

SUMMARY OF DEPARTMENT OF LABOR'S NEW OVERTIME REGULATIONS

I BACKGROUND

The Fair Labor Standards Act (FLSA) guarantees a minimum wage per hour and overtime of one and ½ times the employee's regular rate of pay for hours worked over 40 in a work week UNLESS the employee is exempt from overtime under the Act.¹ The overtime requirements of the Act apply to BOTH employees paid by the hour and salaried employees.

II. GENERAL RULES FOR MEETING THE ACT'S EXEMPTIONS

For an employee to be exempt from the Act's overtime requirements, 3 "tests" must be satisfied: (1) the employee must be paid a pre-determined and fixed salary; (2) the employee must be paid at a certain minimum salary level ("Salary Basis" test) and (3) the employee must perform certain job duties. (the "Job Duties" test.)

III. OVERVIEW OF NEW REGULATIONS

The new DOL regulations that become effective December 1, 2016 revise the "Salary Basis" test for certain categories of employees, including: Executive, Administrative, Outside Sales, Professionals and Computer employees ("White Collar" employees). The primary features of the revised rules are as follows:

- Even assuming the "White Collar" employee satisfies the "Job Duties" test, that employee is not exempt from the Act's overtime requirements unless he/she earns at least \$913/week (\$47,476/year). The previous salary threshold was \$455/week (\$23,660/year). It is estimated that approximately 12.5 million workers who previously were not entitled to overtime (because they satisfied the "Job Duties" test and made more than \$23,660/year, but less than \$47,476/year) will now be entitled to overtime under the FLSA.
- This new salary minimum threshold for White Collar employees will be adjusted every 3 years so that it will rise to \$51,000 by 2020.
- For the first time, an employer will be permitted to satisfy this salary threshold through the payment of bonuses, incentive payments and commissions of up to 10% of this new salary level, PROVIDED these so called "catch-up" payments are paid at least quarterly.
- The salary level for the "Highly Compensated Employee" ("HCE") exemption was raised to \$134,004. Under this exemption, employees making above this sum are not entitled to overtime even if they do not satisfy the Job Duties test.

¹ If an employee is exempt from overtime, he/she is also exempt from the \$7.25 minimum wage requirement of the Act. Since it is unlikely that "White Collar" employees will make less than minimum wage, this summary will focus on the overtime requirements of the the Act.

IV. EXCEPTIONS AND OTHER PROVISOS TO THE NEW RULE

1. The new Rule makes no changes to the “Job Duties” test for these White Collar employees, however, even if those employees do perform the job duties required to satisfy the Job Duties test, if they are paid less than \$47,476/year, they will be still be entitled to overtime;
2. Contrary to what some employers believe, the Act’s overtime requirements apply to salaried employees as well as hourly employees. Therefore, if an employer pays a “White Collar” employee \$40,000/year, he/she will be entitled to receive overtime at one and ½ times his/her regular rate of pay (calculated as his/hourly weekly pay divided by 40);
3. IF an employee makes more than \$47,476/year, but less than the new threshold for Highly Compensated Employees, he/she still may be entitled to overtime. To be exempt, that employer still establish that the employee satisfies the Job Duties test.
4. SMALL BUSINESSES AND NONPROFITS: The new Rule did not change the Act’s threshold revenue requirement. With certain exceptions, the Act’s requirements do not apply to small businesses and nonprofits who generate LESS than \$500,000/year in revenues. NOTE: Even if a small business or nonprofit generates revenues below this \$500,000 figure, employees of those entities who engage in interstate commerce activities for that employer are subject to the Act’s requirements. (e.g. an Office Manager who regular purchases supplies for the business or nonprofit from an out-of-state vendor).
5. SPECIAL RULES FOR NONPROFITS: In calculating the \$500,000 in yearly revenue threshold, only revenue generated from a nonprofits “commercial activities” are included. Membership fees, donations and grants are NOT included in calculating whether the nonprofit is subject to the requirements of the Act. HOWEVER, certain types of nonprofits are always subject to the Act, including hospitals, employers providing nursing care to residents and schools. Additionally, the Act leaves unchanged the rules regarding VOLUNTEERS. Nonprofits may still hire Volunteers assuming the various rules relating those Volunteers are met.

IV. THE JOB DUTIES TEST FOR THE VARIOUS WHITE COLLAR EMPLOYEES COVERED BY THE NEW RULES

Most of the legal issues surrounding the FLSA’s overtime requirements have centered around the Job Duties test. These issues are unchanged by the new Rule. Determining if an employer has established that the employee meets the Job Duties required by the Act is always fact-intensive and turns on a careful examination of the particular employee’s job duties. While job titles and written job descriptions may be helpful evidence in determining whether a particular employee is exempt and thus not entitled to overtime (assuming his salary meets the new \$47,476/year threshold), those titles and job descriptions are not dispositive. Below is a brief summary of the Job Duties test for the various White Collar employees covered by the new Rule.

