

OVERTIME OVERHAUL

DOL SAYS DON'T WORRY, BUT SHOULD YOU?

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OVERTIME – THE FUNDAMENTALS

FLSA – WAGE & HOUR LAW

The Fair Labor Standards Act (FLSA) requires that most employees be paid:

- at least the federal **minimum wage** for all hours worked and
- **overtime pay** (at time and one-half the *regular rate of pay*) for all hours worked over 40 hours in a workweek.

The FLSA is an employee protection act and employees are generally presumed entitled to overtime. Strict record-keeping requirements.

The FLSA, however, provides an exemption from both minimum wage and overtime pay for certain **“white collar”** workers.

“WHITE COLLAR” EXEMPTIONS

Categories of “white collar” employees that may be exempt from both minimum wage and overtime requirements of the FLSA:

- Executive
- Administrative
- Professional
- Outside Salespersons
- Highly Skilled Computer Employees
- Highly Compensated Employees



“WHITE COLLAR” EXEMPTIONS

Categories of “white collar” employees that may be exempt from both minimum wage and overtime requirements of the FLSA:

- **Executive**
- **Administrative**
- **Professional – (EAP)**
- **Outside Salespersons**
- **Highly Skilled Computer Employees**
- **Highly Compensated Employees – (HCE)**



FLSA - WAGE & HOUR LAW

Non-exempt employees = eligible for overtime

Exempt employees = ineligible for overtime

SO WHICH EMPLOYEES ARE “EXEMPT”?

- For EAP and HCE employees whether they are exempt or non-exempt depends on:
 - how they are paid
 - how much they are paid
 - what kind of work do they do

REQUIREMENTS FOR EXEMPTION

Remember, exemption depends on three things:

1. How employees are paid
2. How much they are paid
3. What kind of work do they do

REQUIREMENTS FOR EXEMPTION

Remember, exemption depends on three things:

1. *How* employees are paid  SALARY BASIS

- employee must be paid a pre-determined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed
- no partial day deductions

REQUIREMENTS FOR EXEMPTION

Remember, exemption depends on three things:

1. How employees are paid  **SALARY BASIS**
 - employee must be paid a pre-determined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed
 - no partial day deductions
2. ***How much*** they are paid  **SALARY LEVEL**
 - currently this is \$455/week or \$23,660 per year

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 - no partial day deductions
2. How much they are paid  **SALARY LEVEL**
 - currently this is \$455/week or \$23,660 per year
3. What *kind of work* do they do  **JOB DUTIES TEST**
 - each category of exemption – Executive, Administrative & Professional - has different required job duties as set forth in the regulations

REQUIREMENTS FOR EXEMPTION

Remember, exemption depends on three tests:

1. How employees are paid

- exempt

Must satisfy ALL THREE of these tests to be exempt from overtime.

is
or

2. How

-

Paying salary alone is not enough!

3. Whether

- e.

Salaried employee is not the same as "exempt" employee.

WHITE COLLAR DUTIES TEST

Executive, Administrative & Professional - must have different required white collar job duties as set forth in the regulations (ex. regularly supervises 2 or more full-time employees)

EXCEPTIONS

The salary level and salary basis tests do not apply to:

- Outside Sales Employees
- Doctors
- Lawyers
- Certain computer-related occupations paid at least \$27.63 per hour

“SPECIAL” EXCEPTIONS

The salary level and salary basis tests do not apply to:

- Teachers
 - primary duty is teaching, tutoring, instructing or lecturing at an educational establishment
- Academic Administrative Employees
 - engaged in work relating to the academic operations and functions of a school rather than work relating to the general business operations of the school
 - paid salary threshold OR a salary at least equal to the entrance salary for teachers in the same educational establishment



