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The DOL Overtime Rule: Questions and Answers for Big "I" Members

Background

The federal law that regulates employment issues for most employees is the Fair Labor Standards Act (FLSA).[1] The FLSA is enforced by the Department of Labor (DOL) Wage and Hour Division. The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees. States also have their own employment rules and regulations that may impose additional or different requirements beyond the federal requirements.

On May 18, 2016, the DOL released an update to the regulation that exempts certain employees from overtime and minimum wage requirements, commonly referred to as the "white collar" exemptions.[2] In short the rule requires that almost all employees who make less than $47,476 annually be paid overtime. However, workers who make more than $47,476 annually *and* meet certain requirements would be "exempt" and not generally entitled to overtime. Unless exempt, employees covered by the FLSA must receive overtime pay for all hours worked over a 40 hour workweek at a rate not less than one and one-half times their regular rates of pay. Under the updated rule, the $47,476 threshold will be automatically updated every three years, starting in 2020.

The new rule will usher in sweeping changes to overtime regulation and require many employers to pay overtime to employees who were not previously legally entitled to overtime (i.e. exempt employees who currently make between $23,660 and $47,476). Employee salaries and overtime eligibility status must be reviewed and adjusted, as needed, to comply with the new rule. Below you will find a list of questions and answers that cover the changes to the overtime rule that will take effect on *December 1, 2016*, as well as basic information on how the changes interact with current law under the FLSA, as it is applicable to Big "I" member agencies.

Who is exempt from overtime under the "white collar" exemptions?

Effective December 1, 2016, with the exception of the narrowly defined outside sales exemption, to qualify for one of the "white collar" exemptions, employees must first earn a salary of at least $913 a week, or $47,476 annually. Currently, the salary threshold is $455 a week, or $23,660 annually. This means that any FLSA covered employees, except for outside sales employees, who earn less than $47,476 must be paid overtime for all hours worked over a 40 hour workweek at a rate not less than one and one-half times their regular rate of pay.

Generally, earning a salary means that an employee receives regular predetermined amounts of compensation each pay period and the predetermined amount cannot be reduced during that pay period because of variations in the quantity or quality of one's work.[3] Commissions alone cannot satisfy the base salary threshold. However, as explained further below, up to 10% of the minimum salary requirement can be satisfied by commissions under the new rule.

If an employee earns a salary of at least $47,476 on an annual basis that employee is still entitled to paid overtime for all hours worked over a 40 hour workweek at a rate not less than one and one-half times their regular rate of pay, unless the employee qualifies for one of the "white collar" exemptions by satisfying the "duties test" for that individual exemption. The "duties tests" for the "white collar" exemptions were not amended by the new rule, only the salary threshold was changed from $23,660 to $47,476. So the current laws and rules for the "duties test" will continue to apply moving forward. The "duties tests" for executive, administrative and outside sales exemptions (those exemptions most common

[1] 29 USC § 201, et seq.
[2] 29 CFR §§ 541.0-541.710
[3] 29 CFR § 541.602

for insurance agencies) are outlined below. The classification of any individual employee is a case-by-case determination. Also, there are two other "white collar" exemptions, the requirements for which are not covered here. Those exemption are the professional exemption which applies to learned professionals (i.e. practicing doctors or lawyers) and creative professionals (i.e. actors or musicians), and an exemption for computer professions, such as a software engineer.

Executive (i.e. manager)	**Administrative**	**Outside Sales**
To qualify for the executive exemption *all* of the following job duties requirements must be satisfied: (1) primary duty[4] must be managing the business at which the employee is employed, or managing a customarily recognized department or subdivision (2) must customarily and regularly[5] direct the work of at least 2 full-time employees or their equivalent (i.e. 1 full-time employee and 2 part-time employees) (3) must have authority or influence over the hiring, firing, or employment changes (i.e. promotions) of other employees *Note: Certain business owner can satisfy an abbreviated version of the executive exemption requirements.* [6]	To qualify for the administrative exemption *all* of the following job duties requirements must be satisfied: (1) 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 costumers (2) primary duty must include the exercise of discretion and independent judgment with respect to matters of significance *Note: Employees whose primary duty is inside sales do not generally qualify as exempt administrative employees.* [7]	To qualify for the administrative exemption *all* of the following job duties requirements must be satisfied: (1) primary duty must be making sales[8] or obtaining orders or contracts for services (2) must be customarily and regularly engaged away from the employer's place or places of business[9] *Note: There is no minimum salary requirement for outside sales employees.*

