# How to Prepare for the Updated FLSA Threshold

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## Introduction

The Department of Labor ("DOL") issued its Final Rule on the "white collar" exemptions to the Fair Labor Standards Act ("FLSA") on May 18, 2016 and published the Rule in the Federal Register on May 23. The white collar exemptions to the FLSA exempt certain employees from the overtime requirements of the FLSA. Traditionally, use of the exemption is based upon whether the employee's duties and job responsibilities are "executive, administrative, or professional" in nature (the "duties" test) and whether the employee is paid a salary, regardless of the quality or quantity of work, that exceeds a certain threshold (the "salary basis" test).

The most important aspect of the Rule is that it increased the salary threshold for the salary basis test. The new salary threshold is set at the fortieth percentile of full-time salaried employees salaries in the lowest wage census region, the South. At present, this figure is $47,476 per year ($913 per week). This is a notable increase from the prior amount: $23,660 per year ($455 per week) The new salary threshold will take effect December 1, 2016.

## Effects on Employers[1]

### A. Currently Exempt Employees

The DOL in the Notice of Proposed Rulemaking[2] estimates approximately 4.6 million workers will be affected by the change. 80 F.R. at 38518. Undoubtedly, many employers have employees currently exempt and earning salaries between $23,660 and $47,476 per year. For this reason, employers should already be compiling a list of exempt employees making less than $47,476 and preparing to reclassify them or consider increasing their annual salaries. Which route to take obviously will involve financial considerations, but employers also should consider the morale or psychological effects of shifting an exempt employee, who may enjoy being "salaried," to an hourly basis.

### B. Job Titles and Salary Projections

The Rule provides that the salary will be updated every three years, beginning January 1, 2020, to reflect the current fortieth percentile of the lowest wage census region. In light of the Rule's automatically updating the salary threshold every three years, employers should critically analyze the job titles currently considered exempt, the projected future earnings of employees close to the line, and the possibility that "index creep" might result in employees steadily falling out of the exempt category every three years. Employers also should review all job titles, job duties, and the actual duties and regular activities of current employees to determine where to set yearly compensation and how to compensate current and future employees.

## Action Plan for Employers

### 1. Identify All Exempt Employees Earning Less than $47,476.

Even though the changes will not be in effect until July 2016 or later, the employer should, immediately, compile a list of all currently exempt employees earning less than $47,476. Due to the every-third-year updates, it might even serve an employer's best interests to include employees earning up to $50,000. This way, the employer can begin to formulate an overall plan for reclassification or salary increases and to evaluate the budgetary impact of the changes.

### 2. Audit or Evaluate the Approximate Hours Worked by Relevant Exempt Employees

In order to estimate the costs and benefits of reclassifying or increasing salary, the employer should determine the average weekly hours worked by relevant employees. If an exempt employee regularly works over forty hours, it might be more cost effective to raise that employee's salary. Though it may be difficult, as a practical matter, to discern whether such employees would welcome the opportunity to make additional overtime compensation, such considerations should remain in the employer's evaluation. If an employee works under forty hours, it might be more suitable to reclassify her and limit her opportunities to work more than forty hours in the future.

Given the employee will be accustomed to earning a certain amount of income for a certain work schedule, it also will be important, for morale and psychological purposes, to approximate the employee's earnings if

she is to be reclassified. It may be perceived as unfair and, as discussed below, may cause further risks, if an employee ends up being compensated less after being reclassified as a non-exempt employee. Also discussed below, some employees enjoy being considered "salaried" or prefer the flexibility that some employees perceive is part of being exempt.

**3. Audit or Evaluate Employee Benefits**

Further to the above estimation of hours worked, employers should ensure that any reclassified employee will not lose benefits or suffer a negative impact on her benefits due to the change.

**4. Prepare a Reclassification Process and Message**

Reclassifying an employee from exempt to non-exempt is a significant matter. Exempt employees often become accustomed to the more flexible work arrangements and scheduling that, in some workplaces, are part of being "salaried." It is also possible a reclassified employee will see the move as a "demotion." For this reason, it is critically important to prepare an open, transparent, and consistent process for reclassifying the employees, groups of employees, or job descriptions.

