

FLSA Changes: What You Need to Know

Webinar Q&A Responses

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General Questions

Q. Duties Test Exemption Questions:

- Is it okay to make staff exempt if they are entry level?
- Do you have any further description or guidance of the Administrative exemption? We have some employees that are paid around \$40,000 that do work more than 40 hours per week. The way I understand it, if they would meet the two requirements below, we would not have to pay them overtime. Is that correct?
 - 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
 - The employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.
- What takes precedent - white collar exemption categories or the dollar amount \$47,476?

A. For an employee to be considered exempt, all 3 of these tests must be confirmed:

1. Salary Level – employee is paid at least \$913 per week effective 12/1/2016;
2. Paid on a Salary Basis – employee is paid the same amount every week regardless of quality or quantity; and
3. Duties Test – Some employees are exempt from overtime compensation. The “white collar” exemptions consist of Executive, Administrative, and Professional employees (https://www.dol.gov/whd/overtime/fs17a_overview.htm). Also, there are other exemptions for employees in certain professions and industries. Please review these exemptions on the Department of Labor (DOL) website to see what positions meet the duties test (<http://webapps.dol.gov/elaws/whd/flsa/screen75.asp>).

Q. To clarify, an employee must meet all 3 tests to be exempt: Salary level, salary basis and duties test?

A. Correct, for the “white collar” exemption an employee must meet all 3 tests. See question above for a summary of each test.

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Q. I had heard that it is okay to keep an exempt employee who is under the \$47,476 threshold as salaried and then just pay them time and a half if they work over 40 hours. This is opposed to making them hourly. The employee is not required to track all hours just submit OT hours to manager for payment. Is this a viable option?

A. You are describing a "salaried non-exempt" employee. Since this position is still non-exempt, you are required to pay this employee overtime compensation for hours worked in excess of 40 AND track their time based on the [FLSA recordkeeping requirements](#).

Q. Our company pays 100% of employees' health, dental and vision benefits - can this be calculated in the overall comp to come up to the \$47,476 level?

A. No, the salary threshold is based off of weekly compensation of at least \$913 per week effective 12/1/2016. The salary threshold does not include payments for medical, disability, or life insurance plans or retirement plan contributions.

Q. Based on your example, how realistic is it to reduce the hourly wage of employees without affecting morale?

A. If you are referring to changing an exempt employee to non-exempt to meet the requirements, we believe this is all in the communication and individual conversation with employees. We highly recommend companies begin having these conversations now explaining why you are asking currently exempt employees to track their time and explain you are gathering data so the company can exercise care and consideration. Emphasize that this is not a demotion and that the value of the employee's role and/or position has not changed.

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Q. Comp Time

- **I thought it had to be the employee's choice whether they want overtime pay or take time off to compensate for overtime hours worked.**
- **Can an employer grant comp time instead of paying the overtime rate?**
- **I heard Kimberly say we need to check state rulings, but it sounds like all comp time would need to be within the same workweek. Do you have any other thoughts?**

A. Some state laws or state & local governments permit compensatory time. However, in general, comp time is not permitted for private employers. Employers are required to pay overtime to non-exempt (hourly) employees for hours worked in excess of 40 in a workweek. An employer can adjust an employee's work schedule during the workweek to ensure the employee is not working over 40 hours to avoid overtime compensation. Please see DOL Fact Sheet #7 (<https://www.dol.gov/whd/regs/compliance/whdfs7.pdf>).

Q. Is there any issue with a reduction of the base salary to account for overtime expected? (e.g., tax accounting industry with a peak workload January through April). When I was researching moving an employee to an hourly rate rather than salary, there were a few sites that mentioned potential legal issues since you are moving the position to non-exempt and you may be liable for prior overtime hours never paid.

A. We believe this is a reference to the fact that tax people work a significant amount of their annual hours in January through April and want to factor this into a base salary calculation. If an employer is moving a currently exempt employee to non-exempt as a reaction to the new salary threshold we do not believe there should be legal concerns or requirements to pay overtime for hours work prior to 12/1/2016.

Q. If our work period is 80 hours, do we still account wages by each 7 day period?

A. Yes, the FLSA defines a work week as 7 consecutive 24 hour periods or 168 hours. Regardless of your company's pay cycle non-exempt employees' overtime compensation should be calculated on a work week, NOT a biweekly pay cycle.

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Q. Employee Benefits

- **How do employee benefits impact the total amount compensated to staff?**
- **For a company that currently pays 100% of employee health insurance, can you change to have the employee pay the insurance but add that amount to their pay to increase pay closer to the \$47,476? What would the pros and cons be of this option?**

A. In general employee benefits do not impact the salary threshold. The salary threshold does not include payments for medical, disability, or life insurance plans or retirement plan contributions. If a company chooses to change their cost-sharing approach for insurance premiums to offset the salary threshold, keep the Affordability requirements in mind (<https://www.healthcare.gov/glossary/affordable-coverage/>).

Q. Would regular rate of pay include a structured bonus plan that the payout is determined based on the overall profit of the company. Therefore the bonus amount changes if the company has low profit or high profit?

A. Non-discretionary bonus and incentive pay should be including in a non-exempt employees calculation for overtime compensation.

Q. Does this apply to an individual's salary or the bottom of the salary range for the classification?

A. This salary requirement applies to each individual exempt employee which must be at least \$913 per week.

Q. If an employee qualifies to be exempt by meeting the salary tests and duties test, are we legally required to make them an exempt position? Can we leave them as non-exempt and continue to pay them OT?

A. Employers are not required to classify an employee as exempt if they meet all three tests.

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Q. 12/1/16 Compliance Date and Paychecks for that Pay Period

- **How do you handle making the change on 12/1/16 if your pay period straddles that date - i.e., work week from 11/28/16 to 12/4/16?**
- **Do you know if the 12/1/16 is when the employees need to be converted to hourly or is it with pay checks paid after 12/1/16? We have a pay period ending November 26th, but gets paid on December 2nd. Can we make it effective November 27th or does it need to change so the 12/2 payroll reflects the change.**

A. There are several ways to approach this. A couple of examples: the company can decide to change a pay period prior to 12/1/16 or the company could prorate based on the 12/1/16 effective date. The DOL has not given guidance on this outside of the 12/1/2016 compliance date.

Q. If employer requires salaried persons to work 45 hours a week, do you pay OT over 40 or 45?

A. If the employee is exempt no overtime is required. If an employee is "salaried non-exempt" the employer must pay overtime in excess of 40 hours per workweek.