THE NEW OT RULE

Announced May 18, 2016

Published in the Federal Register May 23,
2016 www.federalregister.gov

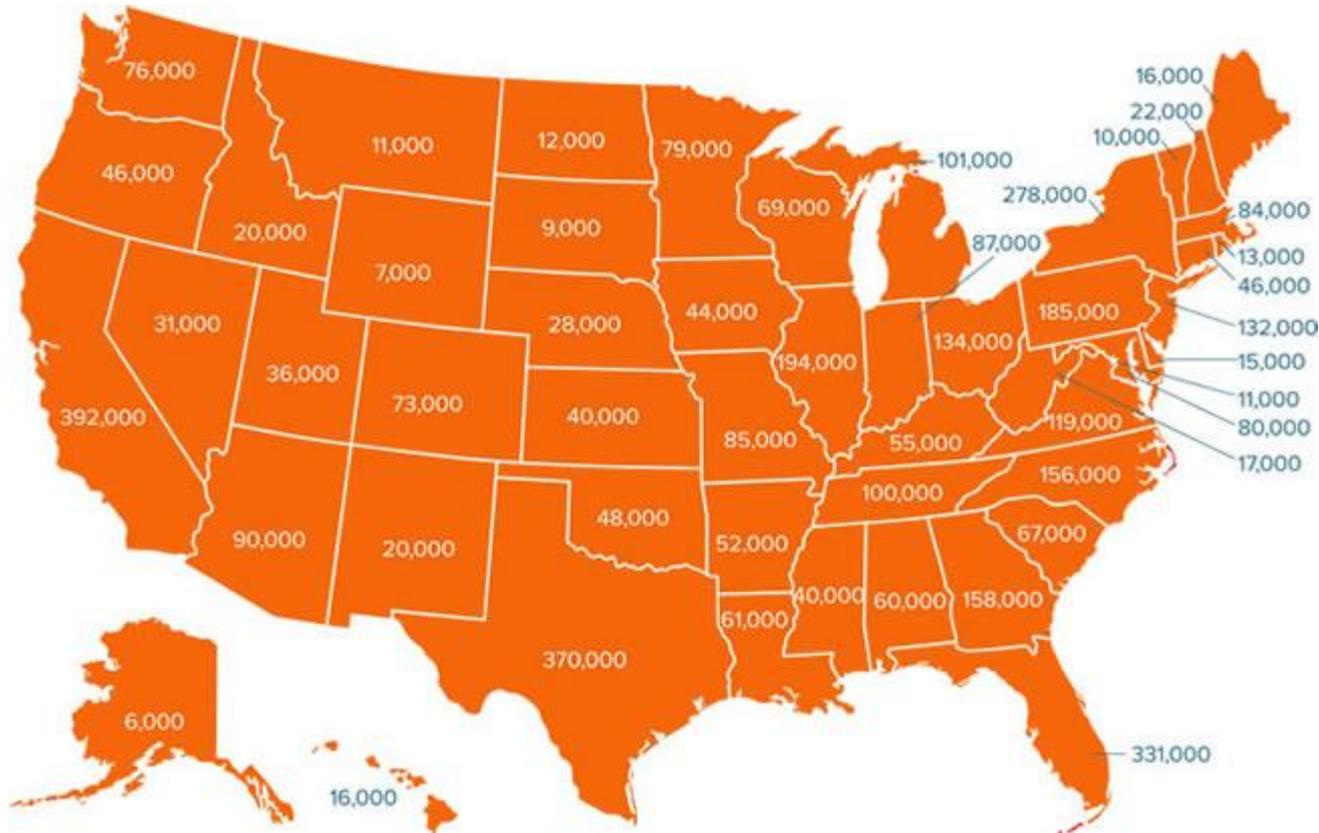
Effective December 1, 2016



THE NEW OT RULE

For EAP (Executive, Administrative and Professional) exemptions and HCE (Highly Compensated Employees)

ADDITIONAL 4.2 MILLION WORKERS ACROSS THE COUNTRY WILL BE NON-EXEMPT



Source: <https://www.dol.gov/featured/overtime>

THE FINAL RULE

Remember, exemption depends on three things:

