

New Changes in the Overtime Regs and Frequently Asked Questions

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February 14, 2020

Complimentary HR Audit



Objectives

- Overview of the Fair Labor Standards Act
- Exempt vs. Non-Exempt
- Changes to the Federal Overtime Law
- Changes to the California Overtime Law
- Duties tests for Exempt Positions
- Frequently Asked Questions

FLSA

- The Fair Labor Standards Act (FLSA) was adopted in 1938 to establish federal minimum wage, overtime pay, hours worked, recordkeeping, and child labor standards.
- Its standards **cannot** be waived either expressly or through implication.



Exempt vs. Non-Exempt



The 3 Tests

- The *salary basis test* requires that the employee regularly receive a predetermined amount of weekly compensation each pay period. An amount that is not subject to fluctuation due to variations in quality or quantity of work performed.
- NEW!!! The *salary level* test
- The *duties tests* require that the employee' duties meet the standards of one of six revised tests – (executive, administrative, professional, computer, highly compensated or outside sales exemption).

Changes to the “Salary Level” Test

- **Salary Threshold - Federal**

- Changed from \$455/week (\$23,660 per year) to \$684/week or \$35,568/year.
- Any Salaried/Exempt employee who makes less than \$35,568 per year must be re-classified as non-exempt effective January 1, 2020. Non-exempt employees are subject to their respective state’s minimum wage and overtime regulations.

Bonuses and Commissions

- The DOL is allowing nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the federal salary test requirement. Bonuses must be tied to productivity or profitability. For those making less than \$35,568 per year, the employer could use \$3,556 in bonus and commission to equal an annual salary of at least \$35,568. (any salary less than \$32,012 is out of the picture). A one-time “catch up” amount can be used within 1 pay-period after the end of the year.

California Changes to the “Salary Level” Test – 1/1/2020

- **Salary Threshold – CA**

- Beginning 1/1/2020, the new salary threshold for exempt level employees is \$49,920/year (\$960/week) for employers with 25 or fewer employees and for employers with 26 or more, the minimum threshold is \$54,080/year (\$1,040/week)



California Changes to the “Salary Level” Test – 1/1/2020

- **Salary Threshold – CA**

- Salaried/Exempt employees making less than \$49,920 and \$54,080/year, respectively, must be re-classified as non-exempt. Non-exempt employees are subject to the minimum wage and overtime regulations of the state, or in some cases, each city. Currently, 29 municipalities have their own minimum wages. See link: <https://www.minimum-wage.org/california>
- Unlike the federal law, CA does NOT allow for non-discretionary bonuses to be used when calculating total annual salaries.

Duties Tests

- Executives
- Administrative
- Computer
- Professionals
- Highly Compensated
- Outside Sales

Executives

These positions can be classified as exempt if *all* of the following are met:

1. Their primary duty is managing the enterprise or a recognized department or subdivision, and
2. They customarily and regularly direct the work of at least two or more FTE's, and
3. They have the authority to hire or fire employees (or suggest and recommend hiring, firing, promoting or changing the status of other employees)

Administrative Employees

These employees will be exempt if *all* of the following are met:

1. Their primary duty is performing office or non-manual work directly related to the management or general business operations of the employer,
2. The primary duty includes the exercise of discretion and independent judgment “with respect to matters of significance” to the company or its customers.



Computer Employees

These employees will be exempt if all of the following are met:

1. They are employed as a computer systems analyst, programmer, software engineer or other similarly skilled worker in the computer field, and
2. Their primary duty must consist of: (a) the application of systems analysis techniques, including consulting with users, to determine hardware, software or system functional specifications; (b) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs; (c) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; (d) a combination of the foregoing duties, the performance of which requires the same level of skills.

Computer Employees (continued)

Compensation for Computer Employees

Federal - Computer Employees are exempt from overtime regulations if their hourly wage is at least \$27.63/hour or \$684/week on a salary basis

CA - The Computer Professional Employees are exempt from overtime if their hourly wage is at least \$46.55/hour or \$6,927.75/month or \$83,132.93/year.

Professionals

These employees will be exempt if *all* of the following are met:

1. Their primary duty is performing work requiring advanced knowledge which is predominantly intellectual in nature and requires the exercise of discretion, judgment and advanced knowledge in a field of science or learning and
2. The advanced knowledge can be customarily acquired by a prolonged course of specialized intellectual instruction.

Professionals (continued)

- In Law or Medicine, employees can be exempt from overtime by holding a valid license to practice law or medicine and being engaged in a practice or as an intern or enrolled in a resident program.
- Creative professionals may be exempt if their primary duty is “performing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
- Teachers in an educational establishment with a primary duty of teaching, tutoring, instructing or lecturing are considered exempt.

