New FLSA Overtime Exemption Rules: A Perfect Storm?

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What We Will Cover Today

- ❑ Legal Framework
- ❑ Administration and Enforcement
- ❑ Timeline for the New Rule
- ❑ Overtime Requirements
- ❑ Overtime Exemptions
- ❑ Changes Under the New Rule
- ❑ Employer Compliance Strategies

Legal Framework

- Federal Fair Labor Standards Act
- Maine Employment Practices Law
- Case Law
- Federal Regulations
- Advisory Opinions

Federal v. State Law

- General Rule: No Preemption
- Examples
  - Minimum Wage Rate
  - Comp Time
  - Outside Sales Exemption
- Multi-State Employers
- Interpretation of Federal and State Law
- Minimum Standards

Administration

- Federal
  - US Department of Labor, Wage and Hour Division
  - Office of the Solicitor
- Maine
  - Maine Department of Labor, Bureau of Labor Standards
  - Office of the Attorney General

Complaints & Inspections

- Employee Complaints
- Labor Unions and Other Complaints
- Referrals
- General Schedule Inspections
- Priorities
  - Child Labor
  - Minimum Wage
  - Non-Payment of Overtime

Enforcement

- Private Civil Actions
- Class Actions
- Civil Actions by the Department of Labor
- Remedies
  - Backpay
  - Liquidated Damages
  - Civil Penal Damages
  - Attorneys' Fees

Statutes of Limitation

- The statute of limitation under the federal Fair Labor Standards Act is two years, or in the case of a willful violation, three years.
- *However,* under Maine law, the Office of the Attorney General takes the position that the applicable statutes of limitation for state minimum wage, overtime, and wage payment claims is six years.

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Deep Timeline: "White Collar" Exemptions (1985 – 2004)

- Overtime exemption for "executives," professionals" and "administrators," provided they met certain "duties" tests and were paid on a "salary basis" at or above the required salary threshold
- There were "long" form and "short" form duties tests
- There was a 20% limit on non-exempt work
- The minimum required salary was $250/week under the "short" tests and $155/week under "long" test ($170/week for professionals)

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Deep Timeline: "White Collar" Exemptions (2004 – 2016)

- Overtime exemption for "executives," professionals" and "administrators," provided they meet certain "duties" tests and are paid on a "salary basis" at or above the required salary threshold.
- "Long" form and "short" form duties tests are abandoned in favor of a single test in each category.
- 20% limit on non-exempt work is abandoned.
- The minimum required salary is $455/week.
- Maine: Promulgated overtime rules to preserve pre-2004 duties tests under state law.

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Immediate Timeline for the New "White Collar" Exemption Rules

- March 13, 2014: President Obama signs a Presidential Memorandum directing USDOL to update the FLSA white collar overtime exemption regulations.
- July 6, 2015: USDOL publishes Notice of Proposed Rulemaking (NPR) in Federal Register, triggering a 60-day comment period.
- September 4, 2015: Comment period closes (USDOL received 270,000 comments).
- March 15, 2016: DOL releases a final rule to OMB.
- May 18, 2016: DOL publishes final rule.
- December 1, 2016: Effective date of final rule.

What’s Next?

- Senator Lamar Alexander (R-TN) has said he will introduce a resolution to block the rule under the Congressional Review Act (CRA).
- Legislation has been introduced by House and Senate Republicans to block the rule and require deeper analysis of the impact on small businesses, non-profits and regional economies.

Congressional Review Act

- The Congressional Review Act (CRA) gives Congress 60 legislative days to review on an expedited basis any major new regulation before it takes effect. If Congress doesn't like the regulation, it can nullify it with a resolution of disapproval.
- Ordinarily a CRA review doesn't pose much threat to a sitting president, since he or she can always veto the resolution. But if the 60 legislative days extend past the inauguration of the next president, and if the new president is of a different party, he or she might well let the resolution of disapproval stand.
- With this year's legislative calendar, any regulation issued after mid-May carries a risk that the decision to veto would be made by the next administration.
- Publication of the final rule in May means that a CRA process may play out between the Republican Congress and the current Administration, with the current Administration empowered to veto the challenge.

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Overtime: The Basics

- Unless specifically exempted, employees must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rates of pay.
- Except for minors, there is generally no limit under the FLSA on the number of hours employees may work in any workweek.

Workweek Basis

- Overtime is determined on a workweek basis: An employee's workweek is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods.
- The workweek need not coincide with the calendar week.
- Different workweeks may be established for different employees or groups of employees.
- Averaging of hours over two or more weeks is not permitted.
- Normally, overtime pay earned in a particular workweek must be paid on the regular pay day for the pay period in which the wages were earned.

Regular Rate

The employee's regular rate of pay for overtime compensation purposes includes

- on-call pay
- non-discretionary bonuses or prizes, including bonuses for attendance, seniority, and incentive or productivity bonuses
- shift differentials
- salaries and
- retroactive pay increases.

Regular Rate

The regular rate of pay need <u>not</u> include

- holiday pay
- vacation pay
- paid time off
- premium pay if at least time and one-half the regular rate
- severance pay
- show-up or reporting pay
- disability benefits
- uniform allowances and
- payments made to employees in lieu of use of accrued time off.