1. How employees are paid → **SALARY BASIS**
 - employee must be paid a pre-determined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed
 - no partial day deductions
2. **How much** they are paid → **SALARY LEVEL**
 - currently this is \$455/week or \$23,660 per year
3. What kind of work do they do → **JOB DUTIES TEST**
 - each category of exemption – Executive, Administrative & Professional have different required white collar job duties as set forth in the regulations (ex. regularly supervises 2 or more employees)

THE FINAL RULE – SALARY THRESHOLD

Currently:
\$455/wk
\$23,660

Proposed:
\$970/wk
\$50,440

FINAL RULE:
\$913/wk
\$47,476

THE FINAL RULE – SALARY THRESHOLD

- 40th percentile of weekly earnings of FT salaried workers in the lowest wage Census Region – the South

**FINAL RULE:
\$913/wk
\$47,476**

REGION	40 th Percentile (4 th Qtr 2015)
South	\$913
Midwest	\$994
Northeast	\$1,036
West	\$1,050

THE FINAL RULE – HIGHLY COMPENSATED EMPLOYEES

Currently:
\$100,000

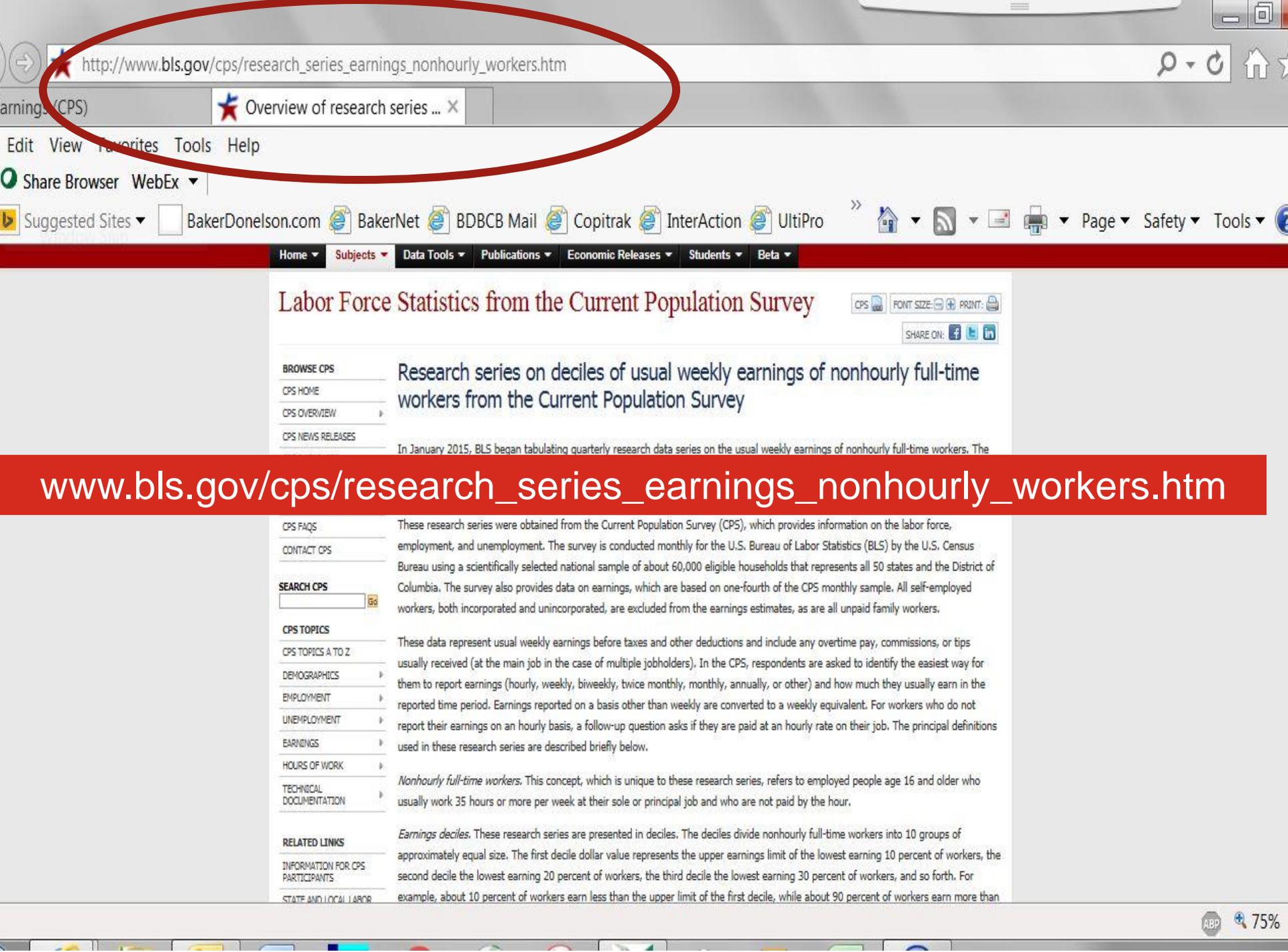
Proposed:
90th
percentile
of FT
workers
nationally

