

The Proposed FLSA Regulations:

How You Can Prepare Now for Potential Changes to FLSA Overtime Exemptions

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Current Law: The Basics

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Unless specifically exempted, an employee covered by the FLSA must receive pay for hours worked in excess of 40 in a workweek at a rate not less than one and one-half their regular rate of pay.

This is referred to as “overtime” pay.



Current FLSA Exemption Requirements



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Employees are exempt if they are employed in a bona fide **executive, administrative, or professional (EAP)** capacity as those terms are defined in the Department of Labor's regulations at 29 CFR part 541.

This exemption from the FLSA is sometimes referred to as the “**white-collar**” or “**EAP**” exemption.

Currently, to fall within the **EAP** exemptions, an employee *generally* must meet the following tests:

- **Salary Basis Test:** Be paid a salary, meaning that they are paid a predetermined and fixed amount that is not subject to reduction because of variations in the quality or quantity of work performed;
- **Salary Level Test:** Be paid at least \$684 per week (the equivalent of \$35,568 annually for a full-year employee) in the current regulations; and
- **Duties Test:** Primarily perform executive, administrative or professional duties.



EAP Executive exemption



Executive exemption



The employee must be compensated on a salary basis at a rate not less than **\$684 per week/\$35,568.00 per year**;



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**.



EAP

Administrative exemption



Administrative exemption



The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than **\$684 per week/\$35,568.00 per year**;



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**.

Educational
Establishments

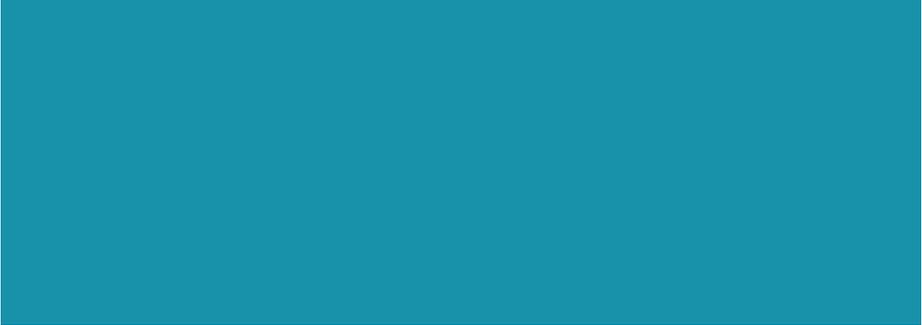
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Administrative
Functions

The administrative exemption is also available to

- employees compensated on a **salary or fee basis at a rate not less than \$684* a week, or on a salary basis which is at least equal to the entrance salary for teachers in the same educational establishment**, and
- whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment.

Academic administrative functions include operations directly in the field of education, and **do not include jobs relating to areas outside the educational field.**



Educational Establishments

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Administrative Functions



- Employees engaged in academic administrative functions include:
 - **the superintendent**
 - **any assistants responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program;**
 - **the principal and any vice-principals responsible for the operation of an elementary or secondary school;**

Having a primary duty of performing administrative functions directly related to academic instruction or training in an educational establishment includes, by its very nature, **exercising discretion and independent judgment with respect to matters of significance.**



EAP Professional exemption

(Learned Professional, Creative Professional, Computer Employee)



Learned Professional exemption



The employee must be compensated on a salary basis at a rate not less than \$684 per week/\$35,568.00 per year



Primary duty is performance of work requiring advanced knowledge;



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



What about teachers?



Teachers

- **Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment.**
- **Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; home economics teachers; and vocal or instrument music teachers.**
- **The salary and salary basis requirements do not apply to bona fide teachers.**

Creative Professional exemption



Salary of at least \$455.00 per week (\$23,660.00 per year); AND



Primary duty is performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor

Computer employee exemption



The employee must be compensated on a salary basis at a rate not less than \$684 per week/\$35,568.00 per year 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: **The application of systems analysis techniques and procedures**, including consulting with users, to determine hardware, software or system functional specifications;

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;



The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
A combination of the aforementioned duties, the performance of which requires the same level of skills.

Computer employees

- 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.

Highly compensated employee

HCEs performing office or non-manual work and paid total annual compensation of \$107,432 or more (which must include at least \$684 per week paid on a salary or fee basis) are exempt from the FLSA if they 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.

SO, WHO IS (TYPICALLY!) EXEMPT?

- ❖ Teachers
- ❖ Certificated personnel
- ❖ Principals
- ❖ Directors
- ❖ Executive Level Employees
- ❖ Superintendent
- ❖ CSFO
- ❖ Other Directors
- ❖ Administrative Employees
- ❖ Nurses (R.N.'s)
- ❖ Accountants

AND WHO IS (TYPICALLY) NOT?