As discussed above, it likewise will be critical for relevant managers to be able to articulate the bottom-line financial consequences for an employee whose classification will change. For example, if an employee at present earning $45,000 per year must be reclassified, she likely will be relying on earning approximately $45,000 per year. In order to ensure the employee can continue to earn her regular income on a regular basis, managers need to be prepared to establish and explain the expectations necessary to reach the proper result. If the employer has done the homework described above, the proper hourly rate and hours scheduled should be close to compensating the employee consistent with her prior expectations.

**5. Case-By-Case Matters**

The two most important potential concerns, now discussed at several points in this memo, are the cases of the employee who enjoys being "salaried" and the employees who, while their current salary is above the threshold, could be below it after annual adjustments. For this reason, the employer may need to develop customized plans and messages to such employees. For the salaried employee, the employer should open a dialogue explaining the changes to the employee. The employer should ask the employee what aspects of her job she enjoys – perhaps not keeping up with her daily hours, punching in and out, or having more flexibility with her lunch, the time she arrives, or the time she leaves – and develop a way to preserve some of those features as she transitions to her non-exempt status.

The second example will require more long-term planning. For the employee earning $50,000 per year or close to it, the employer should begin projecting how the current employees' salary advancement will occur and perhaps even consider transitioning the employee earlier.

**6. Audit and Evaluate Job Titles and Job Descriptions to Determine Future Classifications**

Many employers have a set of job titles and classifications where the salaries will fall in the $50,000 range. As the salary levels increase every three years, employers risk a cycle of reviewing job duties, employees, and reclassifying at least as often. To avoid this, employers could develop a strategy of reclassifying entire job classifications as non-exempt, even if such jobs in the past might command $55,000 or more in yearly compensation.

## Additional Matters for Employers

**a. Other Employment Law Exposure**

It is possible some employees will consider being reclassified from exempt to non-exempt as a demotion. In some cases, demotions could be pled or litigated as adverse employment actions for the purposes of an employment lawsuit. It is important to document and specifically demonstrate to the employee the reasoning behind the reclassification and to ensure the employee's job duties and responsibilities are not reduced or changed upon reclassification. For example, if an employer chooses to reclassify and employee by changing her to a predetermined job description which, while similar to her own, has always been non-exempt, this is more likely to be considered a demotion than a carefully-crafted reclassification of the employee's current job.

### b. The Fluctuating Workweek Solution

One possibility for many employers could be reclassifying an employee from exempt to fluctuating workweek non-exempt.

Provided the employee's salary is clearly understood to be a salary, is guaranteed to be paid every week regardless of hours worked, and which would not ever result in the employee being paid a per-hour rate less than the minimum wage, the employer could classify her as a fluctuating workweek salaried employee. In that case, the employee would receive a salary each week for all hours worked, regardless of how many. In weeks where the employee worked more than 40 hours, the employee would receive half the computed hourly rate for that workweek per hour greater than forty, in addition to the salary paid. This might be a good solution for employees who rarely, if ever, work in excess of 40 hours per week. Nonetheless, the method is mathematically complex and can be risky if not done properly.

Most of the confusion stems from the computation of the "hourly rate" for purposes of overtime. When an employee works more than forty hours in a given workweek, the employer must compute an hourly rate based upon the employee's weekly salary divided by her hours worked that week only. Overtime compensation is paid that week on the basis of that particular rate, which, naturally, will fluctuate each week on the basis of hours worked.

Another source of confusion is that the employee's workweek must actually fluctuate above and below 40 hours per week; the employer cannot utilize this method where the employee almost exclusively works in excess of 40 hours. If utilization of the fluctuating workweek method is desirable based upon specific circumstances, employers should take care to ensure it is computed and paid correctly.

