



EMPLOYMENT & LABOR ADVISORY

JUNE 2016

What is the impact of the recent changes to the FLSA on your non-profit or ministry?

The recent changes to the FLSA white collar exemption has nearly every business asking, “what does this mean for the company?” All companies with employees, including non-profits and churches need to understand the revised overtime regulations and determine (1) do these regulations apply to your non-profit or ministry and (2) what do I need to be ready when the regulations become effective?

This material was prepared to assist non-profits and ministries with the long anticipated final changes to the overtime regulations. Read on to determine whether these changes will apply to your company and if so, what preparations will need to be taken prior to the December 1, 2016 effective date of the regulations.

How did the salary test change?

The most significant change to the regulations is the increase in the salary level required for exemption from overtime to an annual salary of \$47,476 (up from the current salary threshold of \$23,660). This translates to a weekly salary of \$913 (up from \$455 per week). This figure was revised downward from the proposed regulations and is set at the 40th percentile of fulltime salaries in the lowest-wage Census Region, which is currently in the South.

This means that exempt employees, who currently earn more than \$455 per week, but less than \$913 per week, need to be examined. Employers may (1) reclassify these employees as nonexempt, which will entitle them to overtime for any hours worked over 40 in a week or (2) increase those employees’ salaries to the \$913 per week threshold, for those employees not far off from the new threshold.

Will the upcoming change apply to your non-profit organization or ministry?

There is no blanket exemption for non-profits from the FLSA. Rather, the non-profit organization is subject to the same coverage tests (enterprise or individual) to determine whether they are covered by the FLSA. Most non-profits are covered by the FLSA under one test or another.

What is “enterprise” coverage?

“Enterprise” coverage exists when a company has annual sales or business of at least \$500,000. For a non-profit, enterprise coverage applies only to the activities performed for a business purpose (such as selling logoed items or providing services for a fee). It does not apply to those charitable activities that are not in substantial competition with other businesses. Thus, income from contributions, membership fees or dues,

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and donations used for a charitable activity are not counted toward the \$500,000 threshold that establishes enterprise coverage.

When does “individual” coverage exist?

While many non-profits may not be considered a covered enterprise, it is likely that their employees are entitled to FLSA protections as covered individuals. “Individual” coverage is determined on a case-by-case basis and is established when the employee is engaged in interstate commerce or in the production of goods for interstate commerce.

For example, employees whose work involves the regular use of interstate emails, telephone, or other similar instrumentalities for communication across state lines are engaged in interstate commerce and qualify for individual coverage. An employee will be determined to be engaged in interstate commerce if the activities (e.g., traveling across state lines, interstate communication, interstate purchase of goods) are a “regular and recurrent” part of his or her duties, but not if it is a *de minimis* activity. Most significant, is that the non-profit or non-business nature of the employee’s work is not considered in determining whether the employee is covered individually under the FLSA.

Because your non-profit or ministry, or the employees therein, are likely covered by the FLSA, it is important that your employees are properly classified as exempt or non-exempt.

Ministerial Exception

The FLSA does not contain a ministerial exemption in the statute. To the extent that a “ministerial exemption” to the wage and hour requirements within the FLSA, it has been created by court decisions. Ministers, clergy, or others similarly ordained or licensed in a religious capacity, may qualify for the white-collar exemptions to the FLSA. If not, ministers may be excluded from the FLSA under the court created “ministerial exemption.”

The 2012 United States Supreme Court decision in EEOC v. Hosanna-Tabor Evangelical Lutheran Church, outlined four factors in finding that a teacher in a religious school fit a ministerial exception to Title VII. Although it is not completely certain how courts will apply this exemption to the FLSA, the four factor test may be applicable in exempting ministers from the FLSA requirements:

- 1.) the church held out the employee as a minister, with a role distinct from that of most of its members;
- 2.) the employee’s title as a minister reflected a significant degree religious training, including a formal commissioning;
- 3.) the employee holds himself/herself out as a minister of the church; and
- 4.) the employee’s job duties reflect a role in conveying the church’s mission.

If an employee fits these four categories, the employee may qualify for a ministerial exemption. But whether the courts will apply this exemption to the FLSA has yet to be decided by the courts.