Q. What does the highly compensated threshold relate to in the rule changes?

A. The highly compensated salary threshold will increase to \$134,004 effective 12/1/2016.
(https://www.dol.gov/whd/overtime/fs17h_highly_comp.pdf)

Q. Employee Classification and Different Compensation Levels

- **I heard you say that two employees doing the same job can be paid differently on salary exempt and the other not - did i understand correctly?**
- **Can different employees with the same classification be salaried and hourly based on their level of pay?**

A. The "white collar" exemptions require an employee to be paid on a salary basis, paid above a certain salary level, and meet the respective duties test. If an employee meets the duties test of an executive, administrative, or professional employee, and meets the salary basis requirement, and meets or exceeds the salary level requirement, they would meet the requirements for the exemption. If they fail to meet any part of the criteria, they would not meet the exemption and would therefore be non-exempt. The exemption is applied on an employee by employee basis, not to a particular classification. We recommend that employers have a solid communication plan to explain why employees in the same job might be paid differently. continued >>>

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Q. Are salaried employees required to work 40 hours?

A. No, exempt employees do not have to work 40 hours to be paid their full salary. Employers can certainly choose to set work schedules/hours. However, if an exempt employee works anytime during the work week they should receive their full salary. However, please note “salaried” does not equal “exempt.” If the position is “salaried non-exempt,” you must track hours. If the position is “salaried exempt,” employers are not required to track hours.

Q. Professionals and Job Duties

- **Please provide a listing of job duties that qualify for exempt status.**
- **Can you go over the professionals again?**

A. There are several "exemptions" under the FLSA. During this session we discussed the following: Executive, Administrative, Professional, Outside Sales, Computer and Highly Compensated. There is not a list of duties available however the DOL provides guidance:

<http://webapps.dol.gov/elaws/whd/flsa/screen75.asp>

Professionals include – Lawyers, CPAs, Doctors, Pharmacists, Engineers

Primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction

Primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. For more information please review DOL Fact Sheet 17d (https://www.dol.gov/whd/overtime/fs17d_professional.pdf).

Q. Can someone with a salary of \$40,000 still be paid his or her salary as long as they work less than 40 hours?

A. This would be considered salaried non-exempt in which employers are required to track actual hours worked and pay the employee overtime in excess of 40 hours in a workweek.

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Q. Employees arrive at work at different times. Our office opens at 8:00. If an employee arrives at 7:30, for his or her own convenience, do we have to allow them to clock in or start crediting them for time at that point?

A. If a non-employee arrives early to the office, the employer is not required to compensation unless the employee is actually performing work. A good practice would be to request that employee remain logged out of their computer or in the break room until their scheduled shift begins. If the non-exempt employee performs work even outside their schedule shift this would be compensatory time.

Q. If personnel policy allows 1 hour for lunch, does the employee need to clock in and out for lunch?

A. Non-exempt employees that are relieved of their duties should clock in/out for the lunch hour.

Q. Does the salary threshold trump the duties test? If they make more than the threshold salary does it matter what their duties are?

A. For an employee to qualify as exempt, they have to satisfy the following tests: Salary level, Salary Basis, AND Duties tests. See the first Q&A on page 1 for a summary of each test.

Q. Do you know how this ruling applies when our staff raises some of their own support? For example, if we have an employee that is at \$45,000 salary with the option of another \$5,000 if they raise their own support. Is this legal under this ruling? The \$5,000 isn't promised since they don't get it if they don't raise it. I'm assuming from what I've heard that we would have to either make them non-exempt or raise to threshold.

A. Correct, the ruling requires an exempt employee to make at least \$913 per week/\$47,476 to remain exempt.

Q. Can we keep a person who is a supervisor as exempt even if their pay is less than the new amount required in December as long as they track their hours and then if they go over 40 hours in a work week that we pay them overtime for those overtime hours in that work week?

A. That person would no longer meet the salary threshold as an exempt employee. However, your description indicates a "salaried non-exempt" employee. An employer is permitted to pay a non-exempt employee a salary which is less than the required \$913 per week (New Overtime Final Rule) as long as the employee is not paid less than the federal minimum wage rate of \$7.25 for all hours worked and is paid overtime for all hours worked in excess 40 per week. Please note, if the position is "salaried non-exempt," you must track hours. continued >>>

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Q. Regarding salary basis exemption, did you say that if the employee gets paid the same amount each pay period no matter hours worked that they are exempt?

A. To qualify for any of the “white collar” exemptions, employees generally must meet the salary basis test, the salary level test, and the duties test. Generally, if an exempt employee is subject to the salary basis test and works for any amount of time during their workweek, they must receive at least the full standard salary level (\$913 per week beginning on December 1, 2016) to retain their exempt status. To be paid on a salary basis, an employee's pay cannot fluctuate according to the quality or quantity of their work. However, employers may deduct from an employee's salary for full-day absences under certain circumstances. For example, if an employee is absent from work for one or more full days for personal reasons other than sickness or disability, the employer may make a deduction without changing the exempt status of the employee. See DOL Fact Sheet #17G for circumstance in which deductions can be made to an exempt employee's salary (https://www.dol.gov/whd/overtime/fs17d_professional.pdf).

Q. Alternative Hour and Work Commitments

- **If we have a 20-hour/week, salaried employee who works 50 hours in a week. We need to pay 10 hours of overtime, but do we also have to pay an additional 20 hours of regular time for that week?**
 - **We have several employees who work 30-35 hours a week who also do events for the organization and are currently paid a flat rate for doing an event. Will we need to now calculate those events and pay on an hourly basis to accurately calculate regular and overtime pay?**
- A. If the employee is non-exempt they must be compensated for all actual hours worked and time and 1/2 in excess of 40 in a work week. Please note, “salaried” does not equal “exempt.” If the position is “salaried non-exempt,” you must track hours.

Q. As I understand the regulation changes, the duties test did not change. Can you confirm that please?

A. Correct. The new FLSA ruling impacted the salary threshold, not duties test.

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Q. Explain how to pay an exempt employee with salary of \$115,000 and works 60 hours a week.

A. For an exemption to qualify the following terms must be satisfied: 1.) Salary level 2.) Salary Basis 3.) Duties Test. If the employee meets these 3 tests paying a salary of \$115,000 is acceptable and no overtime is due. If you plan to use the Highly Compensated exemption to meet the duties test, the salary must be \$134,004 effective 12/1/2016 and at least one of the white collar duties apply.

Q. So does payroll immediately pay an exempt employee overtime after 40 hours on any paycheck unless they are salaried at \$134,004 or more?