The following table contains a simple example. An employee earning a base salary of $500 per week works the following hours in five different weeks: 36, 40, 45, 50, and 70.

| Total Hours Worked | Weekly Rate | Overtime Comp | Total Comp |
|---|---|---|---|
| 36 | Not Applicable | $0 | $500 |
| 40 | Not Applicable | $0 | $500 |
| 45 | $11.11 per hour ($500/45) | $27.77 ($11.11 x ½ x 5 hours) | $527.77 |
| 50 | $10.00 per hour ($500/50) | $50.00 ($10.00 x ½ x 10 hours) | $550.00 |
| 70* | Not Applicable | Not Applicable | Not Applicable |

* *Employee may not work more than the number of hours that would result in a weekly rate of less than the federal minimum wage. Here, that figure is 68.9 hours.*

### c. Options for Government Employers

Government employers, unlike private employers, may utilize compensation time off in lieu of overtime pay. Government employer clients may wish to evaluate the possibility of offering compensation time off to employees in order to blunt the effect of the decreased flexibility that would come with being reclassified. Likewise, government employers may wish to develop policies for granting compensation time off to reclassified employees where budgetary constraints may require avoiding substantial overtime liability, but where that employee's contributions of hours in excess of forty most weeks are important to the employer.

While compensation time is a special option for government employers, merely paying all overtime to employees as compensation time is not a good solution. To begin, federal law permits the payment of only up to 240 hours of compensation time, after which full overtime must be paid. See 29 C.F.R. 553.21. Furthermore, an employee requesting to use compensation time must be permitted to do so within a reasonable period of making a request, and such a request may not be denied unless that employee's absence would unduly disrupt the employer's operation. See 29 C.F.R. 553.25. This means that more employees may be able to use compensation

time, thus actually disrupting the employer's operations or causing other administrative issues. Government employers should carefully consider whether increased usage of compensation time would be preferable to other avenues of compliance.

## Conclusion

Employers following the above Action Plan should be in the best possible position to adapt and respond to the challenges of the new salary threshold.

1 This article is meant to be broad and apply to all employers. All of the matters discussed here should apply to municipalities and counties as well as other types of employers. Additionally, the Rule does not change the exclusion of elected officials, personal staff, policymakers, advisers, legislative aides, and others not subject to the civil service laws of the employing state. See 29 U.S.C. 203(e)(2)(C)(i) & (ii).

2 The precursor to the Rule.

UNITED STATES DEPARTMENT OF LABOR

# Overtime Final Rule and State and Local Governments

**State and local governments**: The Fair Labor Standards Act ("FLSA") has long applied to state and local governments. The FLSA and the Department's regulations, however, contain some unique provisions applicable only to public sector workers, notably the permitted use of compensatory time off, under certain conditions. These provisions will help state and local governments adapt to the overtime final rule.

**Overtime Final Rule**: The Department of Labor's final overtime rule updates the salary level required for the executive, administrative, and professional ("white collar") exemption to ensure that the FLSA's intended overtime protections are fully implemented, and it provides greater clarity for white collar workers and their employers, including for state and local governments. The rule also will lead to better work-life balance for many workers, and it can benefit employers by increasing productivity and reducing turnover.

The final rule updates the salary threshold under which most white collar workers are entitled to overtime to equal the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage Census region, currently the South. The final rule raises the salary threshold from $455 a week ($23,660 for a full-year worker) to $913 a week ($47,476 for a full-year worker) effective December 1, 2016.

## The FLSA and State and Local Governments

Neither the FLSA nor the Department's regulations provide a blanket exemption from overtime requirements for state and local governments, nor for public sector workers. However, the FLSA contains several provisions unique to state and local governments, including compensatory time ("comp time").

Comp time: Pursuant to an agreement with employees or their representatives, state or local government agencies may arrange for their employees to earn comp time instead of cash payment for overtime hours. Any comp time arrangement must be established pursuant to the applicable provisions of a collective bargaining agreement, memorandum of understanding, any other agreement between the public agency and representatives of overtime-protected employees, or an agreement or understanding arrived at between the employer and employee before the performance of the work. This agreement may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay (for example, providing the employee a copy of the personnel regulations). The comp time must be provided at a rate of one-and-one-half hours for each overtime hour worked. For example, for most state government employees, if they work 44 hours in a single workweek (4 hours of overtime), they would be entitled to 6 hours (1.5 times 4 hours) of compensatory time off. When used, the comp time is paid at the regular rate of pay.

