

# COMPLIANCE OVERVIEW

Provided by A.G. Insurance Agencies, Inc.

## FAQs—New Overtime Pay Rules

On **May 18, 2016**, the U.S. Department of Labor (DOL) announced a [final rule](#) regarding overtime wage payment qualifications for the “white collar exemptions” under the Fair Labor Standards Act (FLSA). Employers will need to comply with this rule by **Dec. 1, 2016**.

The final rule increases the salary an employee must be paid in order to qualify for a white collar exemption. The required salary level is increased to **\$47,476** per year and will be automatically updated every three years. The final rule does **not** modify the duties test employees must meet to qualify for a white collar exemption.

Along with the final rule, the DOL has released [Questions and Answers](#) on a number of topics related to the new overtime pay requirements. This Compliance Overview includes answers to some commonly asked questions.

### LINKS AND RESOURCES

The DOL has provided the following resources to help employers understand the overtime rule changes:

- Fact sheets for [nonprofit organizations](#), [institutions of higher learning](#) and [public agencies](#)
- Guidance for [private sector employers](#), [nonprofit organizations](#) and [institutions of higher learning](#)
- Overview of the [overtime regulations](#)

### HIGHLIGHTS

#### FINAL OVERTIME PAY RULE

- The salary level for administrative, executive and professional employee exemptions will increase to \$47,476.
- The salary level for the highly compensated employee exemption will increase to \$134,004.
- The final rule does not change the duties test for white collar exemptions.

#### IMPORTANT DATES

- On May 18, 2016, the DOL announced a final rule updating white collar exemption qualification requirements.
- On Dec. 1, 2016, the final rule becomes effective. Employers are required to comply with the final rule by this date.

## IN GENERAL

### *What are the significant changes to the overtime regulations for white collar salaried workers?*

To restore the effectiveness of the salary level test, the DOL is setting the new standard salary level equal to the 40th percentile of weekly earnings for full-time salaried workers in the lowest-wage Census region, which is currently the South. The final rule increases the standard salary level from \$455 per week (\$23,660 for a full-year worker) to **\$913 per week (\$47,476 for a full-year worker)**.

In order to prevent the salary level requirements from again becoming outdated and ineffective, the DOL is establishing mechanisms for automatically updating the salary and compensation levels every three years to maintain them at the levels set in this rulemaking.

Finally, for the first time, employers will be able to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level, provided that these payments are made on a quarterly or more frequent basis.

The DOL is also setting the annual compensation level for certain [HCEs](#) equal to the annualized value of the 90th percentile of earnings for full-time salaried workers nationally (\$134,004).

### *How do the current regulations, the proposed rule and the final rule compare?*

	Current regulations (from 2004 to Dec. 1, 2016)	Proposed Rule	Final Rule
Salary Level	\$455 weekly	\$970 weekly (40th percentile of full-time salaried workers nationally)	\$913 weekly (40th percentile of full-time salaried workers in the lowest-wage Census region, currently the South)
HCE Total Annual Compensation Level	\$100,000 annually	\$122,148 (90th percentile of full-time salaried workers nationally)	\$134,004 (90th percentile of full-time salaried workers nationally)
Automatic Adjusting	None	Annually, with requests for comment on a CPI or percentile basis	Every three years, maintaining 40th and 90th percentiles
Bonuses	Cannot apply nondiscretionary bonuses and commissions toward the standard salary level	Request for comment on counting nondiscretionary bonuses and commissions toward standard salary level	Up to 10 percent of standard salary level can come from nondiscretionary bonuses, incentive payments, and commissions, paid at least quarterly
Standard Duties Test	See WHD Fact Sheet #17A for a description of duties	No specific changes proposed to the standard duties test; request for comment on whether the duties tests are working as intended	No changes to the standard duties test

## ***How will employers implement the updated salary level requirement established in the final rule?***

Employers have a range of options for responding to the updated standard salary level. For each affected employee newly entitled to overtime pay, employers may:

1. Increase the salary of an employee who meets the duties test to at least the new salary level to retain his or her exempt status;
2. Pay an overtime premium of one and a half times the employee's regular rate of pay for any overtime hours worked;
3. Reduce or eliminate overtime hours;
4. Reduce the amount of pay allocated to base salary (provided that the employee still earns at least the applicable hourly minimum wage) and add pay to account for overtime for any hours worked over 40 in the workweek, to hold total weekly pay constant; or
5. Use some combination of these responses.

