



# **FAIR LABOR STANDARDS ACT**

FREQUENTLY ASKED QUESTIONS

April 2019

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**Note:** The Q&As that follow are based on federal regulations only. Certain states may apply more restrictive standards. Please check your state's wage and hour office for state rules. When federal and state laws overlap, generally the law that provides the greatest benefit to the employee will prevail.

# 2019 PROPOSED OVERTIME RULE CHANGES

On March 7, 2019, the U.S. Department of Labor (DOL) announced a proposed rule to update and revise Fair Labor Standards Act (FLSA) white collar exemptions by raising the salary level for an exemption from \$455 per week (\$23,660 annually) to \$679 per week (\$35,308 annually). The proposed changes will increase the minimum salary requirement that must be applied for those employees who are identified as “white collar” employees from earning overtime. White collar employees are those whose job duties are classified as executive, administrative, or professional (EAP), as defined by the DOL. **The proposed rule, if finalized, is anticipated to go in to effect on January 1, 2020.**

By raising the salary level threshold from the current 2004 level, FLSA overtime protections, if enacted, will cover more workers. To be exempt from FLSA overtime pay requirements, employees must generally be paid on a salary basis at or above a specified minimum weekly salary level and meet certain requirements related to their primary job duties.

This proposed rule has been in the works for a few years. On May 23, 2016, the [DOL issued a final rule](#) increasing the standard salary level; however, [it was declared invalid](#) by the U.S. District Court for the Eastern District of Texas and [an appeal was filed](#). In this rulemaking, the DOL proposes to formally rescind the 2016 rule and propose a new rule that both:

- ✔ Updates the minimum weekly standard salary level to reflect growth in wages and salaries; and
- ✔ Allows the inclusion of certain [nondiscretionary bonuses](#) and incentive payments to count towards up to 10 percent of the standard salary level.

The DOL also proposes:

- ✔ To update the total annual compensation requirement for the “highly compensated employee” test.
- ✔ To revise the special salary levels for employees in the motion picture industry and certain U.S. territories.
- ✔ An intention to propose updates to the earnings thresholds every four years (but it does not propose automatic adjustments as previously expected).

## What Now?

There is no specific action employers are required to take at this time because the rule is proposed and not enacted. After a 60-day public comment period, the DOL anticipates the rule will be enacted and take effect January 1, 2020.

In the meantime, a modification of the 2004 threshold is inevitable; therefore, employers should [begin to review and analyze the reclassification of employees](#). This analysis should incorporate not only the FLSA but also any applicable state and/or locality minimum wage rate because the higher rate controls and requires compliance.

# OVERTIME RULE CHANGES

## What are the overtime changes that are proposed to occur?

The new overtime rules, if passed as proposed, will increase the minimum salary level that allows an EAP employee to be classified as “exempt” from overtime pay. The current minimum salary level is \$455 per week (\$23,660 annually) and will increase to \$679 per week (\$35,308 annually), anticipated to be effective January 1, 2020.

The proposed rule would also increase the minimum salary requirement for the highly compensated employee (HCE) exemption status from the current \$100,000 per year to \$147,414 per year.

## How do the current regulations and the proposed rule compare?

	CURRENT REGULATIONS	PROPOSED REGULATIONS
<b>Salary Level</b>	\$455 weekly	\$679 weekly
<b>Highly Compensated Employee (HCE) Compensation Level</b>	\$100,000 annually	\$147,414 annually
<b>Bonuses</b>	No provision to count nondiscretionary bonuses and commissions toward the standard salary level	Up to 10% of standard salary level can come from non-discretionary bonuses, incentive payments, and commissions, paid at least annually.
<b>Standard Duties Test</b>	See <a href="#">WHD Fact Sheet #17A</a> for a description of EAP duties.	No changes to the standard duties test.