A. This is up to the employer to implement and determine which positions/employees should be paid overtime and the approval process and the automation of that process. If an employee meets the criteria for an exemption then no overtime is due after 40 hours in a workweek. For guidance on how to determine if an employee meets the “white collar” exemption remember there 3 tests: Salary level, Salary Basis and Duties Tests (see page 2 for a summary of each test).

Q. Am I correct in my understanding that an employee can work overtime hours without supervisory approval?

A. Employers are required to pay overtime to non-exempt (hourly) employees for hours worked in excess of 40 in a workweek regardless of approval. We recommend an overtime approval policy and if employees abuse overtime the employer can take disciplinary action for policy violation per the employer’s normal disciplinary practices.

Q. Is there guidance available on how to properly share this information with employees?

A. This is a good article to get started: *7 Steps for Communicating Employee Transitions from Exempt to Non-Exempt* <http://compensation.blr.com/Compensation-news/Compliance/Employee-Overtime/7-steps-for-communicating-employee-transitions-fro/?redirect=autologin>.

Q. How does vacation or sick pay impact any potential OT pay?

A. Employers only have to pay for actual hours worked in excess of 40 in a work week. If the employee uses PTO or sick time this time does not have to be included in the overtime consideration.

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Q. Recordkeeping requirements – during the webcast you mentioned a laundry list of payroll records that an employer should have but I didn't see a slide and I couldn't write them all down as you quickly read through them.

A. Payroll records must be maintained for 3 years and wage computations must be maintained for 2 years. The following is a listing of the basic records that an employer must maintain:

1. Employee's full name and social security number.
2. Address, including zip code.
3. Birth date, if younger than 19.
4. Sex and occupation.
5. Time and day of week when employee's workweek begins.
6. Hours worked each day.
7. Total hours worked each workweek.
8. Basis on which employee's wages are paid (e.g., "\$9 per hour", "\$440 a week", "piecework")
9. Regular hourly pay rate.
10. Total daily or weekly straight-time earnings.
11. Total overtime earnings for the workweek.
12. All additions to or deductions from the employee's wages.
13. Total wages paid each pay period.
14. Date of payment and the pay period covered by the payment

Q. We have employees that are neither hourly nor salary - they are paid on an incentive basis tied to productivity. Are they considered non-exempt and are subject to the \$47,476 minimum salary?

A. For an exemption to qualify the following terms must be satisfied: Salary level, Salary Basis, AND Duties tests. Employees that don't met the exemption tests would be considered non-exempt and are subject to federal or state minimum wage requirements. There are also special exemptions for commissioned employees and outside sales employees. Please review DOL Fact Sheet #20 (<https://www.dol.gov/whd/regs/compliance/whdfs20.pdf>) and # 17F (https://www.dol.gov/whd/overtime/fs17f_outsidesales.pdf) for more details.

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Q. Does the administrative exemption apply below the threshold of \$47,476?

A. No, for an exemption to qualify the following must be satisfied: Salary level, Salary Basis AND Duties tests.

Q. If an employee's schedule is adjusted due to excess hours, must that be provided at 1-1/2 time for hours over 40?

A. Yes, if the employee is non exempt (hourly) they should be paid time and 1/2 for hours worked in excess of 40 in a work week.

Q. Can you have two employees in the same position one earning less than 47,476 and one earning more with them each respectively at a different exemption status? For example, 2 HR Generalist with one earning \$45,000 and the other earning \$55,000. Could one be NE and other EX?

A. Yes, the exemption is applied on an employee-by-employee basis, not to a particular classification. The "white collar" exemptions require an employee to be paid on a salary basis, paid above a certain salary level, and meet the respective duties test. If an employee meets the duties test of an executive, administrative, or professional employee, meets the salary basis requirement, and meets or exceeds the salary level requirement, they meet the requirements for the exemption. If they fail to meet any part of the criteria, they would not meet the exemption and would therefore be non-exempt.

Q. What do you estimate the next adjustment to be in 3 years? I don't want to move someone to \$47,500 and then the next increase is say \$55,000. Do you have any feel for this?

A. The standard salary level will be updated to maintain a threshold equal to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South). You can check here for updates: <http://www.bls.gov/ncs/ocs/compub.htm#Division>

Q. Is there a way to structure a work week so that a non-exempt employee can work 9 hours for 8 consecutive days and then one 8-hour day so they can have every other Friday off? Or does that exceed the "40" hours in a workweek?

A. Non-exempt employees would be entitled to receive overtime pay for all work hours beyond 40 in a workweek.

Q. Are small businesses exempt from this? We have less than 10 employees.

A. No, small businesses are not automatically exempt from FLSA.

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Q. We are an interior design firm and a bulk of our employees fall under this role who are currently treated as exempt. Most of their base salary wages do not meet the new requirement amount however they would meet the overall new requirement if we include their bonuses. So that tells me we just need to look at some shifting in wages from bonus to base to increase their base and lower the bonus as long as they qualify for the white collar creative professional exemption status.

I also have a team member, position title of Chief Accountant, that I wanted to check on. She assists in overseeing our accounting department as well as serves as the company's office manager. She meets the salary requirement however I'm not certain about the duties test. I feel she would qualify as Administrative exemption as she mainly performs office/non-manual work for the general operation of the business and does use discretion and judgment on certain business matters. She does not have authority to hire/fire staff, although she would certainly provide valued feedback on a suggestion of either.

A. Interior Designers - 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 (as defined in the regulations) at a rate not less than \$913 per week (12/1/2016); and
- 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.

This requirement distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. 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.

Chief Accountant/Office Manager - The Administrative exemption might apply if she has the ability to make decisions such as interpret policy or negotiate/sign contracts without approval from superiors. Review the DOL Administrative Exemption (https://www.dol.gov/whd/overtime/fs17c_administrative.pdf).

Q. Is December 1, 2016 the deadline for newly non-exempt employees to begin tracking hours or is that the date after which employees must be paid based on hours worked?

A. The final ruling does not change the recordkeeping requirements; however employers that make the decision to transition employees to non-exempt status will need to be in compliance as of the date the employee transitions to the non-exempt status.

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Q. Does the time employees spend at organization meetings count as work hours? example: Lions club meetings, chamber or rotary

A. For a non-exempt employee, if this is a requirement of their job, then it would be considered compensable time. Employers will want to review their travel policies to ensure compliance with the Portal-to-Portal Act. (more here : <https://www.dol.gov/whd/regs/compliance/whdfs22.pdf>).

