

# **UNDERSTANDING THE NEW OVERTIME RULES**

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## AGENDA

Basics of the Fair Labor Standards Act  
Understanding Your Options  
Planning and Communicating Changes

Since this law is so difficult to understand, we will talk a bit about the basics before covering the changes and your options.

## What is the Fair Labor Standards Act?



Originally passed during the Depression, the act has not had many updates for a more modern economy. Critical to understand how to protect your organization from claims and legal risk.

## FLSA Basics

Wages and hours rules

States also have wages and hours laws

The primary issues we will be dealing with today are the Acts requirements for who gets overtime pay at time and a half – often called ‘non-exempt’ workers. Many states and localities also have laws which cover overtime, breaks – paid or unpaid, and such issues.

## What Organizations are Covered?

Gross: \$500,000 or more

OR

In interstate commerce or produce goods  
for interstate commerce

In general, if your organization has gross income over \$500,000 or is in interstate commerce, it is covered. We will talk about the major exceptions, others do exist too.

## FLSA Coverage - Special Cases

All Hospitals

All Organizations providing residential  
medical or nursing care

All Schools (Pre-K through Higher Education)

All Public Agencies

Any organization in the fields above, without regard to income or interstate commerce, is covered by FLSA. Note that there is a temporary exemption from the new changes for residential care facilities with fewer than 15 beds.

## FLSA Coverage - Special Cases

Non-profits which are charities have separate rules.

If charity has businesses or sales over \$500,000, it is covered.

If charity is not covered, individuals who work for it in interstate commerce are.

Non-profits generally are covered by FLSA. If you are a charity, the rules somewhat different. Where your gross income from business operations or sales via gift shops or such, exceeds \$500,000 the charity is covered. If the charity is not covered, individual employees who work in interstate commerce are. The definition here is quite broad and includes those who communicate with people in other states in any manner basically.

## Basic FLSA Coverage Rules

Employees covered by FLSA must be paid overtime at 1.5 times their normal hourly rate for all work over 40 hours per week.

If your workweek is less than 40 hours, you are still not required to pay overtime until after 40 hours – although you may want to do so and can if you want. It is each organization's choice as to whether they will include any holiday, vacation, PTO, or sick leave days in the calculation. The law does not require you to do so.



## Basic Coverage Rules

To be exempt from FLSA, three tests are required:

- \* Salary basis test
- \* Salary level test
- \* Duties test

While only the salary level test is changing, we will discuss all to assist you in assessing if you are currently in compliance or need to address any issues to get there.

## Basic Coverage Rules -Salary Basis Test

Paid regular salary each pay period

Not subject to reductions for 'quality or quantity'

Must be paid full salary every week if work at all during the week. Cannot reduce pay due to quality or quantity of work although there are limited other exceptions. You are not required to pay a full week in the first or last week of employment if a full week is not worked. Time off under the Family and Medical Leave Act or under paid time off plans are the most common exceptions.

## Basic Coverage Rules -Salary Basis Test

Limited Exceptions –  
Personal Time, Offset Other Pays

Safety & Discipline Exceptions

A person who takes a full day off for personal time and does not use any existing benefit plans may be docked for the time. Those who spend time on jury or witness duty or military reserve duty may be paid the difference between the pay received in such actions and their standard pay. Employees may also be docked for significant safety violations or significant workplace conduct rule violations under standard policies or practices.

Salary  
≠  
Exempt

You may pay any employee on a salary basis. Salary basis alone does not mean an employee is exempt. If you have a non-exempt, salaried employee you must pay any overtime earned no later than the following pay period.

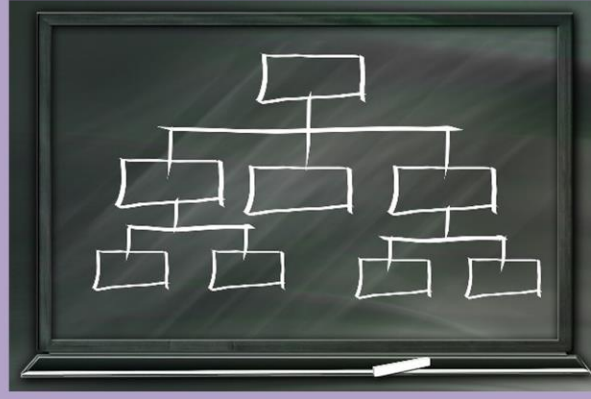
## Basic Coverage Rules –Duties Test

### Professionals



These are 'learned or creative' professionals. Learned means within a recognized field of specialized intellectual property and degreed and it specifically includes doctors, lawyers, teachers at all levels so long as they are working in their field. Creative means requiring creativity, originality and imaginative work and includes composers, artists, musicians. Salary tests do not apply here, these folks are exempt so long as they are paid a salary or on a fee basis. This exemption does not include just anyone who has a degree however.