## Are all exempt positions required to meet the minimum salary test requirement?

No. The new FLSA minimum salary requirement applies to “white collar” exempt employees only. Other previously exempt positions will continue to be classified as exempt but will not have to comply with the increased minimum salary requirements. This includes, but is not limited to:

- ✔✔ Outside sales positions that are exempt from both minimum wage and overtime rules;
- ✔✔ Employees who are bona fide licensed practitioners of law or medicine;
- ✔✔ Teachers if their primary duties are teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge;
- ✔✔ Computer professionals who meet the computer professional exemption status and are paid hourly; and
- ✔✔ Certain retail employees paid on commission that are covered under the FLSA § 7(i) exemption.

The FLSA allows for other overtime exemptions, as outlined on the following pages.

## Is there any transitional relief for small employers or nonprofits to implement the new overtime changes?

No. The DOL has not indicated that employers of a certain category or size that are covered under the FLSA would receive any type of transitional relief.

# HIGHLY COMPENSATED EMPLOYEES



## What are the rules for highly compensated employees?

The FLSA regulations contain a special rule for highly compensated employees who are paid total annual compensation of \$100,000 or more (\$147,414 as proposed). A highly compensated employee is deemed exempt under the FLSA § 13(a)(1) if:

1. The employee earns total annual compensation of \$100,000 or more (\$147,414 proposed), which includes at least \$455 per week (\$679 as proposed) paid on a salary basis;
2. The employee's primary duty includes performing office or non-manual work; and
3. The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee.

For example, an employee may qualify as an exempt highly compensated executive if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all the other requirements in the standard test for exemption as an executive. See [Fact Sheet #17H](#) for more information.



# OVERTIME EXEMPTION CATEGORIES



## What determines if an employee falls within one of the white collar exemptions?

To qualify for exemption, a white collar employee generally must:

1. Be salaried, meaning that he or she is paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the “salary basis test”);
2. Be paid at least a specified weekly salary level, which is proposed at \$679 per week (the equivalent of \$35,308 annually for a full-year worker) under this proposed rule (the “salary level test”); and
3. Primarily perform executive, administrative, or professional duties, as defined in the DOL’s regulations (the “duties test”).

Certain white collar employees are not subject to either the salary basis or salary level tests (for example, doctors, teachers, and lawyers).

## Are there exemptions for business owners?

Under a special rule for business owners, an employee who owns at least a bona fide 20-percent equity interest in the enterprise in which employed, regardless of the type of business organization (e.g., corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive. See [Fact Sheet #17B](#) for more information.

## What are the rules for nonprofits?

The FLSA proposed rule may impact nonprofit organizations that have an annual dollar volume of sales or business activities of at least \$500,000, or those with employees that are normally 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 the overtime rule if they are individually engaged in interstate commerce. Interstate commerce includes such activities as transacting business via interstate telephone calls, the Internet, or the U.S. Mail (such as handling insurance claims), ordering or receiving goods from an out-of-state supplier, or handling the accounting or bookkeeping for such activities. See [Fact Sheet #14A](#) from the Wage and Hour Division regarding nonprofits.



## Are ministers and members of clergy covered under the FLSA?

The FLSA does not contain a blanket exemption for religious entities or individuals, with very few exceptions. Under FLSA regulations, ministers who are defined as employees must meet the FLSA “duties test” and earn at least the minimum salary in order to be exempt from overtime. However, churches and other nonprofits may be exempt from the FLSA if their annual dollar volume of sales or business is less than \$500,000. And, employees of nonprofit organizations that are not exempt from the FLSA may still be covered under the FLSA if they are individually engaged in interstate commerce.

Under various case laws, courts have used a “ministerial exception” rule that exists from Title VII of the Civil Rights Act that exempts ministers and other members of clergy from the protections of federal employment discrimination laws. The ministerial exception is very narrow and limited in application. In fact, clear and definite standards and guidelines have not been established by the courts and each case is being determined on its own merits based on how the First Amendment applies to churches, the definition of employee, and how religious organizations can circumvent areas of antidiscrimination and wage and hour law. Importantly, in *Hosanna-Tabor v. the EEOC*, although the Supreme Court confirmed the existence of the ministerial exception, it was unwilling to define a clear and concise test for the exception. We suggest the application of a “ministerial exception” to the FLSA be applied with caution and only after seeking legal counsel.

