



A New Overtime Rule – What You Need to Know

John Melcon, Associate Attorney, Sherman & Howard LLC

Ted Batson, Partner and Tax Counsel, CapinCrouse LLP

Aaron Mercer, Senior Strategist, ECFA

Today's Presenters



John Melcon

Associate Attorney
Sherman & Howard LLC



Ted Batson

Partner & Tax Counsel
CapinCrouse LLP



Aaron Mercer

Senior Strategist
ECFA



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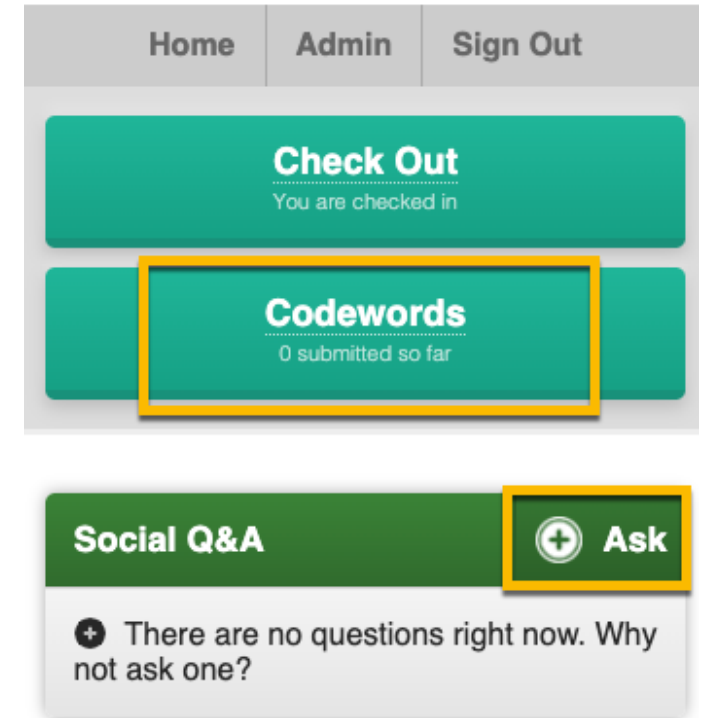
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What Is the Fair Labor Standards Act?

- The Fair Labor Standards Act (FLSA) is a statute first enacted by Congress in 1938
- The FLSA provides numerous worker protections, including:
 - Setting a minimum wage for hourly workers
 - Providing that hourly workers must be paid overtime for hours worked in excess of 40 hours in a week
 - Creating a distinction between “non-exempt” workers eligible for overtime pay and “exempt” workers who may be paid a salary without overtime
 - In 1940, regulations under the FLSA added a minimum salary test to qualify as an exempt executive, administrative, or professional employee



What Is the New Rule About?

- The new Rule **only** updates the minimum salary thresholds **exempt employees** must be paid
 - It makes no other changes to the definition of an exempt employee
- Exempt employees paid less than the minimum salary thresholds must be paid overtime for hours worked in excess of 40 hours in an employer defined 7-day workweek
 - The 7 days must be the same 7 days, not a rolling 7 days



What Is the Primary Change?

Effective Date	Amount per Week	Amount per Year
January 1, 2020 <i>(current threshold)</i>	\$684	\$35,568
July 1, 2024	\$844	\$43,888
January 1, 2025	\$1,128	\$58,656

The amount of the increase puts additional focus on exemptions to the FLSA.

What Are the Other Exemption Requirements?

- Paying compensation above the threshold is necessary but not sufficient for an exemption from overtime.
 - Under the FLSA, employees are not “deprived of the benefits of [overtime compensation] simply because they are well paid.” *Jewell Ridge Coal Corp. v. Mine Workers*, 325 U. S. 161, 167 (1945).
- Per the statute itself, the so-called “white collar” exemption focuses on the “capacity” in which the employee is employed.
 - The exemption applies to “any employee employed in a bona fide executive, administrative, or professional capacity.” § 213(a)(1).
- Job titles alone are insufficient. 29 CFR § 541.2.
- What duties are executive, administrative, or professional (EAP)?



Duties Test: Executive Employees

- The employee's "primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof."
- The employee "customarily and regularly directs the work of two or more other employees."
- The employee "has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight."
- All 3 elements must be present, except for HCEs. 29 CFR § 541.100.



Duties Test: Administrative Employees

- The employee's "primary duty is 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 includes the exercise of discretion and independent judgment with respect to matters of significance."
- Both elements must be present, except for HCEs. 29 CFR § 541.200.