## Basic Coverage Rules –Duties Test Executives



In small organizations, this exemption is for the top few who manage the entire enterprise while in larger ones it includes those who manage significant sub-divisions too. Such an exemption requires that the person directs the work of at least two full-time employees AND has hire and fire authority \_ or whose recommendations are given extra weight.

## Basic Coverage Rules –Duties Test Administrative



Here we are talking about those employees whose work is in managing the organization or the general business operations of it AND who exercise significant judgement and discretion WITH only limited supervision. As with all the exemption tests it is all about the regular duties of the position and NOT the title.

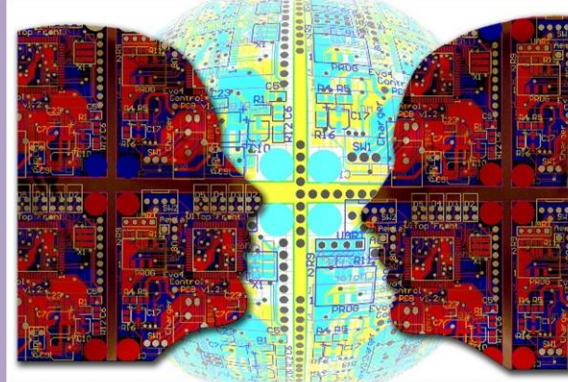
## Basic Coverage Rules –Duties Test Outside Sales



Here the primary duties are in making sales or obtaining contracts for business AND normally the work is done outside the employer's place(s) of business.



## Basic Coverage Rules –Duties Test Computer Professionals



This exemption is not for all computer-related work. It applies only to those high level types of work in the design, development, modification, analysis and testing of computer systems, operating systems, and software. Additionally such people must be paid at least \$27.63 per hour.



Effective December 1, 2016 a new salary level goes into effect.

## What is Changing - Salary Level Test

NEW

\$47,476 (\$913/week)

Will adjust every 3 years, starting 1/1/2020

Until the 1970s, raises in the pay rate were common and far more employees were covered by overtime pay requirements.

## What is Changing - Salary Level Test

NEW

Up to 10% may be non-discretionary bonuses, incentives, or commissions if paid at least quarterly.

This is a major change – you can include in the \$913/week total up to 10% in incentives. These only include non-discretionary bonuses which are those where there is a prior plan or contract or announcement and the amount is not solely at the employer's discretion. Such bonuses may be for quality or efficiency or retention purposes for individuals, teams or the organization. Catch-up provisions are allowed if the amount does not equal \$913 per week but must be paid within the first pay period after the quarter or overtime pay for all of the quarter is required.

## Salary Level Test

Up to \$47,476 - employee is covered by FLSA

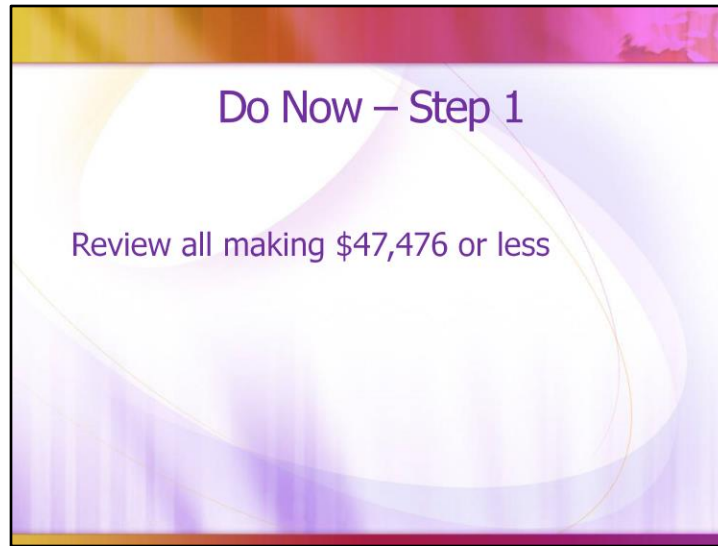
\$ 47,477 -134,004 - Assess Duties Test

Above \$134,004 - Assess Minimal Duties Test

The new rates. Under \$47,476 all employees are non-exempt which means they must be paid overtime at 1.5 times their normal rate. For those between \$47,477 – 134,004 you must do a full assessment of regular job duties to ensure the individual(s) in such positions are exempt or not. For highly compensated employees, over \$134,004 only one main duty from the exemption tests is required to be exempt from overtime. Note: exempt employees may be paid overtime – at straight time or time and a half – but are not REQUIRED to be paid overtime.