Q. How does housing value figure in on the \$47,476?

A. For EAP or “White Collar” employees to qualify for exemption an employee must earn the minimum salary amount, "exclusive of board, lodging, or other facilities." The phrase "exclusive of board, lodging, or other facilities" means "free and clear" or independent of any claimed credit for non-cash items of value that an employer may provide to an employee.

Q. If employees’ job descriptions/duties meet the exempt requirements may they remain below the salary threshold?

A. For employees who are subject to the salary level requirement, an employer may raise their salaries to the new level (\$913 per week, beginning on Dec. 1, 2016) to retain their exempt status, but the employer is not required to do so. Alternatively, the employer may classify the employee as non-exempt and ensure that they receive overtime pay whenever they work more than 40 hours in a workweek. Some EAP occupations are not subject to a salary level requirement (e.g., doctors, lawyers, teachers, and outside sales employees), so if these employees pass the duties test they qualify for exemption regardless of how much they earn, but must be paid a salary to be exempt

Q. Can we get a bit more detail and clarification on the overtime ruling for hourly versus salary employees? Is it specifically for salaried employees or does it also extend to those being paid an hourly rate?

A. Employee classifications are either exempt from overtime or non-exempt (and overtime eligible). References to salary and hourly are payroll terms and shouldn't be confused with the FLSA regulations. For a “white collar” exemption to qualify, the following terms must be satisfied: Salary Level, Salary Basis, AND Duties tests. If the employee does not meet all three tests the position should be non-exempt and eligible for overtime.

Q. Does the White Collar Exemption of \$47,476 vary by state?

A. It is possible. Please review state requirements. States may differ in or dovetail with this new threshold; it could result in legislative or regulatory action at the state level that bears watch.

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Q. Our CPA firm has an individual paid an annual salary of \$60,000 who works in our accounting department. If she takes any time off for vacation or personal reasons she must use per PTO hours or if she exceeds her allowed PTO her salary is decreased accordingly.

She does not have a college degree but has many years of experience. The duties she performs are primarily the preparation of financial statements, tax returns, sales and payroll tax returns. She has client contacts with many of the firm's clients regarding compliance issues but the tax returns and financial statements she prepares are reviewed by the tax and accounting departments. All of our firm's tax returns and financial statements are reviewed by senior staff. She does not manage other staff members and does not make any company decisions.

My view of the above situation is that she is not considered an exempt employee.

A. Based on the information you have provided I would agree this position appears to be non-exempt and thus eligible for overtime compensation.

Q. Does an employee need to earn \$913/week consistently or can they average \$913/week?

A. An employee's exempt status is determined on a weekly basis. Generally, to retain exempt status, an employee must satisfy the duties test and earn at least \$913 per week.

Q. We have a President, Sales Manager, and General Manager who earn roughly between \$115,000 - \$127,500 per year. How do I know whether they need to be bumped to \$134,004?

A. If your employee earns at least \$913 per week and passes the standard duties test, they will not be affected by the increase in the Highly Compensated Exemption (HCE) total annual compensation threshold. If they only pass the relaxed HCE duties test, you would need to raise their compensation to the new threshold (\$134,004 per year effective 12/1/2016) to retain their exempt status.

Q. Can you please provide a chart with the descriptions of each of the exemptions?

A. During this session we discussed the following: Executive, Administrative, Professional, Outside Sales, Computer and Highly Compensated (slide 15 from the [webinar slides](#)). There is not a list of duties available however the DOL provides guidance (<http://webapps.dol.gov/elaws/whd/flsa/screen75.asp>) including DOL Fact Sheet 17d with more detail: https://www.dol.gov/whd/overtime/fs17d_professional.pdf

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Q. Can we continue to pay folks on a salary basis who will now be eligible for overtime? Or must anyone who is eligible for overtime be paid on an hourly basis?

A. Yes, an employer is permitted to pay a non-exempt employee on salary basis which is less than the required \$913 per week (New Overtime Final Rule) as long as the employee is not paid less than the minimum wage rate for all hours worked and is paid overtime for all hours worked in excess 40 per week.

Q. Do you have any advice about using the professional exemption for nonprofit development (fundraising) professionals? There is no specific higher education track for this, but it definitely requires education and training.

A. 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 (as defined in the regulations) at a rate not less than \$455 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.

*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 the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. The position might meet the Executive or Administrative exemption but mostly likely not the Professional exemption. Please also visit this DOL highered guidance: <https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>

Q. I have an employee that is hourly non-exempt with annual compensation of \$58,801. Since he is over the annual limit of \$47,476 he would fail the compensation test to leave him as non-exempt, correct? I would then have to look at his duties and responsibilities to leave him as non-exempt hourly, correct?

A. I believe the terms are reversed in this question. Exempt employee must meet all three test: Salary Level, Salary Basis and Duties. If these three tests are not met then an employee is non-exempt and subject to minimum wage and overtime compensation. Remember, the exemption is just that, an exemption. Everyone is non-exempt unless you can prove otherwise by meeting the tests.

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Q. I have one employee that is salaried exempt with annual compensation of \$47,501. Since he is over the annual limit of \$47,476 I can leave him as exempt with respect to the compensation test, correct?

A. Yes, but don't forget all three tests must be confirmed to be exempt: Salary Level, Salary Basis & Duties tests.

Q. Are there any disadvantages to moving an employee from exempt to non-exempt?

A. Key pieces to watch are the potential costs of overtime compensation and time keeping requirements. Also, be sure to review employee travel and benefits policies to see what that impact will be.

Q. Please explain again the difference between salary & Exempt?

A. Salary is a term used to explain how/method a person is paid. To be exempt 3 tests must be met: Salary Level (\$913 per week effective 12/1/2016); paid on a Salary Basis (paid same fixed amount without regard to quality or quantity) and the Duties tests. If these 3 tests are confirmed the employee is considered exempt.

Q. We have domestic violence advocates which are on call after hours and/or weekends. How is this handled? Do we have to pay time and half for on-call hours?

A. An employee who is required to remain on call on the employer's premises is working while "on call." An employee who is required to remain on call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on call. Additional constraints on the employee's freedom could require this time to be compensated.

Q. When it is okay to reduce an employee below minimum wage? Can you give some examples?

A. In general a non-exempt employee pay should not be reduced below minimum wage. If the employee receives tips, the employer can apply the tipped credit. There can be some exceptions to these standards including farm workers, those on training wages and those disabled. Much of this is governed by state law and varies by state. Be sure to comply with state regulations as well.