Most state and local government employees may accrue up to 240 hours of comp time. Law enforcement, fire protection, and emergency response personnel, as well as employees engaged in seasonal activities (such as employees processing state tax returns) may accrue up to 480 hours of comp time. An employee must be permitted to use comp time on the date requested unless doing so would "unduly disrupt" the operations of the agency.

Fire and police small-agency exemption: The FLSA also provides an exemption from overtime protection for fire protection or law enforcement employees, if they are employed by an agency that employs fewer than five fire protection or law enforcement employees, respectively.

"Work periods" rather than "workweeks" for fire protection or law enforcement employees: Employees engaged in fire protection or law enforcement may be paid overtime on a "work period" basis, rather than the usual 40-hour workweek of the FLSA. A "work period" may be from 7 consecutive days to 28 consecutive days in length. Overtime compensation is required when an employee's hours worked in the work period exceed the maximum hours outlined in a formula in the Department's regulations. For example, for a law enforcement employee who works a 14-day work period, the Department's regulations provide that she must receive overtime compensation after working 86 hours in the work period. See FLSA **Fact Sheet #7** and **Fact Sheet #8** for more information.

**Impact Is Limited by Other Rules and Exemptions**: Many employees of state and city governments won't be affected by the final rule:

- *Hourly workers*: The new threshold will have no impact on the pay of workers paid hourly. Generally, all hourly workers—including those employed by state and local government—are entitled to overtime pay or comp time regardless of how much they make if they work more than 40 hours. Nothing in the new rule changes that.
- *Workers with regular workweeks of 40 or fewer hours*: To the extent that many salaried white-collar staff in state and local government have office jobs where they work no more than 40 hours, the changes to the overtime rules will have no effect on their pay. Additionally, for law enforcement and fire protection employees who regularly work hours that conform to the longer work periods permitted for such employees, the changes will also not impact their pay.
- *Workers who fail the duties test*: Salaried workers who do not primarily perform executive, administrative, or professional duties are not eligible for the white collar overtime exemption and therefore are not affected by the final rule. Those employees already should be getting paid overtime for any hours they work over 40 in one week (or the applicable work period maximum for fire protection and law enforcement employees), as long as comp time is not available.
- *Highly compensated workers*: White collar workers who fail the standard duties test but are "highly compensated"—earn more than $134,004 in a year—are almost all ineligible for overtime under the highly compensated employee exemption, which has a minimal duties test. This exemption would cover some high-level managers in state and local government. (You can see more information on HCE duties in WHD **Fact Sheet #17H**.)
- *Police and fire employees in small agencies*: Fire protection or law enforcement employees in public agencies with fewer than five fire protection or law enforcement employees respectively will continue to be exempt from overtime.
- *Elected officials, their policymaking appointees, and their personal staff and legal advisors who are not subject to civil service laws*: These state and local government employees are not covered by the FLSA and will not be impacted by the rule.
- *Legislative branch employees who are not subject to civil service laws*: These state and local government employees are not covered by the FLSA and will not be impacted by the rule.
- *Public employees who have a comp time arrangement*: By agreement, public sector employers can satisfy their overtime obligation by providing comp time rather than paying a cash overtime premium. State and local government employers may continue to use comp time to satisfy their overtime obligations to employees who have not accrued the maximum number of comp time hours.

## State and Local Government Employers Have Discretion to Choose Between Several Options for Complying with the Final Rule

The Department does not dictate what option employers should use to comply with the revised regulations. In fact, many options are available to employers for complying with the new salary threshold. These options include:

- *Raise salaries*: For workers whose salaries are close to the new threshold and who pass the duties test, employers may choose to raise these workers' salaries to meet the new threshold and maintain their exempt status.
- *Pay overtime above a salary*: State and local government employers also can continue to pay newly-eligible employees a salary and pay overtime, or provide comp time for overtime hours in excess of 40 per week. The law does **not** require that newly overtime-eligible workers be converted to hourly pay status. This approach works for employees who

usually do not work overtime, but have occasional "spikes" or periods that require overtime hours. State and local government employers can either plan and budget the extra pay during those periods or provide comp time.