[4] "Primary duty" means "the principal, main, major, or most important duty that the employee performs." 29 CFR § 541.700.

[5] "Customarily and regularly" means "a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed 'customarily and regularly' includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks." 29 CFR § 541.701.

[6] If an employee is at least a 20% owner of a covered business and meets the first two requirements of the executive exemption, he or she need not meet the third requirement of the executive exemption or the $47,476 salary requirement. 29 CFR § 541.101.

[7] *See*, 29 CFR § 541.203, "Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption." *See also*, DOL Administrators Interpretation No. 2010-1 (Mar. 24, 2010) which found that mortgage loans officers whose primary duty is sales are production employees and do not qualify for the administrative exemption, available at: https://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_1.pdf

[8] "Sales" means "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition" which includes "the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." 29 CFR § 541.501(a).

[9] "The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls." 29 CFR § 541.502.

The new rule also amended the compensation requirements for another exemption called the "highly compensated employee" (HCE) exemption. Effective December 1, 2016, under the HCE exemption an employee must earn at least $134,004 a year in total compensation. This is a 34% increase from the current threshold of $100,000. The "duties test" for the HCE exemption requires that the employee's primary duty be office or non-manual work and the employee must customarily perform at least one of the duties or responsibilities of an executive, administrative, or professional employee.

How are agency employees impacted by the new rule?

While the rule did not make changes to the "duties test", it is prudent to take this opportunity to review current employee duties and job descriptions for both those employees impacted by the rule and those who are not to ensure all employees are properly classified, and to periodically review employee status moving forward.

- For any employee who is properly classified as non-exempt (i.e. overtime pay is required), no change is required under the new rule, regardless of employee compensation.
- For any employee who is properly classified as exempt (i.e. overtime pay is not required) under either the administrative, executive, professional, or computer exemption ***and*** who makes less than $47,476, that employee's status must be changed to non-exempt and overtime must be paid for all hours worked over a 40 hour workweek at a rate not less than one and one-half times their regular rates of pay, ***or*** their salary must be raised over the threshold.
- For any employee who is properly classified as exempt under either the administrative, executive, professional, or computer exemption ***and*** who makes more than $47,476, no change is required under the new rule.
- For any employee who is properly classified as exempt pursuant to the narrowly defined outside sales exemption, no change is required under the new rule, regardless of employee compensation.

How are producers impacted by the new rule?

Producers—who are designated by the agency as employees and not independent contractors—will be impacted by the rule just as any other employee (as explained above), dependent on their current salary and status. There is no specific exemption from the FLSA for insurance sales.[10] Whether or not producers are classified as exempt outside sales employees, exempt administrative or executive employees, or as non-exempt employees is a case-by-case determination that will depend on the agency and that individual producer's specific job duties.[11]

Can commissions be counted toward the salary threshold?

Yes, under the new rule employers for the first time will be able to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the $47,476 salary threshold, provided those payments are made on a quarterly or more frequent basis. If an employee does not earn enough commissions during a given quarter, an employer may make a "catch up" payment no later than the next pay period after the end of the quarter. Any such "catch up" payment counts only toward the prior quarter's salary. The new rule does not give specific date ranges for what the DOL considers to be a quarter.

Under the HCE exemption, $47,476 of the $134,004 salary threshold must be earned on a salaried basis, however, the remainder of the salary can be earned from nondiscretionary bonuses and incentive payments (including commissions).