## Are federal, state, and local governments covered under the FLSA?

Yes, the FLSA establishes minimum wage, overtime, recordkeeping, and youth employment standards covering employees in the private sector and in [federal, state and local governments](#). Certain occupations such as [law enforcement and fire protection](#) personnel may have overtime rules that differ from the general FLSA requirements.

## Are employees of institutions of higher education covered under the FLSA?

Although employees at higher education institutions are generally covered by the FLSA's minimum wage and overtime provisions, some positions are exempt from overtime, regardless of whether they earn above the minimum salary threshold or not. This includes bona fide teachers, coaches, graduate and undergraduate students, and academic administrative personnel. However, the academic administrative personnel must be paid on a salary basis and must be earning a salary at least equivalent to the entry level salary of bona fide teachers. Some positions that will be impacted by the FLSA changes include postdoctoral researchers, non-academic administrative employees, and other salaried employees. See [Fact Sheet #17S](#) for higher education and application of the FLSA.

## Are there exemptions for retail workers or automobile dealership employees?

According to § 7(i) exemption from the FLSA overtime provisions (retail establishment), a retailer, including an auto dealership that is an establishment with an annual dollar volume of sales of goods or services (or of both) of at least 75 percent that is not for resale and is recognized as retail sales and service in the retail industry, satisfies the definition of retail or service establishment for § 7(i) purposes. Additionally, according to [29 C.F.R. § 779.320](#), establishments whose sales or service may be recognized as retail include automobile dealers' establishments. Also, [29 C.F.R. § 779.318](#) discusses characteristics and examples of retail or service establishments, including that an establishment that sells to the general public its automobiles and other goods, and performs incidental services on such goods when necessary, is a retail or service establishment. If the retailer can meet these requirements, then it would be a retail or service establishment for purposes of FLSA exemption in § 7(i).

Next, the salespersons need to meet the requirement of "actual employment," meaning that the employee, whether performing his or her duties inside or outside the establishment, must be employed by the employer in the work of the exempt establishment itself in activities within the scope of its exempt business. Because § 7(i) exempts any employee of a retail or service establishment if § 7(i)'s compensation requirements are satisfied, all business performed by such an establishment constitutes activities within the scope of its exempt business for purposes of § 7(i) and [29 C.F.R. § 779.308](#). This is where the factors of the salesperson position come into play. Unless it is a single establishment where employee duties are irrelevant because § 7(i) exempts any employee of an exempt retail or service establishment who meets the pay requirements of the exemption, an individual employee's duties in a "retail or service establishment" are not relevant for purposes of § 7(i).

Lastly, § 7(i) is an establishment-based and compensation-based exemption. So, because the establishment is a retail or service establishment, § 7(i) would exempt all employees whose compensation satisfies the requirements of § 7(i). (See [29 C.F.R. §§ 779.302 – 303](#).) In other words, if an establishment qualifies as a retail or service establishment, then any employee employed by that establishment is exempt if his or her compensation satisfies § 7(i)'s two other requirements: compensation of one and one-half times the minimum wage, and more than half of compensation derived from commissions on goods or services.

If a retail or service employer elects to use the [§ 7\(i\) overtime exemption](#) for commissioned employees, three conditions must be met:

1. The employee must be employed by a retail or service establishment; and
2. The employee's regular rate of pay must exceed one and one-half times the applicable [minimum wage](#) for every hour worked in a workweek in which overtime hours are worked; and
3. More than half the employee's total earnings in a representative period must consist of commissions.

For more information, see [Fact Sheet #6: The Retail Industry Under the Fair Labor Standards Act \(FLSA\)](#). Always check state laws for any additional restrictions.

## What are the federal overtime exemptions for computer professionals?

It is always important to check laws in your state as they may be more restrictive. In terms of federal law, § 13(a)(1) and § 13(a)(17) of the FLSA provide an exemption from both minimum wage and overtime pay for computer systems analysts, computer programmers, software engineers, and other similarly skilled workers in the computer field who meet certain tests regarding their job duties and who are paid at least \$679 (as proposed) per week on a salary basis or paid on an hourly basis at least \$27.63 an hour.