- A. EXECUTIVE EMPLOYEES: (1) The employee's Primary Duties (a defined term in the Act and regulations) must involve managing the enterprise or a department or subdivision of the enterprise; (2) the employee must customarily and regularly direct the work of 2 or more full-time employees or an equivalent number of employees (e.g. 1 full-time employees and 2 part-time employees); and (3) the employee must have the authority to hire, fire, promote, etc for the entity or have his/her recommendations on those employment decisions be given great weight.
- B. ADMINISTRATIVE EMPLOYEES: (1) the employee's Primary Duties must be office work directly related to the employer's business or its customers; (2) that employee's Primary Duties must include the exercise of discretion and independent judgment with respect to matters of significance to the employer.
- C. PROFESSIONALS: There are several types of "Professionals" in this category – Learned Professionals, Teachers, Lawyers, Doctors and "Creative Professionals". Each has its own Job Duties test for determining whether employees in this category are exempt from the overtime and other requirements of the Act. The most pertinent category for entities in the Arts are "Creative Professionals".

Creative Professionals: In order for an employer to satisfy the Job Duties test for this category of professional and therefore be exempt from the overtime requirements, the employer must establish that the Primary Duties of the employee require invention, imagination, originality and talent in a recognized field of artistic or creative endeavor. Examples include musicians, writers, artists, actors and graphic arts professionals.

- D. OUTSIDE SALES EMPLOYEES: (1) the Primary Duties of the employee must be sales of goods or services for the employer; (2) the employee must be customarily and regularly engaged in such sales activities for the employer away from the employer's place of business (employees who make sales or place orders for sales from an office will not meet this exemption).
- E. COMPUTER EMPLOYEES: (1) the Primary Duties of the employee must relate to computer systems, such as a computer analyst, programmer or software engineer; (2) the employee must customarily and regularly consult with users regarding the specifications of computers, software, etc; and (2) the employee must be involved in the design, development and analysis of computer programs. An employee whose primary duties are fixing computers and the like will not satisfy this exemption;

V. STEPS AN EMPLOYER CAN/SHOULD TAKE TO COMPLY WITH NEW RULES: Some of the actions an employer can or should take to comply with the requirements of the new Rule include the following:

- (1) Track the hours of all non-exempt employees (NOTE: It remains acceptable for a non-exempt employee to work more than 8 hours in a day without receiving overtime so long as he/she does not work more than 40 hours in a week. For example, an employee can work a “flex” schedule of 10 hours/day for 4 days/week). This tracking needs to be done for both salaried and hourly employees.
- (2) For an employee who would otherwise be exempt from overtime (i.e. the employee satisfies the Job Duties test) and who regularly works more than 40 hours/week, it may be more economical to raise that employee’s salary to the new threshold salary level of \$47,476, rather than paying overtime. (e.g. he now makes \$45,000, but under the new rules is likely to earn say \$5,000 in overtime).
- (3) Consideration should be given to raising the salaries of these White Collar employees, while reducing their benefits, since the dollar value of health care and other benefits does not count when determining an employee’s salary. Such an action may result in the same cost per employee for the employer.
- (4) Taking steps to monitor and limit overtime work by employees. This may include hiring more part-time employees.

VI. ADDITIONAL RESOURCES

The Department of Labor has published a number of articles and related materials to help employers understand and comply with these New Rules. The links to some of those materials are listed below.

- (1) The Regulations themselves (all 162 pages) can be found at 29 CFR Part 541 and www.dol.gov/whd/overtime/final2016
- (2) An article entitled “Overtime for White Collar Workers: Overtime and Summary of Final Rule” can be found at <https://www.dol.gov/sites/default/files/overtime-overview.pdf>
- (3) An article entitled “Small Entity Compliance Guide to Fair Labor Standards Act ‘White Collar’ Exemptions” can be found at: <https://www.dol.gov/whd/overtime/final2016/SmallBusinessGuide.pdf>
- (4) For Nonprofits, an article entitled “Guidance for Non-Profit Organizations Paying Overtime Under the Fair Labor Standards Act” can be found at: <https://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf>

VII. CHART SUMMARIZING REVISED WHITE COLLAR EXEMPTION RULES: Below is a Chart summarizing the NEW Rules and the “tests” for satisfying the exemption.

Exemption	Salary Level Test	Salary Basis Test	Duties Test
Executive	• At least \$913 / week (\$4-7,476 / year)	at least 90% of the salary level (\$822 / week] must be paid on a “salary” basis Up to 10% (\$91 / week] may be satisfied with nondiscretionary bonuses or incentive payments	• The employee’s “primary duty” must be that of an exempt executive employee, as described in the “Duties Tests” section of this guide
Administrative		at least 90% of the salary level (\$822 /	• The employee’s “primary duty”

Computer	<ul style="list-style-type: none"> • At least \$913 / week (\$4-7 4-76 / year], or at least \$27.63 /hour 	<ul style="list-style-type: none"> • At least 90% of the salary level (\$822 / week] must be paid on a "salary" or "fee" basis unless the employee is paid on an hourly basis and receives at least \$27.63 / hour • Up to 10% of the salary level (\$91 / week] may be satisfied with nondiscretionary bonuses or incentive payments 	<ul style="list-style-type: none"> • The employee's "primary duty" must be that of an exempt computer employee, as described in the "Duties Tests" section of this guide
-----------------	--	--	---

LARRY A. SILVERMAN, ESQ

167 Shadow Ridge Drive
Pittsburgh, PA 15238
Office/Cell: [412-600-4319](tel:412-600-4319)
Email: larry@lsilvermanlaw.com

Website: www.lsilvermanlaw.com