- ❖ Bookkeepers
- ❖ Administrative Aides
- ❖ Custodians
- ❖ Maintenance Crews
- ❖ Bus Drivers
- ❖ LPN's and other nurses with two year degree or less
- ❖ CNP Personnel



Proposed Federal Regulations



Federal Rulemaking Process

- Publish proposed regs
- Solicit feedback
- Review and respond to feedback
- Publish final rule

Federal Rulemaking Process

- On August 30, 2023, the United States Department of Labor (DOL) released its highly anticipated proposed overtime rule.

Federal Rulemaking Process

- The proposed rule was open for public comment until November 7, 2023

Federal Rulemaking Process

33,310 Comments Received

April Release Date

- On December 6, 2023, the Biden administration indicated that it expects to release the final rules amending the FLSA in April 2024.
- Of course, that could change!

60 days

- The Department is proposing that all aspects of this proposed rule would become effective 60 days after publication of a final rule.
- *This could change*—the DOL specifically sought comment on this deadline.
- Past changes provided 90 and 180 days, so planning and preparation here is key!



Proposed Regs: Good News!



No Changes to Current Standard Duties Test!

- The Department is not proposing changes to the standard duties test, consistent with its approach in both the 2016 and 2019 rules.
- **At this time**, the Department favors keeping the current standard duties test, which is well known to employers and employees.
- **As long as it is paired with an appropriate salary level requirement**, the standard duties test can appropriately distinguish bona fide EAP employees from nonexempt workers.

<https://www.dol.gov/agencies/whd/overtime/rulemaking/faqs#b6>



Wait. . .what about teachers?



- Reminder: Teachers are not currently subject to the salary level test.
- New proposed regulations maintain that position.
- Proposed regs also keep special rules for administrative exemption in educational establishments.



Proposed Regs: Salary Basis Test



Major Increase to Minimum Salary!

- The Department last updated the EAP exemption regulations in 2019.
- Those regs set the standard salary level test at its current amount of \$684 per week (equivalent to a \$35,568 annual salary),
- Has been in effect since January 1, 2020.

Proposed Salary Level

The Department is proposing to set the standard salary level at the **35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South).**

Based on 2022 data. . .

The minimum salary required to be paid to an EAP employee for that employee to be exempt from the FLSA overtime requirements would now be \$1,059 per week (\$55,068 annually).

Note:

- Final rule amounts might be higher.

- The DOL estimates that 3.4 million workers would become newly entitled to overtime protection under the FLSA because of the increase in the salary level.
- **Unless intervening action is taken by their employers!**

- The Department estimates that the proposed rule would result in **a Year 1** income transfer of **\$1.2 billion** from employers to employees, predominantly from new overtime premiums, or pay raises to maintain the exempt status of some affected employees.

- The Department is proposing to set the Highly Compensated Employee (HCE) annual compensation level equal to the 85th percentile of earnings for full-time salaried workers nationwide
- The annual compensation level for HCEs would be **\$143,988** (which must include at least **\$1,059** per week paid on a salary or fee basis).



Proposed Regs: Automatic Increases



Auto Updates:

The proposed regs calls for the salary thresholds to be automatically updated **every 3 years** with current wage data.

Auto Updates:

- The Department's proposal includes a provision allowing the Department to **temporarily delay** a scheduled automatic update where unforeseen economic or other conditions warrant.
- This feature would afford the Department added flexibility to adopt to unforeseen circumstances without sacrificing the benefits provided by automatic updating.

Auto Updates:

- **At least 150 days** before the date of the update of the standard salary level, the Department would publish in the *Federal Register* a notice with the new earnings levels described above.



How to “Get Ahead” of These Potential Changes



Monitor!

- The regulations themselves could change
- The regulations, if enacted, will likely be subject to legal challenge!

Spread the Word

- Review the proposed regulations
- Ensure all key players (Superintendent, HR, Payroll, etc.) understand the possible changes and potential budgetary challenges.

Review current status

- Review who is currently deemed “exempt” in your system.
- Double-Check to ensure the employees still qualify under the existing duties test.

Review current status

- Exemption tests are complicated – decisions should not be made by local administrators
- Job titles alone are insufficient to establish exemption
- Job descriptions alone are also insufficient to establish exemption
- Exemption depends on what employees do - not what the job description says

Review current status

- If you don't have time or resources to conduct a thorough review, at least spot check each position when you post a vacancy
- That is a good time to update the job description too!
- Coordinate with HR, counsel, finance, and local administrators.

Evaluate Costs

If a currently exempt employee falls below the new salary threshold (1,059.00/week), you have two options. . .

Options

1. Reclassify them as nonexempt, which means paying them overtime when they work over 40 hours.

Options

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2. Increase their salary to meet the new threshold

Things to Consider:

- Does the employee often work more than 40 hours?
- If so, how much?

Things to Consider:

- If so, would raising the salary or paying the overtime be cheaper in the long run.
- Is comp time an option? If so, are you set up to monitor/implement?

Things to Consider:

- Be prepared to train/implement solid timekeeping practices for newly nonexempt employees.
- Train their supervisors—they will have to get used to the change too (e.g. break time)
- Coordinate any necessary changes in salary schedule.