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No changes to duties test

The DOL has posted a [fact sheet](#) which explains the final rule's focus on updating salary and compensation level for white collar exempt employees. In addition to the salary threshold, workers must meet the "duties tests" to determine exempt status. The DOL did not alter the duties test for exemption in the final regulations, so employers should continue to follow the familiar duties tests from 2004.

White collar exemption tests

To be exempt from overtime, "white collar" employees must (1) be compensated on a salary basis exclusive of board, lodging, or other facilities rather than on an hourly basis, (2) meet the salary threshold of at least \$913 per week (as of December 1, 2016), and (3) meet the duties tests by having the employee's primary job involve the kind of work associated with exempt executive, administrative, or professional employees.

The overtime exemption applies to any computer employee who is compensated on a salary or fee basis at a rate of \$913 per week or more, or on an hourly basis at a rate of at least \$27.63 an hour, and meets the duties tests.

Three year adjustments

The DOL will automatically update the standard salary and compensation levels every 3 years going forward. This will be easier on employers than the originally proposed annual updates. Based on projections of wage growth, the DOL anticipates that this threshold will rise to over \$51,000 by January 1, 2020, which will be the date of the first increase.

Highly Compensated Employees

The final rule also set the total annual compensation level for highly compensated employees (HCEs) at \$134,004 per year, up from the proposed threshold of \$122,148. This compensation level is equal to the 90th percentile of earnings of full-time salaried workers nationally and is set to adjust automatically every three years on this basis.

According to the DOL, to be exempt as an HCE, an employee must also receive at least the new standard salary amount of \$913 per week on a salary or fee basis and pass a minimal duties test. An HCE must customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee and have the primary duty of performing office or nonmanual work.

Bonuses and incentives

The final rule allows employers to count nondiscretionary bonuses, incentive payments, and commissions toward as much as 10 percent of the salary threshold. In order to count, these payments must be paid on a quarterly or more frequent basis. The new rules also permit the employer to make a catch-up payment.

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An HCE's annual compensation may continue to include commissions, nondiscretionary bonuses, and other nondiscretionary compensation earned, as it has in the past. An HCE must also receive at least the new standard salary amount of \$913 per week on a salary or fee basis.

Current	Final Regulations
Must earn \$455 per week	Must earn \$913 per week
Salary level fixed	Salary level adjusts every 3 years
Must satisfy duties and salary basis test	Duties test unchanged

Overview

Here are some of the legal concerns and options which should be considered in reviewing whether your non-profit or ministry is subject to the FLSA requirements and how to properly classify your employees under the revised regulations.

How to determine whether an employee should be classified as exempt or nonexempt:

- a. Determine whether enterprise coverage exists.
- b. If not, review the job duties of each employee to determine whether individual coverage exists for each employee.
- c. If either enterprise or individual coverage exists, review the white collar exemption test:
 - (1) is the employee compensated on a salary basis exclusive of board, lodging, or other facilities rather than on an hourly basis?
 - (2) does the employee meet the salary threshold of at least \$913 per week (as of December 1, 2016)?
 - (3) do the employee's primary job duties involve the kind of work associated with exempt executive, administrative, or professional employees?
- d. If the answer is "no" to either (c)(1), (2), or (3), the employee should be classified as non-exempt and will be entitled to overtime for all hours worked in excess of 40 in a workweek.
- e. If the answer is yes to (c)(1) and (2), audit each job description to ensure the description properly reflects the actual duties of each position and review to determine whether the exempt duties amount to the primary duties of the exempt employee. This will determine whether (c)(3) can be properly answered in the affirmative.

Options available to employers to assist in controlling overall costs:

- a. Increase the salaries of those employees who are already close to the threshold to allow them to remain in the exempt category in order to avoid paying overtime.