FINAL RULE:
\$134,004

AUTOMATIC UPDATE

The salary threshold will **automatically update every three years** beginning **January 1, 2020**

- will update to 40th percentile of weekly earnings for FT salaried workers in lowest wage region
 - will update HCE to maintain equivalent of 90th percentile of earnings of all FT salaried workers nationwide
 - based on Bureau of Labor Statistics
- estimates - \$51,168 and HCE \$147,524 in 2020



http://www.bls.gov/cps/research_series_earnings_nonhourly_workers.htm

Overview of research series ... X

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Labor Force Statistics from the Current Population Survey

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Research series on deciles of usual weekly earnings of nonhourly full-time workers from the Current Population Survey

In January 2015, BLS began tabulating quarterly research data series on the usual weekly earnings of nonhourly full-time workers. The

www.bls.gov/cps/research_series_earnings_nonhourly_workers.htm

- CPS FAQs
- CONTACT CPS
- SEARCH CPS
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- DEMOGRAPHICS
- EMPLOYMENT
- UNEMPLOYMENT
- EARNINGS
- HOURS OF WORK
- TECHNICAL DOCUMENTATION
- RELATED LINKS
- INFORMATION FOR CPS PARTICIPANTS
- STATE AND LOCAL LABOR

These research series were obtained from the Current Population Survey (CPS), which provides information on the labor force, employment, and unemployment. The survey is conducted monthly for the U.S. Bureau of Labor Statistics (BLS) by the U.S. Census Bureau using a scientifically selected national sample of about 60,000 eligible households that represents all 50 states and the District of Columbia. The survey also provides data on earnings, which are based on one-fourth of the CPS monthly sample. All self-employed workers, both incorporated and unincorporated, are excluded from the earnings estimates, as are all unpaid family workers.

These data represent usual weekly earnings before taxes and other deductions and include any overtime pay, commissions, or tips usually received (at the main job in the case of multiple jobholders). In the CPS, respondents are asked to identify the easiest way for them to report earnings (hourly, weekly, biweekly, twice monthly, monthly, annually, or other) and how much they usually earn in the reported time period. Earnings reported on a basis other than weekly are converted to a weekly equivalent. For workers who do not report their earnings on an hourly basis, a follow-up question asks if they are paid at an hourly rate on their job. The principal definitions used in these research series are described briefly below.

Nonhourly full-time workers. This concept, which is unique to these research series, refers to employed people age 16 and older who usually work 35 hours or more per week at their sole or principal job and who are not paid by the hour.

Earnings deciles. These research series are presented in deciles. The deciles divide nonhourly full-time workers into 10 groups of approximately equal size. The first decile dollar value represents the upper earnings limit of the lowest earning 10 percent of workers, the second decile the lowest earning 20 percent of workers, the third decile the lowest earning 30 percent of workers, and so forth. For example, about 10 percent of workers earn less than the upper limit of the first decile, while about 90 percent of workers earn more than

BLS began tabulating these research series in response to a request by the Office of the Chief Economist of the Department of Labor.