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Q. So if we have non-exempt employees under the \$913 a week (either as part time or full time employees). There is no impact on them, they are already non-exempt and have the ability to earn overtime. If I have say an exempt employee earning less than \$913 a week (no matter how many hours are in their typical work week) then I either have to start paying them overtime and their vacation and time off benefits need to switch to non-exempt benefit levels OR I have to raise their salary to \$913 a week for the year of 2017 so we can keep them exempt. So this theory of "raising folks above poverty level" is not intended toward anyone that is already in non-exempt status. It is really to help those that have been put into exempt status jobs with one salary and working lots of hours earning (in a bad case) the lowest wages possible and being taken advantage of, correct?

A. Your assessment appears correct.

Travel Time

Q. We have hourly employees who travel 2-3 times per year. Is there an industry standard or regulation to base their working hours on during their travel?

- **I have staff that travel to different sites and conferences. Would we be required to pay them overtime for all hours "worked" meaning travel time, etc.?**

A. See information from DOL website regarding travel time (<https://www.dol.gov/whd/regs/compliance/whdfs22.pdf>).

Q. When an hourly employee travels, is there an industry standard or regulation on how many hours they should be compensated during their travel? For example, I am traveling to SF Saturday morning to attend the Charity Bash. Because I'm hourly, we're not sure what I should be reporting. My travel time? Only during the event? I've heard from others the general thought is 8 hours per when you are out of town for work related events. The potential for me to go above 40 hours is slim, but when our Program staff go down for events, it is very likely to cause overtime.

A. Compliance with the Portal-to-Portal Act is important and can be complicated. You will want to review the compensable time requirements and ensure your business travel policy complies (additional guidance from the DOL is available here <https://www.dol.gov/whd/regs/compliance/whdfs22.pdf>)

Q. How will you determine hours for travel by airplane to seminars or by vehicle when driving or not driving.

A. The determination of travel time has not changed due to the new ruling. Please review DOL Fact Sheet #22 (<https://www.dol.gov/whd/regs/compliance/whdfs22.pdf>) for additional details related to travel time.

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Q. If an employee wants to attend a 6 hour educational seminar at a location that is 2 hours away, the total time gone is 2+6+2=10 hours. Does the employer have to pay overtime?

A. If the employee is non-exempt, travel time is compensable if they are driving the car. See information from DOL website regarding travel time (<https://www.dol.gov/whd/regs/compliance/whdfs22.pdf>)

Highly Compensated Employees

Q. Can you give more information on highly compensated employee?

A. When the Final Rule takes effect on December 1, 2016, employees who only satisfy the Highly Compensated Employee (HCE) duties test may qualify for exemption if they earn at least \$134,004 per year and at least \$913 per week. HCE employees must receive 100% of the \$913 weekly threshold on a salary or fee basis, but non-discretionary bonuses and incentive payments (including commissions) may be used to satisfy the remainder of the \$134,004 total annual compensation requirement. Remember, your HCE might also qualify under the EAP rules if they fail the HCE test.

Tracking Time

Q. If an employee moves from exempt to non-exempt, is it necessary that this employee have to clock-in and clock-out each work day? Is it ok to have a timecard with logging the hours that he works each week?

A. Employers may use any timekeeping method they choose. For example, they may use a time clock, have a timekeeper keep track of employee's work hours, or tell their workers to write their own times on the records. Any timekeeping plan is acceptable as long as it is complete and accurate. If a non-exempt employee's schedule is fairly consistent then weekly timekeeping may be an acceptable method. The method should be set to ensure that the employee and manager agree that these are the worked hours so there is a record of the agreement ongoing.

Q. Early in the seminar it was stated that FLSA required hours to be tracked for salaried employees. Is this done by most companies and if so how do most track it?

A. The FLSA does NOT require hours to be tracked for exempt employees. However please note, "salaried" does not equal "exempt." If the position is "salaried non-exempt," you must track hours. If the position is "salaried exempt," employers are not required to track hours. In the session we recommended tracking hours for all employees to gauge how many hours exempt employees are working currently as a means to determine how to address the change in the salary threshold for impacted positions.

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Q. Reasons for Tracking Hours

- **Do you think it is necessary to track salaried employees' time other than for analysis purposes?**
- **Do you recommend continuing to track ALL employee hours even for those that will still be exempt after 12/1?**
- **If all of your exempt employees are above the threshold I would assume there would be no reason to track their actual hours correct?**
- **Why require all employees to complete a timesheet? Is this before the change to get an idea of time worked for those changing status or is this recommended for ALL employees on a regular basis?**
- **Even though the Executives may understand the need for the change and compliance with the law, how would you convince those same executives that they should also track their time? One of your points was that ALL should track their time worked.**
- **Is it a best practice to have ALL employees track actual hours or is it a requirement? If HR has something on file that shows what someone's hours should be and the person is classified as exempt is that in line with the FLSA, or must they have actual hours recorded?**
- **I thought requiring exempt employees to complete a time sheet is illegal?**
- **We have heard some HR consultants suggest that organizations should not track actual hours of salaried, exempt employees for fear of treating them like hourly employees. How does this affect your suggestion to track all hours for all employees?**

A. The FLSA does not require employers to track exempt employee hours. However during this session we recommended this process so employers have good data regarding number of hours worked to complete exempt employees' duties which will allow employees to make decisions on how to implement the salary threshold changes.

Another possible reason an employer might want to track an exempt employee(s) time is for workforce planning purposes (e.g., When it does make sense to add resources or FTE?) Also, you might want to track hours for compliance with the Affordable Care Act and other anticipated reporting requirements.

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Q. It has been mentioned multiple times that ALL employees should be required to complete a timesheet. Are you suggesting this for the Executive Director/CEO level position as well?

A. Only if the Executive Director/CEO does not meet the new salary threshold of \$913 per week.

Q. You mentioned to have all employees (even salaried) keep track of their time. In the past I have been advised not to do such thing as that might exposed the employer to have to pay overtime because they are keeping track of hours. Is there exposure in keeping track of salaried employee's hours?

- **Is it legal to request salaried employees to track their hours?**

A. The FLSA does NOT require hours to be tracked for Exempt employees and the act of tracking hours does not in itself jeopardize exempt status. Businesses have the right to understand how their hours are being spent and increasingly they are being asked to demonstrate compliance as mentioned above. In the session we did recommend tracking hours for all employees to gauge how many hours exempt employees are working currently to determine how to address the change in the salary threshold for impacted positions. If an employer is moving a currently exempt employee to non exempt as a reaction to the new salary threshold there should be no legal concerns or OT requirements. Consult your legal counsel to confirm for your specific circumstances.

