

New Overtime Rules and White Collar Exemptions

The Department of Labor has made changes to the overtime rules under the fair labor standards act that are **effective December 1, 2016**.

The biggest change: the threshold for paying overtime on any white collar employee has increased from a minimum salary requirement of \$455 per week to \$913 per week. That means effective December 1, 2016, anyone earning less than \$47,476 is generally required to receive overtime pay for time worked in excess of 40 hours.

All payroll is generally subject to overtime rules regardless of pay unless the position qualifies for one of the white-collar exemptions described below. For employees who do not qualify for one of the white collar exemptions, the employee will be classified into one of two categories to determine how to calculate overtime: salary-nonexempt or hourly-nonexempt.

What businesses are covered by the fair labor standards act? This rule generally applies to any business with at least \$500,000 gross revenue and employees engaged in interstate commerce which can be as simple as answering an out of state phone call or performing a web search. Almost all business meet the interstate commerce rule.

A business owner who owns 20% or more, and who manages the business, is exempt from these rules. The regulations do not state whether a spouse is also exempt. This is very important for S-Corporation owners who must pay themselves a fair salary.

The new salary exemption thresholds will be adjusted every 3 years.

Existing rules still on the books that may be more important under the new rules:

Fluctuating Work Week: There has always been a special method of calculating overtime called Fluctuating Work Week, where you could pay a salary to an employee and that salary would be considered all compensation for hours worked, except that in the weeks where the employee worked more than 40 hours, the employee was due an additional ½ time at the hourly rate for the hours worked that pay period. For example, an employee making \$800 per week and working 50 hours in a particular work week would be considered to earn \$16 per hour. The employer would owe an additional \$8 per hour for the 10 hours of overtime in that particular week.

On Call Time: Some employee must stay on the premises or be available on call. The general interpretation has been if the employee is free to leave the premises and do personal tasks, those hours are not considered hours worked for overtime purposes.

NEW WHITE-COLLAR EXEMPTIONS - EFFECTIVE DECEMBER 1, 2016

EXECUTIVE

1. Salary of at least \$913 a week (\$47,476 annual). (Quarterly nondiscretionary bonus or incentive can be 10% or \$91 per week)
2. Work not directly and closely related to employee's exempt executive duties cannot exceed 20% of own hours worked in workweek.

All conditions must be met:

1. Primary duty must be managing the enterprise, or a recognized department or subdivision of the enterprise; and
2. Must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
3. The employee must have the authority to hire or fire other employees (or the employee's suggestions as to the hiring, firing, promotion, or other change of status of other employees must be given particular weight).

ADMINISTRATIVE

1. Salary or fees of at least \$913 a week. (\$47,476 annual). (Quarterly nondiscretionary bonus or incentive can be 10% or \$91 per week)
2. Work not directly and closely related to employee's exempt administrative duties cannot exceed 20% of own hours worked in workweek.

All conditions must be met:

1. Primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
2. Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

PROFESSIONAL

1. Salary or fees of at least \$913 a week. (\$47,476 annual). (Quarterly nondiscretionary bonus or incentive can be 10% or \$91 per week)
2. Work not essential part of and necessarily incident to employee's exempt professional duties cannot exceed 20% of own hours worked in workweek.

For the learned professional, all conditions must be met:

1. Primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment; and
2. The advanced knowledge must be in a field of science or learning; and
3. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction

For the creative professional, the following condition must be met:

1. Primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

Teachers are exempt and the salary level test does not apply including kindergarten, nursery school, skilled and semi-skilled trades, automobile driving instruction, aircraft flight instruction, home economics, vocal or music teachers.

Employees practicing law or medicine including medical internship or residency programs are exempt and salary level test does not apply.

OUTSIDE SALESPERSON

1. No salary requirement.
2. Work other than making outside sales or obtaining orders or contracts for services of facilities cannot exceed 20% of hours worked in workweek by nonexempt employees.

All conditions must be met:

1. Primary duty must be making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
2. Must be customarily and regularly engaged away from the employer's place or places of business.

COMPUTER PROFESSIONAL

1. Must be paid on a salary or fee basis of at least \$913 per week; (\$47,476 annual). (Quarterly nondiscretionary bonus or incentive can be 10% or \$91 per week) or
2. Paid at an hourly rate of not less than \$27.63 per hour.

Must be employed as a systems analyst, programmer, software engineer, or other similarly skilled worker in the computer field; and Primary duty must consist of:

1. The application of systems analysis techniques and procedures including consulting with users to determine hardware, software, or system functional specifications;
2. The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs including prototypes based on and related to user or system design specifications;
3. The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
4. A combination of the aforementioned duties, the performance of which requires the same level of skills.

HIGHLY COMPENSATED EMPLOYEES

Must be compensated at least \$134,004 on an annual basis which must include at least \$913 per week.

Must perform office or non-manual work; and must perform at least one of the duties of an exempt executive, administrative, or professional employee identified in the standard tests for exemptions.

WHAT YOU NEED TO DO

Track hours – Employers need to consider hours worked for all of their employees. They should investigate the hours worked for those employees currently classified as exempt to determine what those hours worked will mean from a cost perspective if the employees are classified as non-exempt. For non-exempt employees, it is particularly important to identify how many hours per week each employee works in order to help ensure minimum wage, overtime, and other requirements are met. Monitor non-exempt employees' work ours proactively with threshold reports and/or scheduling tools to help manage overtime costs and ensure that all hours are paid appropriately.

Consider changes to salaries versus re-classification. Consider the options for currently overtime-exempt employees who make less than the new salary threshold, taking into consideration certain nondiscretionary bonuses or incentive compensation, as permitted by the new regulations. To determine if this is a more cost-effective approach, calculate the increased salary and compare it to the estimated overtime costs that would otherwise apply.

Employers should examine these averages across their companies' entire workforces. For example, if the average employee works eight hours of overtime per week at an hourly overtime rate of \$24 per hour, the average overtime paid would be about \$10,000 per year. So, businesses could consider whether or not to increase the base salary of any employees with a salary of at least \$40,000 per year who work the average or more hours per week. Employers may want to extend this analysis to anyone with a lower base salary, but higher than average historical overtime.

Monitor operations and overtime needs. Employers need to look at the ebbs and flows of the business, and consider seasonal fluctuations, too. For example, are there any peaks and lulls? After this evaluation, a business might determine that a more cost-effective strategy is to hire additional full-time, part-time, or even temporary employees.

However, some overtime may be unavoidable. Employers should take a realistic look at their operations to determine if they need a plan to permit overtime during peak periods. If trends from past years can be identified, it may make sense to reserve funds to accommodate extra overtime hours for those peak periods.