Duties Test: Professional Employees

- The employee's 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; or
- The employee's primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
- Either element may be present. 29 CFR § 541.200.



Duties Test: Highly Compensated Employees

- The duties test is more flexible and easier to satisfy for highly compensated employees (HCEs).
 - Per DOL: A very high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed duties analysis.
 - Only applies to workers primarily engaged in office or nonmanual work.
- Current requirements: \$107,432 total annual comp; standard salary level must still be paid on salary or fee basis. 29 CFR § 541.601.
- New Rule by Jan 1, 2025: \$151,164 total annual comp, with at least \$1,128/week on a salary or fee basis.
 - July 1, 2024: \$132,964/year, \$844/week



What Is a “Salary”?

- FLSA regulations require most exempt employees be paid on a “salary basis.”
- “An employee will be considered to be paid on a ‘salary basis’ . . . if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee’s compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.” 29 CFR § 541.602(a).
- Generally, “an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked.” 29 CFR § 541.602(a)(1).
 - If an employee works any part of a week, he or she must receive his full salary for that week.
 - Employers may deduct pay for full-day absences due to personal reasons, or subtract from accrued paid leave subject to an established policy.



What Is a “Salary”?

- *Helix Energy Solutions Group v. Hewitt*, No. 21-984 (2022)
 - Oil rig employee worked 84 hours/week and was guaranteed a rate of \$963/day for any day he worked (totaling more than \$200,000/year).
 - Supreme Court (6-3) ruled he was not paid on a salary basis and was therefore owed an enormous amount of unpaid overtime.
 - Dissent called this a “head scratcher” because the worker was paid \$963 for any day he worked, meaning he was guaranteed at least \$963 for any week where he worked at least one day—well above the \$684/week threshold.



What Is a “Salary”?

- A special rule exists for otherwise exempt employees who are paid on an hourly, daily, or shift basis.
- The salary basis test is met for such employees “if [1] the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and [2] a reasonable relationship exists between the guaranteed amount and the amount actually earned.” 29 CFR § 541.604(b).
 - This provision did not apply in the *Helix* case.
 - So, under the new Rule, employees paid this way still must be guaranteed at least \$1,128/week (Jan 1, 2025)



What Are Other Overtime Exemptions?

- Teachers (no salary requirements)
- Doctors (no salary requirements)
- Lawyers (no salary requirements)
- Computer employees (exempt if paid a conforming salary or at least \$27.63/hour)
- Outside salesmen (must regularly travel; no salary requirements)
- Baseball players



What Are Other Overtime Exemptions?

- Employees of certain seasonal facilities – 29 U.S.C. § 213(a)(3)
 - The FLSA’s minimum wage and overtime requirements do not apply to “any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, 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 33⅓ per centum of its average receipts for the other six months of such year.”
 - Alternative (B), the “receipts test,” is determined based on cash accounting, not accrual accounting, and donations are not counted. See DOL WHD Letter FLSA 2021-3.



Is There An Exemption for Nonprofits?

- Not really:
 - “Enterprise coverage” under the FLSA applies only if revenue from the nonprofit’s commercial activities is at least \$500,000 annually. Charitable contributions and membership fees do not count toward this threshold.
 - However, individual employees are still covered by the FLSA if they are engaged in interstate commerce, which is broadly defined to include things like interstate phone calls and emails.
 - See DOL Fact Sheet 14A.



Are Ministers Exempt?

- *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).
 - “An investigation and review of such matters of church administration and government **as a minister’s salary**, his place of assignment and his duty, which involve a person at the heart of any religious organization, could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment.”
- *Alcazar v. Archbishop of Seattle*, 627 F.3d 1288 (9th Cir. 2010) (applying ministerial exception to preclude overtime claims)
 - “The ministerial exception encompasses all tangible employment action and disallows lawsuits for damages **based on lost or reduced pay.**”
- *Shaliehsabou v. Hebrew Home*, 363 F.3d 299 (4th Cir. 2004)



Are Ministers Exempt?

- DOL WHD Letter FLSA2021-2 (Jan 8, 2021)
 - “Ministers are exempt from the FLSA’s wage-and-hour requirements.”
 - “[E]mployees, if they qualify for the ministerial exception, may be paid on a salary basis that would not otherwise comport with the FLSA.”
- The letter is agency guidance, not black-letter law, but good-faith reliance is a defense to liability. 29 U.S.C. § 259.



Are Ministers Exempt?