Q. Do you need to document hours for exempt employees?

A. The FLSA does not require employers to track exempt employee hours. However during this session we recommended this process so employers have good data regarding number of hours worked to complete an exempt employee's duties which will allow employees to make decisions on how to implement the salary threshold changes.

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Part-Time Employees

Q. Part-Time Salary Threshold

- **Is the minimum salary threshold pro-rated for part-time salaried employees? For example, if a salaried employee's normal work schedule is 24 hours/week would the minimum salary threshold be pro-rated to \$547.80 ($\$913 * 24/40$)?**
- **We have a couple of department managers that are exempt and are paid based on a 30 hour work week. Is the new weekly salary level prorated accordingly based on reduced hours, or is the \$913 week set in stone regardless of hours worked?**
- **We have a .75 FTE salaried employee. If his salary was figured based on 1FTE he would not make the threshold. How does this effect us?**
- **For PT exempt employees are you required to pay the new salary threshold of \$913 a week, regardless of hours worked.**

A. Whether a worker is full-time or part-time, the standard salary level to qualify for “white collar” exemption will be \$913 per week. Keep in mind the salary level and salary basis requirements do not apply to licensed or certified doctors, lawyers and teachers. Employees in these occupations who meet the duties tests are exempt regardless of their salary.

Q. How will part-time employees be figured into the new rules?

A. For an exemption to qualify the following terms must be satisfied 1.) Salary level 2.) Salary Basis 3.) Duties Test. If the employee works part time and meet all three tests they can be considered exempt.

Q. When analyzing part-time employees, is the base salary used for the threshold or is it appropriate to annualize salary as a full time equivalent?

A. An employee's exempt status - and if non-exempt, the employee's right to overtime pay - is determined on a weekly basis. Generally, to retain exempt status, an employee must satisfy the duties test and earn at least \$913 per week.

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Q. Can you elaborate on issues related to employees who are paid salary but the positions are based on part-time status (20-30 hours per week)- these folks don't meet the weekly threshold but the position would meet the job-duties test.

- **If someone is working 1/2 time, 50 percent of the \$47K?**
- **What about PT employees? Any consideration there?**
- **Must an employee meet both the salary level and job duties test to be exempt. What if an accountant at a nonprofit is paid less than the threshold but definitely meets the duties exemption?**
- **If you are paying an exempt employee a fixed rate per week and they only work 10 hours per week and are paid well above minimum wage, are you required to force them to hourly? I realize it would be best practice, but does the law require it? If there is no chance you would violate minimum wage requirements is it still ok to keep them on a fixed weekly rate even though that rate is lower than the new salary threshold?**
- **Do you know if stock compensation can be included in the salary amount? Our employees are paid a combination of cash and stock.**
- **Do Safe Harbor employee matching funds contributions qualify for the non-discretionary bonus threshold of 10%?**
- **If a position is increased to greater than 47,476/year are hours worked over 40hrs still paid at the OT rate?**
- **Could you please give more examples of who qualify as nonexempt? Like the front desk admin or a graphic artist?**
- **We have a part owner who wants to work on a part time basis for an agreed upon salary of \$25,000, but qualifies for exempt status through the administrative employee...with the new levels of pay for the exempt status...do we have to pay her the full 47,476.00?**

A. For a “white collar” exemption to qualify the following terms must be satisfied 1.) Salary level 2.) Salary Basis 3.) Duties Test. If the employee does not meet the salary threshold the position should be non exempt and eligible for overtime.

Stock and other benefits are generally not eligible to meet the salary threshold.

Please review duties test for each role as a job title does not provide enough information. In general front desk admin would be considered non exempt. A graphic artist might meet the professional creative exemption.

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Sales & Commissioned Positions

Q. Wage Threshold and Commissioned Employees

- Let's say we have an employee that is setup at less than the \$47,476 per year salary, but can receive commissions that would get them to that level. Then they do not achieve the sales goals needs to get their salary to \$47,476. What happens at that point? Do we somehow have to figure what their overtime would have been?
- How will the commission salary positions be effected? Can they remain salary with a base plus commission if the overall wage threshold is met?
- What about Base + commission salary employees ,are they required to meet the threshold ? when its 50/50 of the base and commission? Or if they are 100% commission?
- We have salesman who have a salary base + commissions and their commission is directly tied to their sales volume. The employee spends time in the office and out of the office on sales calls. If he only makes a \$31,000 salary, is it limited to 10% commission to count toward this new salary requirement?

A. The new ruling permits employers to satisfy up to 10% (\$822 per week) of the salary requirement with non-discretionary compensation (commissions, production bonuses). The employee must earn at least \$822 per week plus the 10%. This compensation must be paid at least quarterly. If an employee does not meet the salary threshold based on commission or bonus at the end of the quarter an employer has the opportunity for a one time "catch up" payment to ensure employee is meeting the salary threshold. If they employer chooses not to apply the "catch up" payment the employer must than treat the employee as non-exempt and is obligated to pay OT as needed.

A company might choose to change the commission structure to help offset the salary requirement. Please review requirements for "straight "commissioned employees in [DOL Fact Sheet #20](#).

Q. What is the best source to revisit we are calculating overtime correctly for non-exempt employees with an hourly rate but who earn commissions?

A. The DOL website has several examples available - <https://www.dol.gov/whd/StateandLocalGovernment/media/OT%20Examples%20Final.htm>

Q. For the outside sales exemption, do you have any further definition of the “customarily and regularly engage away from the employer’s place of business?” It’s not very specific.

A. The phrase “customarily and regularly” means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks.

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Q. Primarily Commissioned Employees

- **What about the specific exemption for car salesman and service advisors?**
- **I have many employees whose commissions are 70% of their income. These are people who make anywhere from \$60K to \$130K per year, but their salaries fall below the threshold. How will this affect me?**
- **Can you tell me how this affects persons that are on a draw and pay it back when monthly commissions are paid?**

A. If the employee is paid entirely by commissions, or draws and commissions, or if commissions are always greater than salary or hourly amounts paid, the-greater-than-50%-commissions condition will have been met. If the employee is not paid in this manner, the employer must separately total the employee's commissions and other compensation paid during the representative period. The total commissions paid must exceed the total of other compensation paid for this condition to be met. Please review [DOL Fact Sheet #20](#) for more detail and definition of "retail or service establishment"

Q. How would you suggest salespeople track their time?

A. Time tracking methods are the employer's choice. The FLSA states only that time records are accurate and complete for non-exempt employees. There are several methods ranging from time clocks, bio metric or simple handwritten schedules. If you have a payroll vendor they can provide some solutions if needed.