Hourly computer employees who earn at least \$27.63 per hour and perform certain duties are considered part of the EAP exemptions but were excluded from the analysis because they are paid hourly and will not be affected by this proposed rule (these workers were similarly excluded in the 2004 analysis). Salaried computer workers are exempt if they meet the salary and duties tests applicable to the EAP exemptions and are included in the analysis since they will be impacted by this proposed rule.

To qualify for the computer employee exemption, the following tests must be met:

- ✔✔ The employee must be compensated either on a salary or fee basis at a rate not less than \$679 (as proposed) per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
- ✔✔ The employee must be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field performing the duties described below;
- ✔✔ The employee's 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.

The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters, and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption. See [Fact Sheet #17E: Exemption for Employees in Computer-Related Occupations Under the Fair Labor Standards Act \(FLSA\)](#) for more information.



# BONUSES AND COMMISSIONS

## For the white collar exemption, are bonuses and commissions included when determining the minimum salary test?

Yes — with limitations. Employers may use nondiscretionary bonuses and incentive pay, including commissions, to satisfy up to 10 percent of the standard salary test. The nondiscretionary bonus or incentive pay must be on an annual or more frequent basis in order to be included in the minimum salary test. For those employers who pay out significant bonus amounts, the amount attributable to the minimum salary level is capped at 10 percent of the required salary amount. See guidance for limitations in use of bonus and commissions.

**Note:** A nondiscretionary bonus is tied to a measurable objective such as productivity, revenue, achievement of goals, tenure, or other measurable factor. It includes annual bonuses based on time with the company. It does not include spot bonuses that are made arbitrarily at the discretion of the employer. Nondiscretionary bonuses are included when determining the overtime rate of pay.

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

To claim the HCE exemption under the proposed rule, employers must pay workers at least the standard salary level of \$679 (as proposed) 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. Total annual compensation under this definition does not include credit for board, lodging, health or life insurance, or contributions to retirement plans or other fringe benefits. The employee must also customarily and regularly perform at least one of the duties of an exempt executive, administrative, or professional employee identified in the standard tests for exemption.

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.

# DUTIES TESTS FOR EXEMPTION

## Are the duties tests changing?

No. The DOL has considered commentary regarding the current “duties test” for the various exemption statuses, but the proposed rule has made no changes to the duties test.

## What are the federal duties tests?

Note that state laws may be more restrictive.

### *Executive Exemption*

To qualify for the executive employee exemption, all of the following tests must be met:

- ✔✔ The employee must be compensated on a salary basis at a rate not less than \$679 (as proposed) per week;
- ✔✔ The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- ✔✔ The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- ✔✔ The employee must have 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.

### *Administrative Exemption*

To qualify for the administrative employee exemption, all of the following tests must be met:

- ✔✔ The employee must be compensated on a salary or fee basis at a rate not less than \$679 (as proposed) per week;
- ✔✔ The employee’s 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
- ✔✔ The employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

### *Learned Professional Exemption*

To qualify for the learned professional employee exemption, all of the following tests must be met:

- ✔✔ The employee must be compensated on a salary or fee basis at a rate not less than \$679 (as proposed) per week;
- ✔✔ The employee’s 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;
- ✔✔ 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.

Fields of science or learning include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical, and biological sciences, pharmacy, and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

## Creative Professional Exemption

To qualify for the creative professional employee exemption, all of the following tests must be met:

- ✔ The employee must be compensated on a salary or fee basis at a rate not less than \$679 (as proposed) per week;
- ✔ The employee's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

Exemption as a creative professional depends on the extent of the invention, imagination, originality, or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, and others as set forth in the regulations. Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality, or talent. Journalists are not exempt creative professionals if they only collect, organize, and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.

## What does “discretion and independent judgment” mean when applying the duties tests?


The DOL defines the use of discretion and independent judgment as more than the use of skill in applying well-established techniques, procedures, or specific standards described in manuals or other sources. The use of discretion and independent judgment implies that one has authority to make an independent choice, free from immediate direction or supervision. However, discretion and independent judgment can be used even if the decision or recommendation is reviewed by higher authority in the organization.