What you do and when will require careful analysis of your market, your culture, and the actual impact on your organization. Starting your action planning now is critical.



Take a look at everyone. Are the jobs critical to your organization? Do all need to be kept as currently organized or could you make changes to help your future success?

## Do Now – Step 1

Review those making \$47,476 or less

Identify the newly eligible for overtime pay

How many do you have? What jobs are they in? Develop a list of each and their current pay level.



## Do Now – Step 1

Review all making \$47,476 or less

Identify the newly eligible for overtime pay

Review actual job descriptions – are they current?

Are your job descriptions valid for the needs now? It is common for small businesses to add a part-time position that expands into full-time and perhaps overtime but may not actually be needed or be the right job for now.

## Do Now – Step 2

How many new eligibles actually regularly work over 40 hours per week?

Wage and Census reports indicate 60% of employees do not work any overtime hours. Knowing whose yours are who do is critical to considering your options.

## Do Now – Step 2

How many new eligibles actually regularly work over 40 hours per week?

Why do affected individuals work over 40 hours/week?

Why? Too often managers expect employees to respond to texts or emails after normal business hours or place a premium on 'face time' when they work. Is it the work driving overtime or other factors?

## Do Now – Step 2

How many new eligibles actually regularly work over 40 hours per week?

Why do affected individuals work over 40 hours/week?

Are people working on the right tasks?  
At the right times?

Check beyond job descriptions – what is creating overtime work now?



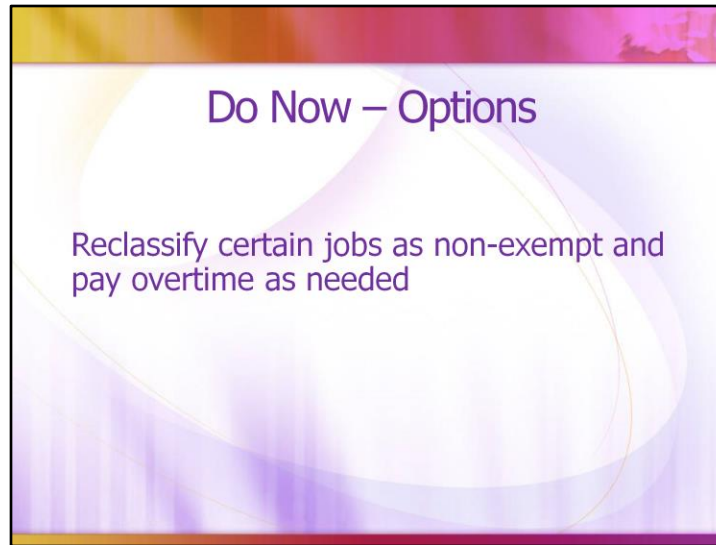
Common ones include the impact of technology on all jobs, a customer service focus, and social media roles. These may be vital to your company or simply common practices no-one has thought much about recently.

### Do Now – Step 3

What policies and practices contribute to such work hours?

Consider changing work practices, as needed

Involve your managers or staff in looking at any work requirements or expectations or practices which might be increasing overtime. This also could make you a more positive place to work and increase retention, done right.



So what are your options? First and appropriate for many is to simply reclassify positions and people into non-exempt and pay overtime. You can limit overtime and require advance approval by management in writing to keep a lid on costs. But if you ignore people coming in early, taking shorter lunches, working at their desk through meal breaks, or staying late you can be required to pay overtime even if you did not request it or approve it.