Q. What about inside salesman? If they get a weekly base pay with monthly commissions depending on what they sold, how would that affect their pay? Are they under the new act?

A. Generally inside sales do not meet the duties exemption. If that is the case they should be nonexempt (hourly) employees and are eligible for overtime compensation. A company might choose to change the commission structure to help offset the salary requirement.

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Q. Outside Sales Exemption

- **How does this new law apply to a commission based salesman? The salesman spends time in the office and outside of the office. Their pay is directly related to their sales volume. Does that salesman have to move to hourly if below the commission level?**
- **Are all outside sales employees full-time and part time subject to the \$47,476 test?**
- **Making sure I understand - unless you are making \$47,476, you are not exempt as an administrative employee or outside sales person (with exception of making \$822 week plus 10% commission/bonus quarterly)**
- **Outside sales is no longer applicable to Hi-Tech....we use sales people, but they do not travel. We utilize webcasts, and do all contract negotiations over phone/email. Exempt?**
- **Are they considered outside sales if they are working out of their homes making sales via phone and email?**

A. To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

The salary requirements of the regulation do not apply to the outside sales exemption. An employee who does not satisfy the requirements of the outside sales exemption may still qualify as an exempt employee under one of the other exemptions allowed by the FLSA if all the criteria for the exemption is met.

Generally working from home is considered the "place of business."

Computer Employee

Q. Question in regard to salary minimums to qualify as exempt as a computer employee. Did you say they need to earn at least \$26.89, not \$455 per week?

A. The computer employee must be compensated either on a salary or fee basis at a rate not less than \$455 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour.

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Seasonal and Camps

Q. How would you handle camps that have staff that work significant hours throughout the summer. These employees typically receive a small stipend each week and room and board. Would OT need to be considered/addressed with these staff? Also what about the directors of the camp that receive a salary that is less than the minimum indicate but they also receive housing year round and work minimal hours in the winter time frame and more during the summer? What are the overtime implications with these staff and can the housing be considered to meet these wage requirements?

- **I have summer seasonal staff that function like camp counselors. They are basically "working" a lot of the time. Does this apply to them?**

A. FLSA provides exemptions for "any employee employed by an establishment which is an amusement or recreational establishment, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33-1/3 per centum of its average receipts for the other six months of such year." Refer to fact Sheet #18 <https://www.dol.gov/whd/regs/compliance/whdfs18.pdf>

S Corporation

Q. What about S Corporation owners? There are a number of small/one-owner S Corporation whose owners are paid a wage - would they also pay themselves overtime? Is there any exemption for one owner S Corporations?

- **Is there an exemption for the owner of a company if he/she has a salary below the \$47,476 threshold?**
- **Are owners of a s-corporation exempt from the overtime rule?**

A. Since a "one owner S Corporation" would own more than 20%, they would fall under this category and therefore would not subject to the increase in standard salary level. Business owners - defined in [29 CFR 541.101](#) as "any employee who owns at least a bona fide 20 percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management" - are not subject to the salary level requirement. These bona fide business owners would not be affected by the Final Rule's increase to the standard salary level.

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Agriculture

Q. Ag employees were exempt from overtime provisions previously. Will this still be the case?

- Is an agriculture employee that is hourly and below the threshold exempt?
- How will this law affect Agriculture employees who are normally exempt from paying overtime?
- How does this affect Agriculture employees that are paid a salary?
- **The only thing I know about ag employees and overtime, I got from CLA's Paul Neiffer from his Farm CPA Today email – see below link. Can you send me any materials specific to farm labor & the new overtime pay rules? <http://www.farmcpatoday.com/2016/06/12/new-overtime-rules-update/>**

A. The DOL's rulemaking addressed the regulations governing the "white collar" exemptions under Section 13(a)(1) of the FLSA - exemptions for executive, administrative, and professional employees, as well as outside sales employees and employees with certain computer-related job duties. Thus, unless an agricultural worker currently qualifies for one of these "white collar" exemptions, they will not be directly affected by the Department's Final Rule. The FLSA's exemptions governing agricultural workers have not been changed by this Final Rule.

Q. Agriculture Exemption

- **What if an employee of a large farming operation does both office work and farm work? Are they required to be paid overtime?**
- **Is there an agricultural exemption?**
- **Are Ag workers still exempt? Do these workers include the hourly person in the office or the employee that keeps the equipment in repair, etc.**

A. Agricultural workers are still exempt if they meet the specified requirements. Agriculture includes farming in all its branches when performed by a farmer or on a farm as an incident to or in conjunction with such farming operations.

Agriculture does not include work performed on a farm which is not incidental to in conjunction with such farmer's farming operation. It also does not include operations performed off a farm if performed by employees employed by someone other than the farmer whose agricultural products are being worked on. So, office workers may not qualify under the Ag exemption.

Refer to the DOL Fact Sheet 12 (<https://www.dol.gov/whd/regs/compliance/whdfs12.pdf>)

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Construction

Q. With regard to construction companies - would the overall project superintendent qualify as a highly compensated employee exemption (as they're on the project and not in an office).

A. To qualify for the highly compensated employee exemption, the employee must earn at least \$134,004 in total compensation effective 12/1/2016, be paid on a salary basis and customarily and regularly perform a primary duty listed in any of the [white collar exemptions](#).

Education

Q. Under the new FLSA rule, are teachers still exempt from the salary level test?

- **How to handle full-time faculty and part-time faculty. Your interpretation of how to calculate hours worked for this type of employee.**
- **Please help me to understand where teachers might be categorized for exemptions.**
- **Under the new FLSA rule, are teachers still exempt from the salary level test?**
- **It is my understanding that teachers were exempt from overtime. Was that changed with the new legislation?**

A. Some EAP or “white collar” occupations are not subject to the salary level requirement, such as: Doctors, Lawyers, Teachers and Outside Sales employees. The DOL defines Teachers as: 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.

Q. We are a campus with admissions recruiters who travel out of state and locally as well as faculty with expertise in the fields they teach. Do our recruiters meet the outside sales test and do our faculty meet the technical test?

A. There is a limited exception for academic administrative employees who are paid at least either the new salary level or a weekly salary equal to the entrance salary level for teachers in the same educational establishment. Exempt academic administrative employees must have the primary duty of performing administrative functions directly related to academic instruction or training.