- For an employee who works a fixed schedule that rarely varies, the employer may simply keep a record of the schedule and indicate the number of hours the worker actually worked only when the worker varies from the schedule.
- For an employee with a flexible schedule, an employer does not need to require an employee to sign in each time she starts and stops work. The employer must keep an accurate record of the number of daily hours worked by the employee. So an employer could allow an employee to just provide the total number of hours she worked each day, including the number of overtime hours, by the end of each pay period.

- *Evaluate and realign employee workload*: Employers can limit the need for employees to work overtime by ensuring that workloads are distributed to reduce overtime, that staffing levels are appropriate for the workload, and that workers are managing their time well.
- *Utilize comp time*: State and local government employers—unlike private sector employers—can provide comp time rather than cash overtime payments in appropriate circumstances.

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## Dedicated to Client Service

Regardless of a client's size or stage of development, we believe that successful legal representation begins with a clear understanding of our client's business, industry and objectives, followed by collaboration with the client to achieve the best possible results. Our lawyers and our support staff work together to deepen client relationships through a commitment to understanding their businesses and their goals, and we strive to advance our clients' interests by providing excellent, effective and efficient legal services and creative solutions across all areas of our practice.

We handle virtually every type of business transaction and civil case in federal and state courts across the region, and regularly provide legal services in the following areas:

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- Antitrust and Trade Regulation
- Appellate Litigation
- Banking and Finance
- Bankruptcy and Creditors' Rights
- Business
- Commercial Litigation
- Construction/Design
- Corporate and Securities
- Employee Benefits/Executive Compensation
- Energy
- Environmental
- Franchise and Distribution
- Gaming
- Government Contracts
- Health Care
- Health Care Litigation
- HIPAA Compliance
- Immigration
- Insurance and Reinsurance
- Intellectual Property
- International
- Labor and Employment
- Legislative and Governmental Relations
- Media and First Amendment Law
- Mergers and Acquisitions
- Oil and Gas and Minerals
- Petroleum Marketing
- Products Liability
- Professional Liability
- Public Finance
- Railroad
- Real Estate
- Renewable Project Development
- Taxation
- Tort Litigation
- Toxic Tort Litigation
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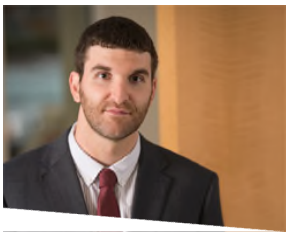

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## Practice Focus

- Labor and Employment
- Appellate Litigation
- Employment Litigation

## Education

- Mississippi College School of Law, J.D., *summa cum laude,* 2008; Editor-in-Chief, *Mississippi College Law Review;* Moot Court Board
- Mississippi State University, B.S., *summa cum laude,* in Business Administration, 2005

## Admissions

- Mississippi
- U.S. Court of Appeals for the Fifth Circuit
- U.S. District Court, Northern District of Mississippi
- U.S. District Court, Southern District of Mississippi

## Clerkships

- Law Clerk to the Hon. Leslie H. Southwick, U.S. Court of Appeals for the Fifth Circuit
- Judicial Extern to the Hon. Daniel P. Jordan, U.S. District Court for the Southern District of Mississippi

## Practice

Todd Butler represents clients in matters involving employment, civil rights and appellate issues. He defends companies and individuals in litigation, including class actions, relating to constitutional law, employment discrimination, wage and hour, wrongful termination and harassment. A portion of his practice is dedicated to traditional labor matters, such as defending unfair-labor-practice complaints before the NLRB and arbitrating cases concerning the interpretation of collective-bargaining agreements. His experience extends to defending clients' rights before administrative agencies as well, including the EEOC and state unemployment commissions, and he also counsels clients on workplace policies and compliance.

Mr. Butler teaches courses on appellate advocacy as an adjunct professor at Mississippi College School of Law and serves as Chairman of the Mississippi Bar's Appellate Practice Committee. He is a past Editor-in-Chief of the Mississippi Defense Lawyers' Association's quarterly magazine.