Fixed Salary for Overtime

- The fact that an employee is paid on a salary basis is not alone sufficient to exempt that employee from the FLSA's minimum wage and overtime requirements.
- Unless the employee qualifies for exemption, a fixed salary for a regular workweek longer than 40 hours does not discharge overtime obligations.
- A lump sum paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as overtime pay even though the amount of money paid is equal to or greater than the sum owed on a per-hour basis.

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Overtime Exemptions

- Executives
- Administrators
- Professionals
- Salary or Fee Basis
- Partial Day Absences

Executives

If an employee is compensated on a salary basis at a rate not less than $455 per week, the employee qualifies for exemption as an executive if

- the employee’s primary duty is managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- the employee customarily and regularly directs the work of at least two or more other full-time employees or their equivalent; and
- the employee has the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

"Learned" Professionals

An employee compensated on a salary or fee basis at a rate of at least $455 per week qualifies for exemption as a "learned professional" if:

- The employee's primary duty consists 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;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Administrators

If an employee is paid on a salary or fee basis at a rate of at least $455 per week, the employee qualifies for exemption as an administrator if:

- the employee’s primary consists of 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
- the employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

"Highly Compensated Employees"

If an employee is paid on a salary basis at a rate of at least $100,000 per year, the employee may qualify for exemption under a less stringent duties test.

Salary Basis

A threshold requirement for exemption as an executive, administrator or professional is that the employee be paid on a salary basis, although some employees may qualify for exemption as administrators or professionals if they are paid on a fee basis.

Salary Basis

- An employee is paid on a salary basis if he or she regularly receives each pay period a predetermined amount constituting all or part of the employee's compensation.
- Salaried exempt employees must receive the full amount of their salary in any week they perform work, regardless of the number of days or hours actually worked.
- If an employee’s compensation is reduced based upon the quantity or quality of work performed, generally the arrangement will fail to qualify as a salary basis for compensation.

Salary Basis

- Deductions generally are not permitted for absences occasioned by the employer or by the operating requirements of the business, or for absences caused by jury duty, attendance as a witness, or temporary military leave.
- As a general rule, however, a salaried employee need not be paid for any week in which no work is performed.

Core Changes under the New Rule

- Under the new rule, the salary required for "white collar" overtime exemption will increase from $455 per week ($23,660 for a full-year worker) to $913 per week ($47,476 for a full-year worker).
- The minimum salary threshold will update automatically every 3 years to reflect the 40th percentile of earnings in the lowest-wage region of the country.
- The "highly compensated employee" threshold will increase from $100,000 to $134,004.
- Qualifying non-discretionary bonuses and commissions can count for up to 10% of salary.

Use of Bonuses and Commissions as Salary

- Under the new rule, qualifying non-discretionary bonuses and commissions can count for up to 10% of the threshold salary.
- 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.
- 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.
- 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 rules permit 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).

Comparing the Current Rule, the NPRM, and the Final Rule

	Current regulations (2004 until effective date of Final Rule, 2016)	NPRM	Final Rule
Salary Level	$455 weekly	$970 weekly (if finalized as proposed) 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 3 years, maintaining the standard salary level at the 40th percentile of full-time salaried workers in the lowest-wage Census region, and the HCE total annual compensation level at the 90th percentile of full-time salaried workers nationally.
Bonuses	No provision to count 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% of standard salary level can come from non-discretionary bonuses, incentive payments, and commissions, paid at least quarterly.
Standard Duties Test	See WHD Fact Sheet #17A for a description of EAP 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.

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What Does This Mean for You?

- The effective date of the final rule is December 1, 2016 and – by that date – employers must either meet the new salary requirements or treat the employee as non-exempt.
- Future automatic salary updates will occur every 3 years, beginning January 1, 2020.

Employer Compliance Options

Employers have several options in response to the new minimum salary requirements, including:

- Increase the salary of an employee who meets the duties test to meet the new salary threshold and retain exempt status;
- Convert the employee to non-exempt and pay overtime;
- Reallocate work to reduce or eliminate overtime hours;
- Establish a new salary or hourly rate so that, when the employee is converted to non-exempt, total compensation with overtime remains the same as the employee's former salary; or
- Some combination of the above.

Employer Compliance Options: Converting to Nonexempt

Employers have several options in converting employees to non-exempt, including:

- Hourly – recording hours and paying the employee on an hourly basis plus overtime for hours worked over 40 in a workweek;
- Salaried, non-exempt – recording hours and paying the employee a salary for all hours worked plus an overtime adjustment for each overtime hour.

Recording Time

- Employers may use any timekeeping method they choose.
- For example, they may use a time clock, have a timekeeper keep track of employee's work hours, or tell their workers to write their own times on the records.
- However, the method must be complete and accurate and, for non-exempt employees, must show actual start and stop times.

Rounding Practices

- Recording actual start and stop times is preferred, but recording the start and stop times to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour, is allowable because this arrangement presumably averages out so that the employees are fully compensated for all the time they actually work.
- Practice must be neutral: one-way rounding is not acceptable.
- Even if the employer records actual start and stop times, neutral rounding-off is an acceptable method of wage calculation.

Fixed Schedules

- When employees work on a fixed schedule, the employer may keep a record showing the exact schedule of daily and weekly hours and merely indicate that the worker did follow the schedule.
- When a worker is on a job for a longer or shorter period of time than the schedule shows, the employer must record the number of hours the worker actually worked, on an exception basis.

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