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Financial Institutions

Q. Our bank pays our tellers a semimonthly salary; the beginning salary is \$917 per pay period. The workweek is generally no more than 37 hours, so they are paid well above the federal minimum wage. It appears that we should start having them keep track of their hours which will vary from pay period to pay period due to the semimonthly pay period. Will this be a problem--that they're hourly rate, while being above minimum wage, will vary?

A. In general tellers would not qualify under the duties test for an exemption. As a non exempt position the FLSA requires employers to track all hours worked for non exempt employees and pay for all hours worked plus time and a half for hours above 40 in a **workweek** (not pay period).

Q. Can you speak to the ruling (I believe) that is in place related to Mortgage Originators &/or Mortgage Lenders that they are to be classified as non-Exempt?

A. The DOL has provided several opinion letters in the past regarding mortgage loan officers which typically have the primary duty of making sales on behalf of their employer; as such, their primary duty is not directly related to the management or general business operations of their employer or their employer's customers required for the Administrative exemption. For more details please review the DOL guidance

https://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_1.htm

Health Care and 8/80 Rule

Q. We are nursing home and pay overtime after 8 hours a day or 80 hours in a biweekly payroll. Is the healthcare industry exempt from the 40 hours a week?

- **We have used and 8/80 rule. Is this okay?**
- **We are a healthcare facility and in the past we were able to use the over 8 and over 80 rule. I am not able to find anything on the web regarding this and the new FLSA rules. Do you have any more information to tell us whether or not that we are able to still use the over 8 and over 80 rule?**

A. Under section 7(j) of the FLSA, hospitals and residential care establishments may utilize a fixed work period of fourteen consecutive days in lieu of the 40 hour workweek for the purpose of computing overtime. To use this exception, an employer must have a prior agreement or understanding with affected employees before the work is performed. This eight and eighty (8 and 80) exception allows employers to pay time and one-half the regular rate for all hours worked over eight in any workday and eighty hours in the fourteen-day period. See [DOL Fact Sheet #54](#) for more details.

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Trucking, Transportation and Drivers

Q. What about when you have a driver who is fined for a moving violation (red light camera) and you deduct for the cost of the fine?

A. These types of deduction are generally not permitted especially if the deduction reduces the employee rate of pay below minimum wage.

Q. Are those who are employed in the trucking industry, still exempt from overtime pay? In the past they fell under like the outside sales person, where they were exempt from any salary thresholds or overtime pay laws.

- **CDL truck drivers considered Professional Employees**

A. Employee in the trucking industry may meet the Motor Carrier Exemptions. Please review the DOL Fact Sheet #19 for definitions and details. <https://www.dol.gov/whd/regs/compliance/whdfs19.pdf>

Nonprofit

Q. I have read material published by DOL for non-profits and that states that employees that perform only charitable work and are not involved with interstate commerce and business transactions across state lines as part of their regular job duties are exempt from the new FLSA coverage. Can you speak to that?

A. Activities that are charitable in nature are not considered ordinary commercial activities, and do not establish enterprise coverage. Examples of activities that are charitable in nature and normally provided free of charge include the following:

- Providing temporary shelter;
- Providing clothing or food to homeless persons;
- Providing sexual assault, domestic violence, or other hotline counseling services; and
- Providing disaster relief provisions.

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Q. Confirm for non-profits: not subject to OT for entire organization. Only individuals engaged in "interstate commerce" are subject to fed OT rule.

- **Which non-profits will be impacted and the enterprise exemption?**
- **For a non-profit organization, are you subject to comply with all aspects of the change in the FLSA, or just specific parts of the act?**
- **Isn't there an exemption for non-profits depending on their revenue? If that revenue is from an activity directly related to the charitable purpose? I thought there was but didn't hear it mentioned.**
- **My NPO has a budget under the \$500k threshold. In addition, 95% of our income is from donations, memberships, etc. I have three employees salaried below the \$47,476. I assume my organization is exempt. Is this correct?**

A. As a general matter, non-profit organizations are not covered enterprises under the FLSA unless they engage in ordinary commercial activities that result in sales made or business done that meet the \$500,000 threshold. Ordinary commercial activities are activities such as operating a business, like a gift shop. Activities that are charitable in nature, however, are not considered ordinary commercial activities, and do not establish enterprise coverage. Employee of a non profit can also be covered if they engage in interstate commerce. Examples of interstate commerce: Making out of state phone calls, sending/receiving interstate mail and email, ordering/receiving supplies from another state, processing credit card transactions. If your non profit is a covered enterprise or an individual engages interstate commerce the salary threshold applies. continued >>>

Law Enforcement

Q. We read the other day that police officers have a special provision and should always be non-exempt and receive OT pay. Can you confirm this? Would the Chief of Police be required to be a non-exempt position, if so?

A. Please reference [Fact Sheet #8](#) Law enforcement. Chief of Police could qualify for Executive exempt depending on the number of employees under supervision.

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Religious Organizations

Q. For religious organizations, is there an exemption that can be applied if they don't meet the \$43,000 (?) annual pay rate?

- **Are churches exempt from the new salary threshold?**
- **Are churches or religious organizations exempt from changes?**

A. Religious organizations are non-profits and could meet the "enterprise" exemption. Please note that enterprise coverage does not apply to a private, non-profit enterprise where the eleemosynary, religious or educational activities of the non-profit enterprise are not in substantial competition with other businesses, unless it is operated in conjunction with a hospital, a residential care facility, a school or a commercial enterprise operated for a business purpose. Employees of enterprises not covered under the FLSA may still be individually covered by the FLSA in any workweek in which they are engaged in interstate commerce, the production of goods for commerce or activities closely related and directly essential to the production of goods for commerce. Examples of such interstate commerce activities include making/receiving interstate telephone calls, shipping materials to another state and transporting persons or property to another state.

As a practical matter, the WHD will not assert that an employee who on isolated occasions spends an insubstantial amount of time performing individually covered work is individually covered by the FLSA.

Q. What is the impact with a Chaplain where a portion of his pay is a housing allowance and where the balance would be under the new exempt \$ amount of Pay per week effective in Dec 2016?

- **What about Ministers and Pastors?**

A. Persons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in the schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be "employees." Since these persons are not considered employees under the Fair Labor Standards Act (FLSA), they are not entitled to the protections of the FLSA. However, the fact that such a person is a member of a religious order does not preclude an employer-employee relationship with a state or secular institution. FOH 10b03 found at: https://www.dol.gov/whd/FOH/FOH_Ch10.pdf

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