Tables

- Quarterly
 - [First quarter 2016](#)
 - [Fourth quarter 2015](#)
 - [Third quarter 2015](#)
 - [Second quarter 2015](#)
 - [First quarter 2015](#)
 - [Fourth quarter 2014](#)
- Annual
 - [Annual average 2015](#)
 - [Annual average 2014](#)
 - [Annual average 2013](#)

Last Modified Date: April 19, 2016

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Deciles of usual weekly earnings of nonhourly full-time workers by selected characteristics, 4th quarter 2015 averages

Selected characteristics	Number of workers (in thousands)	Upper limit of:								
		First decile	Second decile	Third decile	Fourth decile	Fifth decile (median)	Sixth decile	Seventh decile	Eighth decile	Ninth decile
Total, both sexes	51,640	\$509	\$692	\$838	\$972	\$1,146	\$1,359	\$1,591	\$1,911	\$2,577
Men	29,218	563	746	907	1,082	1,272	1,508	1,823	2,124	2,905
Women	22,422	477	634	760	889	1,012	1,161	1,391	1,654	2,117
White, both sexes	41,336	518	710	847	985	1,154	1,376	1,630	1,923	2,623
Men	23,804	576	753	918	1,100	1,308	1,533	1,860	2,216	2,919
Women	17,532	485	644	768	892	1,021	1,166	1,402	1,665	2,175
Black or African American, both sexes	4,989	437	577	660	793	931	1,088	1,261	1,468	1,879
Men	2,369	486	597	699	824	959	1,161	1,343	1,534	1,902
Women	2,620	408	517	642	755	910	1,028	1,176	1,428	1,835
Asian, both sexes	4,103	596	804	970	1,142	1,356	1,568	1,868	2,248	2,885
Men	2,376	641	906	1,092	1,249	1,483	1,770	1,919	2,316	3,134
Women	1,727	513	711	888	1,000	1,156	1,420	1,615	1,900	2,417
Hispanic or Latino, both sexes	5,842	402	545	668	772	914	1,048	1,226	1,473	1,995
Men	3,598	399	555	678	781	942	1,084	1,303	1,608	2,100
Women	2,245	404	527	648	762	873	1,005	1,147	1,356	1,749
Region										
Northeast (1)	10,436	524	725	880	1,036	1,207	1,445	1,673	1,976	2,879
Midwest (2)	10,406	572	734	867	994	1,154	1,360	1,564	1,902	2,469
South (3)	19,716	479	633	768	913	1,054	1,242	1,508	1,866	2,418
West (4)	11,082	560	731	887	1,050	1,229	1,453	1,752	2,062	2,807

Footnotes:

- (1) The Northeast region includes Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont.
- (2) The Midwest region includes Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin.
- (3) The South region includes Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.
- (4) The West region includes Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington,

BONUSES AND INCENTIVE PAY

- up to **10%** of the salary threshold can be met by non-discretionary bonuses, incentives and commission
- must be **paid at least quarterly**
- **non-discretionary** – compensation promised to employees to induce them to work more efficiently or stay with the company.
- Employers can make a **catch up payment** at the end of the quarter (one pay period to make up for the shortfall)



BONUSES AND INCENTIVE PAY – CATCH UP

What Does this Mean?

- Employers must pay employee at least 90% of the salary threshold (\$821.70/week which is 90% of \$913)
- The remaining \$91.30/week can be paid in commissions, non-discretionary bonuses or incentives
- If at the end of the quarter, employee didn't earn \$91.30/week in bonus/commission . . . one additional pay period to pay a lump sum to raise the employees earnings for the quarter to the salary threshold



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- Executive
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HIGHLY COMPENSATED EMPLOYEES

- **Total annual compensation** of at least \$134,004
 - base salary must be \$47,476/year (\$913/week)
- Perform **office or non-manual work**
- **Customarily and regularly** perform any one or more of the exempt duties identified in the standard tests for the executive, administrative or professional exemptions