The circumstances of each affected employee will likely impact how employers respond to the final rule. For example, employers may be more likely to give raises to employees who regularly work overtime and earn slightly below the new standard salary level, in order to maintain their overtime-exempt status so that the employer does not have to pay the overtime premium. For employees who rarely or almost never work overtime hours, employers may simply choose to pay the overtime premium whenever necessary. The DOL accounted for these (and other) possible employer responses in estimating the likely costs, benefits and transfers of the final rule.

Nothing in the rule requires employers to change employees' pay from salaried to hourly, even if the employees' classification changes from exempt to overtime-eligible. Employers may choose Options 2 and 4 above while continuing to pay newly overtime-eligible employees on a salaried basis.

## ***When will these changes take effect?***

The effective date of this final rule is **Dec. 1, 2016**. On that day, the new standard salary level (\$913 per week or \$47,476 per year) and HCE total compensation requirement (\$134,004 per year) will take effect. Future automatic updates to these thresholds will occur every three years, beginning on Jan. 1, 2020.

## ***Is the DOL making any adjustments to the standard duties tests?***

The DOL is not making any changes to the standard duties test. The DOL believes that the increase to the standard salary level, coupled with automatic updating in the future, will address concerns that some workers who satisfy the standard duties test should be entitled to overtime pay because they are

performing substantial amounts of overtime-eligible work (e.g., operating cash registers, stocking shelves, etc.). The DOL also heard concerns from many employers, both in pre-rulemaking outreach and in comments on the proposal, that changes to the standard duties test would be disruptive to employers.

## COVERAGE

### ***Who is covered by the FLSA? Are employees of small businesses covered?***

The FLSA establishes minimum wage, overtime pay, recordkeeping and youth employment standards covering employees in the private sector and in federal, state and local governments. Covered nonexempt workers are entitled to a federal minimum wage of not less than \$7.25 per hour currently. Overtime pay at a rate not less than one and one-half times the regular rate of pay is required after 40 hours of work in a workweek.

Generally, employees of enterprises that have an annual gross volume of sales made or that do business of \$500,000 or more are covered by the FLSA. In addition, employees of certain entities are covered by the FLSA regardless of the amount of gross volume of sales or business done. These entities include: hospitals; businesses providing medical or nursing care for residents; schools (whether operated for profit or not for profit); and public agencies.

Even if an employer is not covered on an enterprise-wide basis, employees may be individually covered by the FLSA if their work regularly involves them in commerce between states ("interstate commerce"). The FLSA covers individual workers who are "engaged in commerce or in the production of goods for commerce." For more information on enterprise and individual coverage under the FLSA, see [Fact Sheet 14: Coverage Under the Fair Labor Standards Act \(FLSA\)](#).

### ***Is there an exemption for nonprofit organizations from either the FLSA or the DOL's overtime regulations governing white collar workers?***

Neither the FLSA nor the DOL's regulations provide an exemption from overtime requirements for nonprofit organizations. Thus, the final rule may impact nonprofit organizations having an annual dollar volume of sales or business done of at least \$500,000, or those with employees individually covered by the FLSA. Nonprofit charitable organizations are not covered enterprises under the FLSA unless they engage in ordinary commercial activities that result in a sufficient amount of sales made or business done, such as operating a gift shop or providing veterinary services for a fee. However, employees of employers that are not covered by the FLSA on an enterprise basis may still be entitled to its protections if they are individually engaged in interstate commerce. For more information on enterprise and individual coverage for nonprofit organizations, see [Fact Sheet 14A: Non-Profit Organizations and the Fair Labor Standards Act \(FLSA\)](#).