- The ministerial exception is an application of the “church autonomy” doctrine arising from the First Amendment.
- *Our Lady of Guadalupe School*, 140 S. Ct. 2049 (2020)
 - “[C]ourts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions. The rule appears to have acquired the label ‘ministerial exception’ because the individuals involved in pioneering cases were described as ‘ministers.’”

What Is the “Ministerial Exemption”?

- The ministerial exception is not limited to employees who are ordained, given ministerial titles, or have completed formal religious training.
 - *Our Lady of Guadalupe*: “What matters, at bottom, is what an employee does.”
- Do not confuse the ministerial exception with the criteria for the ministers’ housing allowance.
- *Hosanna-Tabor Evangelical Lutheran Church*, 565 U.S. 171 (2012)
 - “We are reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister.”



Who Is Covered by the “Ministerial Exemption”?

- The ministerial exception applies to employees who perform religious duties and play a vital role in carrying out the organization’s religious mission.
- Religious duties are generally required, but courts may not entangle themselves in disputes over whether an employee’s activities are religious or secular.
- *Billard v. Charlotte Catholic*, No. 22-1440 (4th Cir. May 9, 2024)
 - “[S]eemingly secular tasks like the teaching of English and drama may be so imbued with religious significance that they implicate the ministerial exception.”



Who Is Covered by the “Ministerial Exemption”?

- *Our Lady of Guadalupe:*
 - Although an organization’s “explanation of the role of [its] employees in the life of the religion” is not dispositive, it is “important.”
 - “[J]udges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition.”
- Courts typically consider evidence from the religious institution such as the mission statement, job descriptions, employment contracts, handbooks, and testimony from leaders, supervisors, and colleagues within the organization.

Who Is Covered by the “Ministerial Exemption”?

- Courts have struggled with assertions of the ministerial exception that would cover all employees at a religious institution.
- *DeWeese-Boyd v. Gordon College*, 487 Mass. 31, 53-54 (2021):
 - “It would also apply, *Gordon* implies, to all its employees, as integrating the Christian faith into daily life and work is part of the college’s mission for everyone in the community, whether they be coaches, food service workers, or transportation providers. This would provide a significant expansion of the ministerial exception”



Can Food and Lodging be Considered?

- No:

To qualify as an exempt executive, administrative, or professional employee under section 13(a)(1) of the Act[, the employee] . . . must be compensated on a salary basis at a rate set forth in paragraphs (a)(1) through (3) of this section, exclusive of board, lodging or other facilities

29 C.F.R. § 541.600



How Does This Impact Part-Time Employees?

- The new minimum salary thresholds are **not** pro-rated for part-time employees

The Department has never prorated the salary level for part-time positions . . . and declines to establish a prorated salary level for part-time positions in this rule. . . . [E]mployees hired to work part time generally do not work in excess of 40 hours in a workweek, and overtime pay is not at issue for these employees.

Preamble to the final regulations

- A part-time employee may be paid a salary

An employer may pay a nonexempt employee a salary to work part time without violating the FLSA, so long as the salary equals at least the minimum wage when divided by the actual number of hours (40 or fewer) the employee worked.

Preamble to the final regulations

- A state minimum wage in excess of the federal minimum wage of \$7.25/hour takes precedence



Does the Rule Preempt State and Local Wage Laws?

- Yes, unless the state or local law provides the employee with greater protection
- Examples:
 - State law may provide that an employee is to be paid overtime for hours worked in excess of a given number per day rather than per week
 - State law may specify that break time must be compensated
- Remote worker application
 - Employers must be familiar with the wage and hour laws in all states where remote workers are located



What Are the Risks of Noncompliance?

- Workers or the DOL can sue for double back pay, plus attorneys' fees.
- A 2-year statute of limitations applies to the recovery of back pay, increasing to 3 years in cases involving willful violations.
- Willful violations may also result in criminal penalties.
- The employer bears the burden of establishing the applicability of FLSA exemptions (and the ministerial exception is an affirmative defense).



What Is the Status of the New Rule?

- Effective Dates: July 1, 2024; Jan 1, 2025; every 3 years thereafter
- Industry groups filed suit on May 22, 2024, arguing the new Rule exceeds DOL's statutory authority.
- Legal challengers face an uphill battle:
 - The July 1 tranche uses methodology from the 2019 rule (20th percentile of weekly earnings of full-time salaried workers in the lowest-wage census region), which was largely supported by the business community.
 - The new rule eventually replaces 20th percentile with 35th percentile.
- A separate suit remains pending challenging the 2019 rule, arguing the FLSA doesn't authorize any salary-level test.



