

# U.S. Department of Labor Overtime Rules

## ***Background, Tips to Prepare, and Frequently Asked Questions***

October 2019

### Background

On September 24, 2019, the U.S. Department of Labor announced a final rule that most employees earning less than \$35,568 per year will be entitled to overtime pay. The rule goes into effect January 1, 2020. The rule also includes revisions around highly compensated employees, nondiscretionary bonuses and special salary levels for workers in U.S. territories and the motion picture industry. This document addresses only overtime rules; for the full rule, please click [here](#).

- Under these rules, United Way exempt staff, including managers, directors, vice presidents, and even some CEOs who make less than \$35,568 will be limited to 40 hours per week. If they work more than 40 hours in any work week, they must be paid overtime.
- The question of whether this rule applies to your United Way is complicated and depends on where your employees perform their duties, the nature of your revenues, and the work that individual employees perform. **However according to the U.S. Department of Labor, almost every employee in the United States is covered by the Fair Labor Standards Act (FLSA).** The Fair Labor Standards Act includes provisions for overtime pay.
- The recently announced U.S. Department of Labor overtime rule will impact many United Way employees: approximately 12% of United Way staff earn less than the new threshold (\$35,536) and 50% of staff at United Ways raising less than \$500,000 are below the threshold.
- The initial assumption is that the FLSA applies to all employees. Therefore, they are “non-exempt” and are eligible for overtime pay unless the three tests (salary level, salary basis and duties tests) have been performed and at least one of the exemptions applies. See attachment with details on the three tests. To determine if an employee is exempt from the FLSA (and overtime pay), apply the three tests for exemption; you may need to consult with an HR professional for guidance on this process. In most cases, **employees must qualify under all three tests in order to be classified as “exempt.”**
  - Salary level test and
  - Salary basis test and
  - Job duties test
    - Executive duties
    - Administrative duties
    - Professional duties
- **We believe all, or nearly all, United Way employees with compensation below the threshold of \$35,568 are covered by the FLSA and the overtime provision** because they engage in interstate commerce, including making out of state phone calls, receiving interstate mail or email, ordering or receiving goods from an out of state supplier, etc. Note – engaging in interstate commerce is one of the ways an individual is covered by FLSA. For full details on FLSA coverage, please click [here](#).
- The new overtime rule changed the salary level test. The threshold under which employees are automatically non-exempt changed from \$23,660 (or \$455 per week) to \$35,568 (or \$684 per week). All employees with compensation at or below the threshold are non-exempt and must be paid overtime.

*Disclaimer: This document is provided for information purposes only. Please consult a Human Resources professional or legal counsel with your specific questions or concerns.*

- Note that some states have laws with provisions concerning overtime pay. Consult with a local HR specialist or legal counsel for questions about what is required by your state.

## Tips to Prepare

- Prepare a communications plan to explain the changes.
- Establish a process to record and track hours worked.
- Review budgets to determine if/how potential overtime expenses can be absorbed.
- Consider revising policies because of potential overtime.
- Undertake a review of FLSA classifications to confirm which positions will be exempt and non-exempt by January 1, 2020. Determine who will manage the review process and whether external help is needed from an HR specialist or legal counsel.
- Update all job descriptions to reflect full depth and breadth of duties.
- Review all currently exempt jobs.
- Decide how changes will be handled. Some options:
  - Reclassify positions and pay overtime
  - Raise salary above the threshold (assuming the position passes the duties test)
  - Increase staff to avoid overtime
  - Eliminate work

## FAQs

**Q: Rather than pay overtime, may we offer non-exempt employees comp time?**

A: Compensatory time can only be requested by the employee. It cannot be imposed by the employer. The regulations require payment in cash, unless the employee specifically requests otherwise and takes the compensatory time within the same week.

**Q: What about flex time?**

A: Flex time is when employees are offered alternative work schedules (different start/end times to their work day, compressed work week, etc.). This is a separate matter and only impacts overtime when employees exceed 40 hours of work in a week. Note that some states have laws that may impact flex time rules for non-exempt employees.

**Q: Our United Way has after-hours special events several times a year. We ask our staff to volunteer at these events since they require “all hands.” Can our non-exempt staff continue to serve as volunteers at our special events?**

A: There are a couple of factors. What are the employee's regular duties? For non-exempt employees that are performing their regular duties at these events, the hours worked would count towards that week's work hours. As an example, if your receptionist is required to work after-hours to admit guests to a special event, that is part of that position's regular duties. The receptionist cannot volunteer to do this duty. Another factor – has your United Way authorized overtime? If not, the employees would apply the hours worked at the after-hours event towards their 40 hours of work, and they would conclude that week's work when they have completed 40 hours.