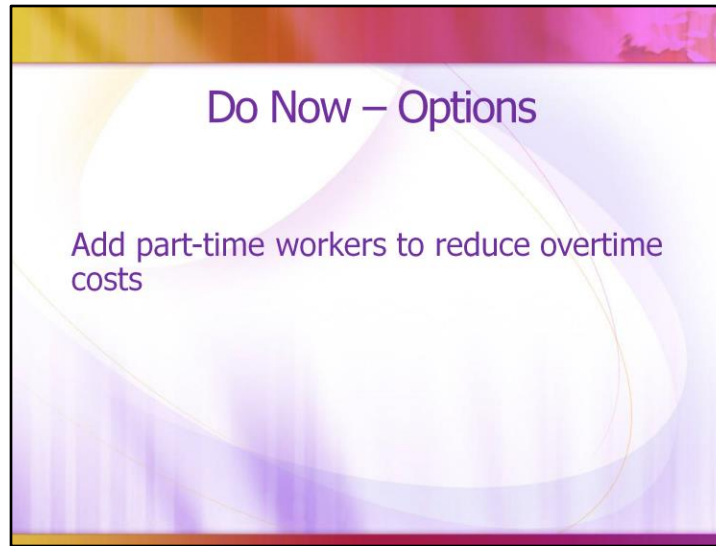
## Do Now – Options

Reclassify certain jobs as non-exempt and pay overtime as needed

Raise pay for some people and keep as exempt

If you have employees whose work duties meet the requirements to be considered exempt, you may wish to raise their pay to meet the new salary level test.





In some cases, hiring additional part-time employees, casual labor, freelancers, or outsourcing work may be more cost effective than paying overtime.

## Do Now – Options

Add part-time workers to reduce overtime costs

Reduce pay so that regular pay plus overtime costs = old pay

This option is rare but some are considering it. Think carefully about the impact on the specific employee(s) as well as in your organization first.

## Critical Considerations

What matters to your workforce?

What is your culture?

In developing your plan on how you will implement the new salary level test, the most important factors to consider are your workforce now and your culture. If you do not, you are likely to lose employees and increase morale issues with costs that can easily outweigh any savings you achieve.

## Cost Issues

Compression Issues on Other Jobs

Benefits Impact

Once you know which employees are affected and what you plan to do for each one, take a look up the chain. What will any new pay changes or overtime increases do to the pay of immediate or higher level supervisors? To more highly skilled employees? On benefits – factor in the added costs due to raised pay on mandated benefits such as Social Security as well as any retirement savings plans. In traditional industries, benefit plans used to be tied to whether one was exempt or not. If you have this structure, you may need to review it for impact also.

## Cost Issues

Direct costs of any changes

Timing of any changes

Once you have completed the actions above, you should be able to forecast the costs of complying with the new salary level test. Please note: compensatory time off is not allowed in lieu of overtime pay outside of government agencies. Then you can look at the timing of changes. Although the law requires the changes by December 1, you may wish to tie them to your annual review if it is earlier or to a closer date for highly sought after career fields, or to other events important in your culture.

## Changing Exempt to Non-Exempt

Employee Concerns

Emotional Reactions

And after all these numbers we get to the emotional and personal. Many people equate 'exempt' with college degrees or 'being professional' or being 'valued'. It is a common marker of status in some organizations. Employees may think that the organization values them less. Few really understand the potential value of being paid for their additional work. What you do and how you communicate are vital to making these issues less damaging or shorter term in impact.

## Changing Exempt to Non-Exempt

Company equipment

Travel time pay

As you change an employee to non-exempt, what if anything will you do about equipment you have provided? Organizations which provide laptops or smartphones are most at risk of these being used outside standard work hours and raising your overtime costs or legal risks. Non-exempts must be compensated for travel time which may especially influence costs of association conferences and such. The federal rules are if the travel is within normal work hours, even if not on a normal work day, you must pay. But states have different rules and you need to know these too. And look at any remote workers or flexible work practices closely to see if you need to make changes.

## Time Tracking and Records

Any form of record-keeping is allowed, so long as it is complete and accurate.

FLSA specifically allows any form of record-keeping so long as it is 'accurate and complete'. You could use a simple form that states an employee certifies they worked their normal hours and shows any exceptions or computer-based systems up through something that tracks hours being worked in real time. Choose what makes sense and you can afford.



## Manager Training

Explain new rules

If you have managers in your organization, they will play a vital role in making sure this whole process works well – or not so much.

## Manager Training

Explain new rules

Define any new processes, practices

If your review indicated a need for new practices, involve your managers in defining these for more effective results.

## Manager Training

Explain new rules

Define any new processes, practices

Tell them who is affected and how

Make sure they understand each change as it affects their staff members and are ready to discuss these with each person.

## Manager Training

Explain new rules

Define any new processes, practices

Tell them who is affected and how

Explain what you expect from them

What role will each have in the process? Who is communicating what? Who is answering employee questions?

## Employee Communications

Communicate new rule changes and  
general information first

Describe what the organization is doing  
and give timeline

Your employees already have heard about these changes. They have been on the news and all over social media. Start communicating as soon as you can!

## Employee Communications

THEN, tell each affected person

In person AND in writing

These discussions may be emotional so do be prepared to answer questions but also give each person something in writing with general info. If you are changing a person's pay, that also should be confirmed in writing with an effective date.

# QUESTIONS?

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