HIGHLY COMPENSATED EMPLOYEES

- Total annual compensation **includes**:
 - Base salary
 - Commissions
 - Nondiscretionary bonuses
 - Other nondiscretionary compensation earned during a 52-week period
- Total annual compensation **does not include**:
 - Credit for board, lodging or other facilities
 - Payments for medical or life insurance
 - Contributions to retirement plans or fringe benefits



HIGHLY COMPENSATED EMPLOYEES

- If an employee's total annual compensation does not equal \$134,004 by the end of the year:
 - **“Catch up payment”** - the employer may, within one month after the end of the year, make one final payment to reach the \$134,004 level
- The \$134,004 may be pro-rated for employees who do not work the full year
- The employer may use any 52-week period at the year



IMPACT ON HIGHER ED AND TIPS FOR RECLASSIFICATION

COMPLIANCE PERIOD

**Compliance period is from now until
December 1, 2016**

DON'T WAIT
UNTIL
IT'S TOO
LATE!



DOL SAYS “DON’T WORRY”

- Concurrent with the Final Rule, DOL published “Guidance for Higher Education Institutions on Paying Overtime under the Fair Labor Standards Act” (<https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>)

*“Because of **special regulations** that apply to certain personnel at higher education institutions, many white collar employees at higher education institutions are not subject to the salary level test or are subject to a different salary level test and therefore will not be affected by the new salary level”*

“SPECIAL REGULATIONS”

- Teachers
- Academic Administrative Employees – *directly related to academic instruction or training*
 - College/University Administrators involved with faculty and curriculum
 - Department Heads
 - Lab Administrators
 - Academic Counselors – advising students on academics, administering testing

DON'T WORRY?

The new salary threshold directly affects the exempt classification of positions across campus, primarily those falling under the **administrative** and **executive** exemptions.

EAP EXEMPTIONS IN HIGHER ED

- **Executive**

- Department heads

- **Administrative**

- Admissions and financial aid
- Academic advisors and counselors
- Development officers and fundraisers

- **Professional**

- Learned Professionals: researchers, CPAs, certified athletic trainers, librarians, post-doctoral fellows
- Teachers: professors, some coaches, adjunct instructors



IMPACT ON HIGHER ED: FINANCIAL

- **Salary increases for affected exempt employees**
- **Overtime payments** to newly classified non-exempt employees
- **Hiring additional staff** due to financial and resource constraints
- **Benefit costs** given to reclassification of employee jobs
- **Salary adjustments** to ensure internal equity and prevent wage compression
- **Possible need for higher tuition** to cover budget shortfalls

IMPACT ON HIGHER ED: MORALE

- **Perceived loss of prestige and credibility** due to reclassification to nonexempt
- **Changes in job** such as diminished job autonomy, less flexibility in work hours and decreased opportunity for career development or advancement
- **Reduction in the amount and type of services** that can be provided to students or employees due to fiscal and resource restraints
- **Change in benefits** (e.g. vacation, tuition reimbursement)

IMPACT ON HIGHER ED: MODIFICATION OF ADMINISTRATIVE PROCESSES

- **New or expansion of existing timekeeping systems**
- Updates to existing **job description responsibilities** to reflect change in exemption status
- Updates to **employee benefits** (e.g. vacation, tuition reimbursement, retirement match, etc.)
- Changes to other **compensation and benefit policies and practices** (e.g. travel policy, etc.)
- Possible to changes to **organizational structures, redistribution of workloads and delivery of services**

COACHES

- Head coaches and assistant coaches employed by higher education institutions may qualify for the **teacher** exemption:
 - primary duty is instructing student-athletes in how to perform their sport
 - primary duty is NOT recruiting, manual labor, or non-teaching activity
- Amount of time spent instructing is relevant but not conclusive
- Important that the coach's primary duty is instructing student-athletes about how to perform their sport, physical health, teamwork, safety, etc.