## Experience

- *Gibson v. Kilpatrick,* No. 12-60905 (5th Cir. 2014) (obtained reversal of district court's denial of qualified immunity in on First Amendment retaliation claim)
- *Corr v. State,* 2012 WL 4125209 (Miss. 2012) (obtained reversal of contempt finding)
- *Akers v. Hinds Community College,* No. 11-60116 (5th Cir. 2012) (obtained reversal of jury verdict)
- *Bell-Wilson v. Skinner*, 466 Fed. App'x 352 (5th Cir. 2012) (obtained affirmance of summary judgment)
- *Phillips v. Leggett & Platt, Inc.,* 658 F.3d 452 (5th Cir. 2011) (obtained reversal of jury verdict)
- *Chandler v. Roncoli,* 449 Fed. App'x 379 (5th Cir. 2011) (obtained affirmance of summary judgment)
- *Johnson v. Kosciusko Police Dept.,* 412 Fed. App'x 730 (5th Cir. 2011) (obtained affirmance of summary judgment)

## Insights

***Publications***

- eLABORate: Fifth Circuit Disagrees with EEOC, Applies "Reasonable Belief" Standard to Witness Statement in Company Investigation - (04/13/2016)
- Health Law Alert: Major Change in Overtime Law on the Horizon - (01/14/2016)
- Co-Author, "Reconsideration of Interlocutory Orders - What Standard," *The*

*MDLA Quarterly* (2012)

- *Heck, Excessive Force, and The Fifth Circuit*" 29 Miss. C. L. Rev. 529 (2010)
- Contributing Author, *2010 Media Law Resource Center 50 State Survey on Employment Libel and Privacy Law*
- Author, "The Computer Fraud and Abuse Act," *The Mississippi Lawyer Magazine* (2010)
- Co-Author, "Social Media Policies," *Greater Jackson Area Business Journal* (2010)
- *Note, Recipe for Disaster: Analyzing the Interplay Between the Castle Doctrine and the Knock-and-Announce Rule After Hudson v. Michigan,*" 27 Miss. C. L. Rev. 435 (2008)
- Co-Author, *Foreword: Celebrating the Life and Legacy of Justice Thurgood Marshall,*" 27 Miss. C. L. Rev. 289 (2008)
- Author, *A Matter of Positivism: Evaluating the Legal Philosophy of Justice Antonin Scalia Under the Framework Set Forth by H.L.A. Hart,*" 11 Holy Cross J.L. & Pub. Pol'y 47 (2008)
- Author, "Ante' Up: Should the Government Garnish the Gambling Winnings of Deadbeat Parents," *Judicial View* (April 2008), available at http://www.judicialview.com

***Speaking Engagements***

- 39th Annual Mississippi Labor & Employment Law Conference - (08/04/2016)
- Panelist, "Depositions: Preparing, Taking and Defending - Brown Bag Session," ABA Teleconference, January 14, 2015 - (01/14/2015)
- Speaker, Keynote Address, 2014 Morton Chamber of Commerce's Honors Banquet
- Speaker, "Managing Your Personnel," 2014 Mississippi Municipal League Convention
- Speaker, "Litigating Cases In Front of Administrative Agencies," 2013 Mississippi Municipal League Convention
- 2012 Mississippi Labor & Employment Law Seminar - (03/14/2012)

***News***

- Mid-South Super Lawyers Recognizes Lawyers in Jackson, Tupelo and Gulfport Offices - (11/16/2014)

## Memberships and Affiliations

- The Mississippi Bar (Chairman, Appellate Practice Section)
- Capital Area Bar Association
- Jackson Young Lawyers Association
- Mississippi Defense Lawyers Association (Editor-in-Chief, *The Quarterly*)
- Mississippi College School of Law (Adjunct Professor)

## Recognition

- Mississippi Bar Young Lawyers Fellow Award (2007)
- *Mississippi Business Journal* - Leadership in Law (2013)
- AV® Preeminent Peer Review Rated by Martindale-Hubbell
- *Mid-South Super Lawyers* - Rising Stars