. Be sure to consider “working lunch breaks,” conferences, and parent-teacher time.
- **Examine** job descriptions and duties. Based on duties performed and whether the program qualifies as educational establishment, can teachers qualify as exempt?
  - Hourly employees and employees who fail the duties test (meaning that they are not eligible for white collar overtime exemption) should be receiving overtime pay and, therefore, will not be affected by the Final Rule.
  - Employees who work fewer than 40 hours per week will not be affected.
- **Identify** all employees who are currently classified as exempt but whose salaries are below \$47,476 per year or \$913 per week.
  - Two options: Reclassify as non-exempt and pay for overtime or increase to meet salary level test (\$913, \$47,476)
  - 10% of a standard salary can be satisfied through non-discretionary means.  
For example: employers could pay \$821.70/week, so long as salary and non-discretionary means equal or exceed \$11,869 each quarter.
- **Communicate** with employees who will be affected.
- **Check** state regulations to be sure to give employees adequate notice about changes in pay.
- **Calculate** the costs of overtime for nonexempt employees by using one of the following formulas:
  1.  $(\text{Weekly salary}/40) \times 1.5 \times \text{overtime hours} = \text{overtime pay per week}$   
Weekly salary remains the same, and overtime is paid in addition.  
For example: an employee earns \$800 per week and works 50 hours per week  
At current rate, \$300 of overtime pay will be earned each week.  
 $\$800/40 = \$20 \times 1.5 \times 10 = \$300$  in overtime pay
  2.  $\text{Weekly salary}/[40 + (\text{estimated overtime hours} \times 1.5)] = \text{new hourly rate}$   
Weekly salary is lowered, and overtime is paid. An employer does not need to maintain current hourly rate. A lower hourly rate with well-estimated overtime hours can be cost neutral.  
For example: an employee earns \$800 per week and works 50 hours per week  
A lower hourly rate with well-estimated overtime hours can be cost neutral.  
 $\$800/[40 + (10 \times 1.5)] = 800/55 = \$14.55 = \text{new hourly}$   
 $\$14.55 \times 40 = \$582.00$  (standard pay)  
 $\$14.55 \times 1.5 \times 10 = \$218.25$  (overtime pay)