Highly Compensated Employees

These employees will be exempt if *all* of the following are met:

1. Salary is at least \$107,432 annually
2. Customarily and regularly perform at least one of the exempt duties or responsibilities of an executive, administrative, or professional employee.



Outside Sales

These employees will be exempt if *all* of the following are met:

1. Employee's primary duty must be making sale or obtaining orders or contracts for products or services and
2. The employee must customarily and regularly work away from the employer's place of business

NOTE: The salary requirements of the FLSA do NOT apply to the outside sales exemption.

Frequently Asked Questions

Q: Are there exceptions to the new rules?

- Teachers are exempt **regardless of their salary** if their primary duty is teaching, tutoring, instructing or lecturing. "Teachers" include, regular academic teachers, kindergarten or nursery schoolteachers, teachers of gifted/disabled children, professors, adjunct instructors, teachers of skilled and semi-skilled trades, home economics teachers, vocal or instrument music teachers.
- Salaried preschool employees whose primary duty is to care for the physical needs of the children would not meet the definition of "teacher" and must be paid the higher amount.

Frequently Asked Questions

Q: Are there exceptions to the new rules (continued)?

- In addition, the administrative personnel that help run higher education institutions and interact with students outside the classroom, such as department heads, academic counselors and advisors, intervention specialists and others with similar responsibilities can be classified as salaried/exempt if they are paid at least as much as the entry level salary for teachers at their institution.

Frequently Asked Questions

Q: Do I have to pay more when my employee works a Holiday or a Weekend or Graveyard?

A: California requires time and ½ for all hours worked on a Sunday if Sunday is the 7th workday, but the Act does not require employers to provide any other measure of extra compensation for hours worked on Sundays or holidays. However, the Act states that extra compensation provided by a premium rate (shift differential, language differential) must be used when establishing an employee's "base pay" for purposes of calculating overtime.

Frequently Asked Questions

Q: Can I “bank” employee’s overtime hours to be used in the future? (Comp Time)

A: The Act forbids private employers from granting compensatory time to their employees in lieu of overtime compensation.



Frequently Asked Questions

Q: When do I have to pay for training and meetings?

A: When meetings or trainings or trade shows are mandatory or even “highly encouraged”, must be considered “hours worked”.

Attendance need not be counted as working time if the following 2 criteria are met:

1. Attendance is in fact voluntary
2. The employee does not perform any productive work during such attendance.

Frequently Asked Questions

Q: How does Vacation time work with Exempt employees and the “salary basis” test?

A: As long as the Salaried/Exempt employee’s salary is “whole”, the DOL doesn’t care where the money comes from (payroll bucket or vacation bucket)

Frequently Asked Questions

Q: How does Sick time work with Exempt employees and the “salary basis” test?

A: 29 CFR § 541.602 states that an employer can “dock” an exempt employee’s pay if the employee is absent for one or more full days because of sickness or disability (including work-related accidents) if the deduction is made as a result of a failure to qualify for a bona fide plan or after the employee has exhausted the leave allowance thereunder.

Frequently Asked Questions

Q: When is it legal to “dock” an exempt employee’s pay?

- When an employee is absent from work for one or more full days for personal reasons and doesn’t perform any work
- For penalties imposed for violations of safety rules of major significance
- To offset any amounts an employee receives as jury or witness fees, or for military pay.
- For unpaid disciplinary suspensions of one or more full days imposed in good faith for violations of workplace conduct rules
- Deductions for partial weeks worked during the initial or final weeks of employment.
- When an employee works a reduced or intermittent work schedule under the Family and Medical Leave Act (FMLA).

Frequently Asked Questions

Q: When do I have to pay my hourly employees when they travel?

A: Time spent in travel away from home during regular working hours as a passenger on an airplane, train, boat, bus or auto is considered work time and must be compensated at no less than minimum wage and is counted as “work hours” for the purpose of calculating overtime.

All time spent by an employee when his/her principal activity is driving or when driving his/her own vehicle must be counted as hours worked.

Frequently Asked Questions

Q: When do I have to pay employees for their “commute”?

A: Time spent in travel from home to the office and from the office to home is considered a commute and is not compensable.

Once an employee reaches the job site, any additional time spent traveling is considered work time and is compensable.

Frequently Asked Questions

Q: When is “On Call” time compensable for hourly employees?

A: It depends on how restrictive the employer has made the “on call” time. Is the employee “engaged to wait”? For example: If the employee **MUST** respond to an emergency with 30 minutes, every minute spent waiting for the phone to ring becomes compensable.