## ***Is there an exemption for schools and institutions of higher education from either the FLSA or the DOL's overtime regulations governing white collar workers?***

Schools and institutions of higher education are generally covered by the FLSA's minimum wage and overtime provisions. Several provisions apply, however, to many employees at these institutions that exempt them from the final rule.

**Teachers** are exempt if their primary duty is teaching, tutoring, instructing or lecturing. "Teachers" include, for example, regular academic teachers, kindergarten or nursery school teachers, teachers of gifted or disabled children, professors, adjunct instructors, teachers of skilled and semi-skilled trades and occupations, home economics teachers, vocal or instrument music teachers, and, under certain circumstances, athletic coaches and assistant coaches. Although a preschool may engage in some educational activities, preschool employees whose primary duty is to care for the physical needs of the facility's children would not meet the requirements for the exemption as a bona fide teacher.

Generally, the DOL views **graduate** and **undergraduate students** who are engaged in research under a faculty member's supervision in the course of obtaining a degree to be in an educational relationship and not an employment relationship with the school or with a grantor. As such, the DOL will not assert that these workers are entitled to overtime.

In addition, the **administrative personnel** who help run higher education institutions and interact with students outside the classroom, such as department heads, academic counselors and advisors, intervention specialists and others with similar responsibilities are subject to a special salary threshold that does not apply to white-collar employees outside of higher education. Instead, they are not eligible for overtime if they are paid at least as much as the entrance salary for teachers at their institution.

Finally, **public universities** or **colleges** that qualify as a "public agency" under the FLSA may compensate overtime-eligible employees through the use of compensatory time off in lieu of cash overtime premiums.

## ***Must employees earning below the new level be converted to hourly pay?***

No. Nothing in the FLSA or in the regulations governing the white collar exemptions requires employers to pay overtime-eligible employees on an hourly basis. There are millions of salaried employees (white and blue collar alike) who are legally entitled to overtime pay under the current regulations.

## ***Will newly overtime-eligible employees have to record their hours on a daily basis or "punch a time clock"?***

No. Overtime-eligible workers are not required to punch a time clock. The FLSA requires that employers keep certain records for each nonexempt worker. That's so workers can be sure that they get paid the wages that they earn and are owed. Employers have options for accounting for workers' hours—some of which are very low cost and not burdensome. There is no particular form or order of records required and employers may choose how to record hours worked for overtime-eligible employees. For example,

where an employee works a fixed schedule that rarely varies, the employer may simply keep a record of the schedule and then indicate the changes to the schedule that the worker actually worked when the worker's hours vary from the schedule ("exceptions reporting"). See [Fact Sheet 21: Recordkeeping Requirements under the Fair Labor Standards Act \(FLSA\)](#).

For employees with a flexible schedule, an employer does not need to require an employee to sign in each time she starts and stops work. The employer must keep an accurate record of the number of daily hours worked by the employee, not the specific start and end times. So an employer could allow an employee to just provide the total number of hours she worked each day, including the number of overtime hours, by the end of each pay period.

The DOL has material available to help employers figure out what method of recording hours works best for their workforce.

***Does the FLSA allow for a flexible schedule for overtime eligible employees? Can employers still allow employees to work from home or have flexible schedules?***

Yes. The FLSA does not require minimum or maximum hours for a shift, or prohibit split shifts. There is no requirement that a worker must have a predetermined schedule or restrictions on where the work is performed. There is also no restriction on when the work may be performed. See [Fact Sheet 22: Hours Worked Under the FLSA](#).