STUDENTS

- Generally, students who work on campus are hourly workers who do not work more than 40 hours per week. The Final Rule does not affect these students
- **Graduate teaching assistants, research assistants, and residential assistants** are also not affected by the Final Rule
 - TA's exempt under teacher exemption
 - Research assistants not considered to have an employment relationship with the school (if they are under faculty supervision in the course of obtaining their degree)
 - Residential assistants not considered to have an employment relationship with the school

RECLASSIFICATION OPTIONS

- **Raise salary to \$47,476**
 - evaluate which employees are close to the new threshold
 - if the employee works enough overtime, may be more cost efficient to raise their salary
- **Convert to hourly and pay or limit OT**
- **Adjust schedules, spread work hours, or reorganize workloads**

RECLASSIFICATION OPTIONS

- **Pay current salary**
 - If employee earns under \$47,476 but does not work overtime, no impact on pay
 - e.g. employee earns \$42,000 but works a strict 9-5 schedule, can continue to pay the fixed salary (just have to document hours worked)
- **Pay overtime above a salary**
 - can continue to pay a salary for fixed hours, which can be more than 40 hours per week
 - only required to pay half time for hours already included in salary

FIRST STEPS

1. Conduct an audit of potential positions and employees impacted
 - identify exempt employees earning less than \$46,476
 - costs to bring employees to salary threshold
 - wage compression issues
 - position reclassification issues
 - benefit cost changes



FIRST STEPS

2. Determine hours the employee works
 - Suffered or Permitted (even if not requested)
 - Waiting Time
 - On-Call Time
 - Meal and Rest Periods
 - Training Time
 - Travel Time
 - “Hidden” OT



FIRST STEPS

3. Review, discuss and revise:
 - Position management plans and processes
 - Organization and job structure
 - Workforce or succession plans
 - Staffing levels
 - Career advancement
4. Review job descriptions and tasks of impacted positions
 - determine if certain exempt tasks may be reassigned or maintained with the current position
5. Assess time and attendance processes, work flows and systems to support roll out of changes

MIXED CLASSIFICATION POSITIONS

- There may be a positions that contains both exempt and non-exempt employees based solely on their salary
 - same duties and responsibilities but salaries create different classifications
 - requirements of timekeeping and possible resistance
 - monitoring “off the clock” work – including remote work
 - if employee is manager, who will do the monitoring?
 - partial-day deductions
 - benefit differentiation (exempt v. non-exempt)
 - morale issues

TIMEKEEPING REQUIREMENTS

- It is the **employer's obligation** that non-exempt employees record their time accurately
 - “as long as they are complete and accurate, employers may use any method they chose for tracking and recording hours”
- Records must include:
 - **Total hours worked each workday and each workweek**
 - time actually worked
 - Total daily or weekly straight-time earnings
 - Regular hourly pay rate for any week when overtime is worked
 - Total overtime pay for the workweek

TIMEKEEPING REQUIREMENTS

- what is going to be your time keeping mechanism for newly classified employees?
- who is going to monitor those time records?
 - recommend monitoring newly classified employees' records regularly at first
 - require verification

COMP TIME FOR PUBLIC EMPLOYEES

- Public colleges and universities may pay employees “compensatory time off” instead of a cash payment for overtime hours
 - The college/university must be public (a political subdivision of the State)
 - Employees may not accrue more than 240 hours of comp time (unless in public safety – then 480 hours)
 - Comp time must be credited no less than 1.5 hours for every hour of overtime worked
 - Comp time must be established via a collective bargaining agreement or other formal agreement between the school and labor union, or the school and the employee
- Comp time is not available to private institutions

NOW IS THE TIME TO CLEAN HOUSE!



Audit all of your exemptions and make any necessary changes.

- especially where you have a mixed classification position
- also take a look at independent contractor relationships, time-keeping methods, off-the-clock work

DOL WILL BE KNOCKING!

- DOL's FY2017 budget proposes spending **\$277 million on Wage and Hour Division enforcement**
 - \$50 million more than 2016
 - DOL recovered more than \$246 million in back wages in 2015 alone for more than 240,000 workers.
 - In 2015, the Division found violations in 79% of its investigations.



STAY TUNED

BAKER DONELSON will keep you updated with alerts and follow-up webinars. Make sure you are on our mailing list!

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