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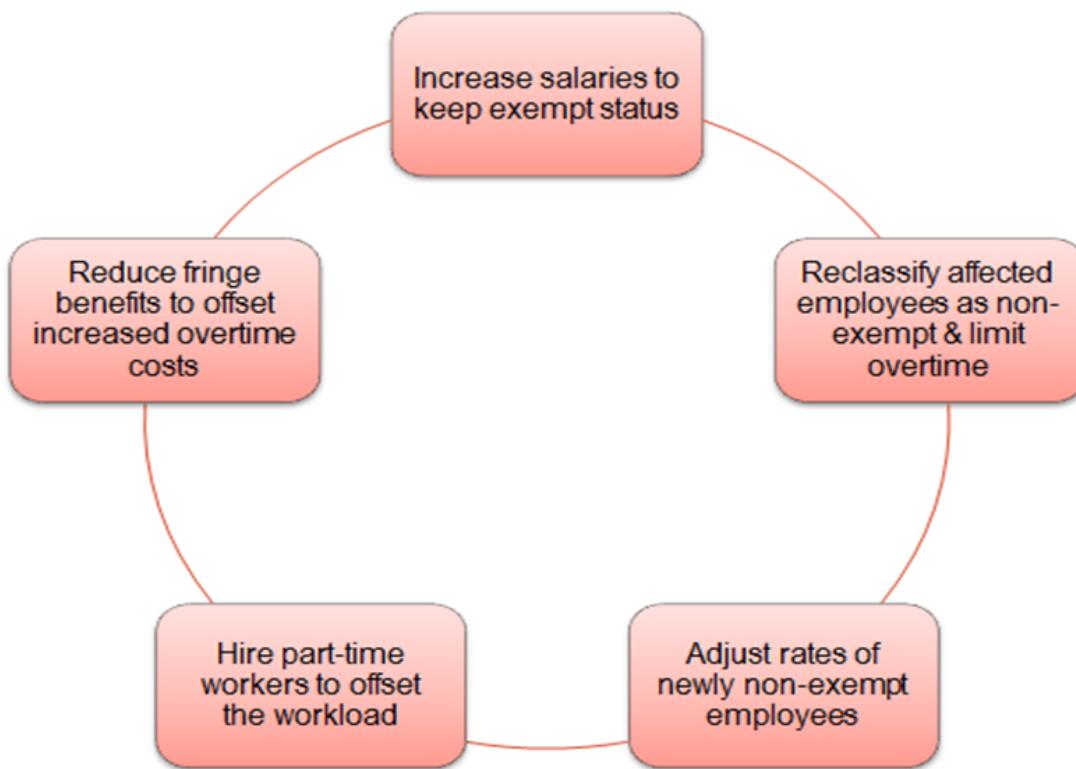
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- b. Drop the hourly rates of newly nonexempt employees, so the total cost when paying overtime will be comparable to the salary they were paid when they were exempt (although this option may not go over well with employees).
- c. Reclassify the affected employees as nonexempt, but limit their overtime hours.
- d. Hire part time workers or temporary employees to offset the reduced workload of employees who are no longer working more than 40 hours per week.
- e. Reduce fringe benefits such as health insurance contributions, 401(k) match, vacation, sick days, etc. to offset the increased overtime costs.
- f. Train newly nonexempt employees to use proper timekeeping methods and to prevent them from working unauthorized overtime.
- g. Implement policies that prohibit employees from working over 40 hours in a workweek without prior written approval from the supervisor. While non-exempt employees must always be paid overtime for hours worked in excess of 40, employees may be disciplined for violated a work policy for failing to obtain prior written approval.



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Prior to making any changes, employers should explain to employees why the change is taking place, i.e., to comply with standards set by changes to the federal law, not a discretionary change by the company. Reclassifying an employee from exempt to nonexempt offers overtime options, but may appear to be a loss of status to the newly nonexempt. While some employees will welcome the chance to receive overtime pay, others may see the need to track actual hours worked as a demotion. Therefore, reiterate that the changes are not a reflection of how the company views the employee. These measures will likely ease the transition.

Now is the perfect time to conduct an overall internal wage and hour audit to determine current and ensure future FLSA compliance. We've already seen an uptick in DOL audits of companies in which the focus has been on the classification of exempt versus non-exempt employees. These final regulations promise a continued uptick on the focus on the proper classification of employees by the DOL. This is an excellent opportunity to review your company's compensation plans and job descriptions which are essential when properly classifying employees as exempt or non-exempt based on white collar exemptions under the FLSA.

If you would like assistance with such a review or for more information on compliance in general, please contact Jodi R. Bohr or Don Johnsen.

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Will the new FLSA regulations impact my organization?