## **SALARY LEVEL, NONDISCRETIONARY BONUSES AND INCENTIVE PAYMENTS**

***What are the new salary and compensation levels under this final rule?***

When the final rule takes effect on Dec. 1, 2016, the "standard" salary level will increase to \$913 per week (equivalent to \$47,476 annually for a full-year worker), up from \$455 per week (\$23,660 annually). The total annual compensation requirement for highly compensated employees will increase to \$134,004 per year, up from \$100,000 per year. These levels will update automatically every three years, beginning on Jan. 1, 2020, to maintain the earnings percentiles set in the final rule.

***May employers use bonuses to satisfy part of the new standard salary level test?***

Yes. The DOL is changing the regulations to allow nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary test requirement. Such bonuses include, for example, nondiscretionary incentive bonuses tied to productivity or profitability (e.g. a bonus based on the specified percentage of the profits generated by a business in the prior quarter). The DOL recognizes that some businesses pay significantly larger bonuses; where larger bonuses are paid, however, the amount attributable toward the standard salary level is capped at 10 percent of the required salary amount.

For employers to credit nondiscretionary bonuses and incentive payments (including commissions) toward a portion of the standard salary level test, such payments must be paid on a quarterly or more frequent basis.

### ***What's the difference between a discretionary bonus and a nondiscretionary bonus?***

Nondiscretionary bonuses and incentive payments (including commissions) are forms of compensation promised to employees to induce them to work more efficiently or to remain with the company. Examples include bonuses for meeting set production goals, retention bonuses and commission payments based on a fixed formula.

By contrast, discretionary bonuses are those for which the decision to award the bonus and the payment amount is at the employer's sole discretion and not in accordance with any preannounced standards. An example would be an unannounced bonus or spontaneous reward for a specific act.

### ***May employers make a catch-up payment in the event that an employee doesn't receive enough in nondiscretionary bonuses and incentive payments (including commissions) in a given quarter to remain exempt?***

Yes, if an employee does not earn enough in nondiscretionary bonuses and incentive payments (including commissions) in a given quarter to retain their exempt status, the DOL permits a "catch-up" payment at the end of the quarter. The employer has one pay period to make up for the shortfall (up to 10 percent of the standard salary level for the preceding 13-week period). Any such catch-up payment will count only toward the prior quarter's salary amount and not toward the salary amount in the quarter in which it was paid. If the employer chooses not to make the catch-up payment, the employee would be entitled to overtime pay for any overtime hours worked during the quarter.

### ***Does the final rule change how employers may use bonuses to satisfy the salary level for highly compensated employees (HCEs)?***

No, the DOL has not made changes to how employers may use bonuses to meet the salary level component of the HCE test. To claim the HCE exemption under the final rule, employers must pay workers at least the standard weekly salary level of \$913 per week on a salary or fee basis, while the remainder of the total annual compensation may include commissions, nondiscretionary bonuses and other nondiscretionary compensation. Because employers may fulfill almost two-thirds of the HCE total annual compensation requirement with commissions, nondiscretionary bonuses and other forms of nondiscretionary deferred compensation, the DOL determined that it would not be appropriate to permit employers to also use nondiscretionary bonuses and incentive payments to satisfy the standard salary amount.

## AUTOMATIC UPDATES

### ***How often will the DOL update the standard salary level and HCE total annual compensation requirements?***

The DOL will update the standard salary and HCE total annual compensation requirements every three years, with the first update taking effect on Jan. 1, 2020. Future automatic updates will take effect on Jan. 1 of 2023, 2026, etc. The DOL will publish a notice of the new updated thresholds in the Federal Register at least 150 days before those updated amounts take effect, and will also publish these updated rates on the Wage and Hour Division's website.

### ***How will the DOL automatically update the standard salary level and HCE total annual compensation requirement?***

The DOL will automatically update the standard salary and HCE total annual compensation levels by applying the exact same method used to set those levels in the final rule. Specifically, the DOL will update the standard salary level to maintain it at the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage Census region, and the DOL will update the HCE total annual compensation level to maintain it at the annual equivalent of the 90th percentile of earnings of full-time salaried workers nationwide.