[10] The DOL does not consider most insurance sales to qualify for the retail sales exemption, which exempts certain commissioned employees from overtime pay. See, DOL Fact Sheet #6, available at: https://www.dol.gov/whd/regs/compliance/whdfs6.pdf and 29 CFR § 779.317 "Partial list of establishment lacking "retail concept" ("Insurance; mutual, stock and fraternal benefit, including insurance brokers, agents, and claims adjustment offices."), available at: https://www.gpo.gov/fdsys/pkg/CFR-2010-title29-vol3/pdf/CFR-2010-title29-vol3-sec779-317.pdf. See also, *Mitchell v. Kentucky Finance Co*., 359 U.S. 290, 295 (1959).

[11] "[D]epending on the duties actually performed, an insurance agent may qualify for either the outside sales or administrative exemption…. Each agent must be evaluated on an individual basis…" DOL Opinion Letter FLSA 2009-28 (Jan. 16, 2009), available at: https://www.dol.gov/whd/opinion/flsa/2009/2009_01_16_28_flsa.htm

Examples of nondiscretionary bonuses or incentive payments would be individual or group production bonuses.[12] Commissions are considered nondiscretionary incentive payments as such payments are generally based on a prior contract or understanding and employees generally have a contractual right to the commission promised.[13]

Can comp time be offered in lieu of overtime pay?

No, private sector employees are not permitted to offer comp time (i.e. extra time off for extra hours worked above a regular 40 hour workweek) in lieu of monetary overtime pay legally required under the FLSA. Comp temp can be offered generally, but not as an alternative to legally required overtime pay.

How will the automatic updating of the salary threshold work?

The new DOL rule puts in place a process for automatically updating the salary threshold every three years, beginning January 1, 2020. Future updates will take effect on January 1, 2023, 2026, etc. Each update will raise the standard threshold to the 40th percentile of full-time salaried workers in the lowest-wage census region (currently the south/southeast), estimated to be $51,168 in 2020. The HCE threshold will increase to the 90th percentile of full-time salaried workers nationally, estimated to be $147,524 in 2020. The DOL will post new salary levels 150 days in advance of their effective date, beginning August 1, 2019.

Is there an exemption for small businesses?

There is no small business exemption for the overtime rule or the FLSA. Generally, the FLSA and the overtime rule apply to employees of enterprises that have an annual gross volume of sales made or business done of $500,000 or more. However, if your business is under the $500,000 threshold, it does not mean that your employees do not enjoy any FLSA protections. Employees are still covered by the law if they are engaged in interstate commerce, which includes such activities as making out-of-state phone calls, sending mail, or handling credit card transactions. "Engaged in interstate commerce" has been interpreted broadly to cover almost all workers.[14]

How is the rule enforced?

The FLSA is enforced by the Wage and Hour Division of the DOL. Investigators are stationed across the United States and are responsible for gathering data on wages, hours, and other employment conditions or practices, in order to determine compliance with the law. While some investigations are proactive, many are in response to an employee complaint. It is a violation to fire or in any other manner discriminate against an employee for filing a complaint or for participating in a legal proceeding under FLSA.

Where violations are found, the DOL may recommend changes in employment practices to bring an employer into compliance. A common remedy for violations is to require employers to pay any back wages that employees may be owed. Generally, a two-year statute of limitations applies to the recovery of back pay. In the case of willful violations, a three-year statute of limitations applies.[15] Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to a civil money penalty of up to $1,000 for each violation.[16]

[12] DOL analysis of the rule on page 116 footnote 65, provides these as examples and is available here: https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-11754.pdf

[13] In conjunction with the rule DOL issued a Small Entity Compliance Guide, which explains why the DOL considers commissions nondiscretionary on page 5, available here: https://www.dol.gov/whd/overtime/final2016/SmallBusinessGuide.pdf

[14] 29 USC § 203(s). See also, DOL analysis of the rule on pages 25 and 231-32.

[15] See, DOL website page on backpay, available here: https://www.dol.gov/general/topic/wages/backpay

[16] 29 CFR §§ 578.1-578.4