What Is the Status of the New Rule?

- Legal challenges invalidated the 2016 rule:
 - The 2016 rule would have set the salary threshold to the 40th percentile (\$913/week at the time).
 - 21 states and dozens of businesses sued.
 - The 2016 rule was blocked by a federal court in Texas days before the effective date (Nov 22; Dec 1).
 - The court later invalidated the rule entirely as having exceeded DOL's authority.
 - The 2016 rule was formally rescinded and replaced in 2019.
- The May 22 lawsuit was filed in the same court that invalidated the 2016 rule.



When Should Employers Implement Changes in Response to the New Rule?

- Plan now, but delay implementation if necessary.
- In 2016, when the threshold was set to increase to \$47,476, many employers had already implemented changes by the time the rule was blocked.
- Determine your plan for each tranche, assuming the new Rule is not blocked by a court.
- DOL “estimates businesses will require an average of 75 minutes per employee to choose how to make adjustments for affected employees.”



What Are Some Practical Considerations?

- Comply by increasing salaries above the threshold
 - This can be done on an employee-by-employee basis
 - Make sure the employee is in fact exempt employee
 - Has obvious budget considerations

What Are Some Practical Considerations?

- Convert current salaried employees to hourly
 - You can still pay a salary for the first 40 hours; you only have to know the hours worked above 40 to pay overtime
 - You have choices about the hourly rate
 - Impact on employee morale if you use a formula other than annual salary ÷ 2,080 hours
 - Employees who work too many hours above 40 hours/week may be paid more if converted to hourly



What Are Some Practical Considerations?

- You will have to monitor employee hours to know when they work more than 40 hours
 - Timesheets, anyone?
 - What overtime approval process will you put in place?
 - How will you monitor “after hours” use of email, texting, and other communication means?
 - How will you supervise/monitor remote employee hours?
- Unintended consequences
 - Employee morale
 - Employees who never “watched the clock” may become clock-watchers
 - Remote employees accustomed to intermixing personal and work tasks throughout the day will now find it difficult to track time
 - Revealed inequities: Converting to hourly will highlight employees who put in more hours than others with the same duties

What Other Actions Should Employers Take to Get Ahead of This Change?

- Review or implement overtime policies.
 - Consider a timekeeping system for all employees, in light of the Rule's escalator clause.
 - Require approval for overtime work.
 - Develop a system for efficient approval or disapproval.
 - Pay unauthorized overtime but take disciplinary action for corrective purposes.



What Other Actions Should Employers Take to Get Ahead of This Change?

- Strengthen ministerial exception defenses.
 - Review overarching policies and documents that characterize the role of employees within the organization as a religious community.
 - Imbue “secular activities” with religious significance.
 - Find and document genuine ways to involve employees in exclusively religious activities like prayer, devotions, and worship.
 - Build a culture that treats all roles as vital to the religious mission.
 - Update job descriptions to reflect ministry qualifications and duties.
 - Incorporate these ministerial elements into performance evaluations.



What Other Actions Should Employers Take to Get Ahead of This Change?

- Consider a “duties test” audit.
 - DOL is likely correct that many employees are treated as exempt because they are paid an adequate salary, yet they do not meet the duties test.
 - Look at all non-HCEs but focus on employees who will be affected by the new thresholds.
 - Carefully assess risks and possible corrective action (backpay) if you conclude an employee was misclassified and working overtime.



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Love one another.
As I have loved you,
so you must love one another."
- [John 13:34 NIV](#)

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[E-File Delay for Unrelated Business Income Tax Forms](#)

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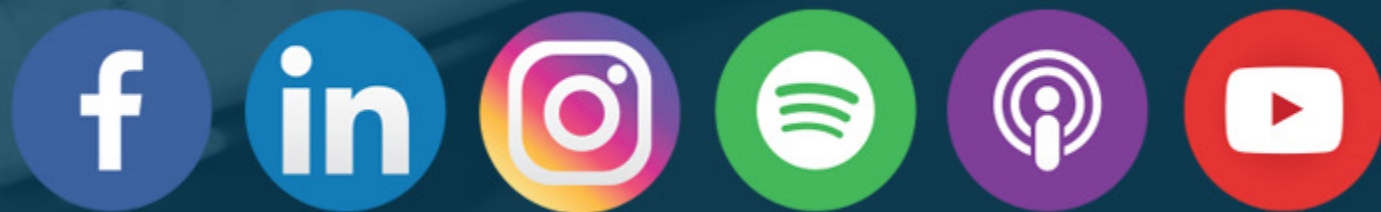
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