Discretion and independent judgment does not require that the decisions being made have to be final or free from review. The fact that one's decisions may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that one is not using discretion and independent judgment.

The phrase “discretion and independent judgment” must be applied in the light of all the facts involved in the particular situation in which the question arises. Factors include, but are not limited to:

- ✔ Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;
- ✔ Whether the employee carries out major assignments in conducting the operations of the business;
- ✔ Whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business;
- ✔ Whether the employee has authority to commit the employer in matters that have significant financial impact;
- ✔ Whether the employee has authority to waive or deviate from established policies and procedures without prior approval;
- ✔ Whether the employee has authority to negotiate and bind the company on significant matters;
- ✔ Whether the employee provides consultation or expert advice to management;
- ✔ Whether the employee is involved in planning long- or short-term business objectives;
- ✔ Whether the employee investigates and resolves matters of significance on behalf of management; and
- ✔ Whether the employee represents the company in handling complaints, arbitrating disputes, or resolving grievances.

Discretion and independent judgment does not include:

- ✔ Applying well-established techniques, procedures, or specific standards described in manuals or other sources;
  - ✔ Clerical or secretarial work;
  - ✔ Recording or tabulating data; or
  - ✔ Performing mechanical, repetitive, recurrent, or routine work.
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The information contained herein is for informational purposes only and is not tax or legal advice or a substitute for legal counsel.

## **If two or more employees work the same job duties that meet the administrative exemption job duties test, but earn different rates of pay, can some of them be classified as exempt and others classified as nonexempt?**

Yes. The “white collar” exemption requires an employee to be paid on a salary basis that is at least the minimum salary threshold (\$679 per week, as proposed) and meets the job duties test. If the employee meets these requirements, the employee may be classified as exempt. If the employee fails to meet any part of the criteria, the employee would not meet the exemption status and must be classified as nonexempt. The exemption is applied on an employee-by-employee basis, not by a particular job class or department.

## **What if an employee has job duties that are both exempt and nonexempt?**

An employee may be classified as either exempt or nonexempt, but not both. The classification is based on the employee’s primary duties. “Primary duty” means the principal, main, major, or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all of the facts in a particular case, with the major emphasis on the provisions of the employee’s job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to: the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee’s relative freedom from direct supervision; and the relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

## **What if an exempt employee works part-time hours?**

An employee who is performing exempt duties must meet the minimum salary level threshold (\$679 per week, as proposed) in order to maintain the exempt status, regardless of the number of hours worked per week. The FLSA does not allow prorating the salary for part-time employees. If the part-time employee earns less than \$679 (as proposed) per week, the employee must be reclassified as a nonexempt employee even if the job duties are exempt.

# COMPENSATION



## How do we pay an exempt employee when they work less than 12 months of the year?

The new minimum salary threshold for “white collar” exempt employees is proposed to be \$679 per week. The exempt employee must earn no less than \$679 per week for the months in which they work. See the DOL [Field Operations Handbook](#), section 22g10.

## If we hire employees that meet the professional exemption (accountants, for example) but pay them less than the proposed \$35,308, must we pay them overtime?

Yes. Although the employees may meet the professional exemption test, they fall below the minimum salary test, requiring you to classify them as nonexempt and compensate them for all overtime hours worked.

## Can we pay our nonexempt employees a salary?

Yes. Nonexempt employees may be paid an hourly wage, salary, commission, or fee as long as they are compensated for all hours worked at a rate not less than the state (or local) minimum wage and are compensated at one-and-one-half times their regular rate of pay for all hours worked beyond 40 in the work week (or eight hours in a day for some states).

## Can an employee earn more than \$35,308 per year and still be classified as nonexempt?

Yes. An employee must be able to pass the “white collar” job duties test and earn a salary of at least \$679 (as proposed) per week. Employees may earn more than \$679 (as proposed) per week (\$35,308 annual, as proposed) but not meet the job duties test. Therefore, you must classify them as nonexempt and compensate them for any overtime hours worked.

## For those who are classified as exempt under the HCE rule, must we increase their salary to \$147,414 effective January 1, 2020?

Not necessarily. To maintain the HCE exemption, the employee must earn at least \$147,414 annually, as proposed, whereby at least \$679 per week of that salary is in the form of a fixed salary, and the employee performs at least one job duty that meets the criteria of either the executive, administrative, or professional exemption (EAP) job duties tests. However, the employee may be able to fall under the EAP exemption if the employee meets the standard duties test under the EAP job duties tests and the employee earns at least \$679 (proposed) per week.



# INTERACTION WITH STATE LAWS

## How does the federal law interact with state laws?

Employers must also review state laws for the states in which they have employees working. When federal and state laws overlap, whichever law is more generous to the employee will generally apply. Both California's and New York's minimum salary requirements for exemption are two times the state's minimum wage, which is greater than the current federal minimum salary requirement of \$455 per week. And, if and when the DOL proposed overtime rules become effective, the federal regulations will continue to be below each state's requirements.

Employers should also review the job duties rules for exempt status for each state. Several states have a larger range of positions that are exempt from overtime based on state-specific work orders. At present, there have been no changes to these rules, but it is important that employers understand the various rules that apply to their organizations.

# EMPLOYEE RECORDKEEPING

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

Under FLSA regulations, overtime-eligible workers are not required to punch a time clock. The FLSA requires that employers keep certain records for each nonexempt worker. This is so workers can be sure that they get paid the wages that they earn and are owed. There is no particular form or order of records required and employers may choose how to record hours worked for overtime-eligible employees. 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 he or she worked each day, including the number of overtime hours, by the end of each pay period. Generally, the recordkeeping methods currently used by your nonexempt employees may be applied to the newly reclassified nonexempt employees affected by the FLSA change. See [Fact Sheet 21: Recordkeeping Requirements under the Fair Labor Standards Act \(FLSA\)](#).

**Note:** State laws may outline more restrictive guidelines for recordkeeping. Please check your state laws for payroll recordkeeping rules.

# EMPLOYER ACTION PLANNING

## What should employers do regarding the classifications of their employees?

Employers should begin to determine which employees are classified as exempt and earn \$35,308 per year or less. Estimate the increased costs of either increasing their salaries to \$35,308 per year or reclassifying the employees as nonexempt and paying overtime when they work more than 40 hours per week (or overtime hours worked based on your state's overtime laws).

- ✔ **Review job descriptions.** Take a look at your organization's job descriptions to ensure that they are accurate for the work that the employees actually perform. Update as needed. Review the classifications as exempt or nonexempt based on the "job duties test" as defined by the DOL.
- ✔ **Forecast overtime.** Talk with the impacted employees and their managers to get an estimate of how much overtime per week they actually work.
- ✔ **Review your overtime policies.** While employers must pay overtime per federal and state laws even if the overtime is not authorized, employers can limit the amount of overtime allowed and provide disciplinary action to those who fall out of compliance.
- ✔ **Measure productivity.** Now that some exempt employees may be reclassified as nonexempt, ensure that the extra hours worked result in measurable productivity. Many exempt employees did not track hours worked previously and may have worked longer hours when not absolutely necessary. Since that time will now be compensable time, employers should ensure that the overtime is warranted based on business demand.
- ✔ **Review meal and rest break rules.** Those employees who will be reclassified as nonexempt will be required to comply with state or company mandated meal and rest break requirements.
- ✔ **Review employee communications** regarding policies, the enforcement of such policies, and how you will communicate these changes to those employees who will be affected by the change in status.

# EMPLOYER PENALTIES

## What are the penalties if an employer misclassifies an employee?

There is no fixed dollar amount for penalty for misclassification. However, the financial burden may be costly to employers. Costs will include back pay plus interest (up to three years); liquidated damages equal to the amount of unpaid wages, and more in some states, attorney's fees and court costs, and willful violation penalties — up to \$10k in fines and up to six months in prison.