**Q: How does travel time work for non-exempt employees?**

A: For non-exempt employees on non-local business travel, the first tactic is to have the employee travel during regular work hours. Travel time does count as work hours. Once the employee is at the travel destination, the time spent working, including attending work-related training and conferences, counts towards that week's work. Other time the employee spends at the destination, after their workday has concluded, does not count as hours worked.

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**Q: Does the expense of benefits count towards the compensation threshold?**

**A:** Probably not, but there are a few cases where it might. Consult with an HR specialist or legal counsel.

**Q: We are considering not authorizing overtime for our non-exempt employees. Is this allowed?**

**A:** Yes. That means when a non-exempt employee has worked 40 hours in a week, they are dismissed from work the remainder of the week. But if they do work over the 40 hours per week, you are responsible for compensation for the overtime. You can discipline for violating the organization's policy, but you still have to pay the overtime.

## FLSA Exemption Questionnaire

*Note to employers: This questionnaire serves as a basic outline for an employer's initial analysis of positions being considered for exemption under the FLSA and is meant to serve as one of several tools in such an analysis. Job titles are insufficient to determine exempt status. Additionally, state wage and hour laws may have different requirements. SHRM strongly recommends that employers have legal counsel review their exemption decisions.*

**Position Title:** \_\_\_\_\_

**Employee:** \_\_\_\_\_

**Date:** \_\_\_\_\_

**Completed by:** \_\_\_\_\_

Completion of this questionnaire helps determine the exemption status of a position. Check the appropriate exemption (executive, administrative, professional, computer-related, outside sales or highly compensated), then check all boxes under the selected exemption that are applicable. To qualify for an exemption, all boxes must be checked for that exemption. [Access the exemption regulations \(29 CFR Part 541\).](#)

### **EXECUTIVE (examples: chief executive officer, controller, vice president, director)**

- ☐ Regularly receives a predetermined amount of pay constituting all or part of the employee's salary, which is not subject to reduction because of variations in the quality or quantity of work performed. [Access the DOL's salary basis information.](#)
- ☐ Is paid at least \$684 weekly (effective Jan. 1, 2020).
- ☐ Primary duty consists of managing the enterprise or a customarily recognized department or subdivision of the enterprise.
- ☐ Customarily and regularly directs the work of two or more full-time employees or their equivalents (for example, one full-time employee and two half-time employees).
- ☐ Has the authority to hire or fire other employees **OR** makes recommendations that carry weight as to the hiring, firing, advancement, promotion or any other change in status of other employees.

[Access the DOL's executive exemption information.](#)

### **ADMINISTRATIVE (examples: manager, supervisor, administrator)**

- ☐ Regularly receives a predetermined amount of pay constituting all or part of the employee's salary, which is not subject to reduction because of variations in the quality or quantity of work performed. [Access the DOL's salary basis information.](#)
- ☐ Is paid at least \$684 weekly (effective Jan. 1, 2020).
- ☐ Primary duty consists of performing office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers.
- ☐ Work includes the exercise of discretion and independent judgment with respect to matters of significance.

[Access the DOL's administrative exemption information.](#)

**PROFESSIONAL: LEARNED AND CREATIVE (examples: accountant, nurse, engineer, composer, singer, graphic designer)**

- ☐ Regularly receives a predetermined amount of pay constituting all or part of the employee's salary, which is not subject to reduction because of variations in the quality or quantity of work performed. [Access the DOL's salary basis information.](#)
- ☐ Is paid at least \$684 weekly (effective Jan. 1, 2020). Note: For teachers, licensed or certified practitioners of law and medicine, and medical interns and residents covered under this exemption, the salary basis and salary requirements do **NOT** apply.

**Learned Professional**

- ☐ Primary duty consists of the performance of work that requires advanced knowledge (beyond high school) and that is predominantly intellectual in character and consistently includes the exercise of discretion and independent judgment.
- ☐ The advanced knowledge is in a field of science or learning.
- ☐ The advanced knowledge was acquired by a prolonged course of specialized intellectual instruction. (This knowledge may be demonstrated either by possessing the appropriate academic degree or by having substantially the same knowledge level and performing substantially the same work as degreed employees but possessing advanced knowledge only through a combination of work experience and intellectual instruction.)

**Creative Professional**

- ☐ Primary duty consists of the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work.

[Access the DOL's professional exemption information.](#)

**COMPUTER-RELATED (examples: network or database analyst, developer, programmer, software engineer)**

☐ Is paid at least \$684 weekly (effective Jan. 1, 2020) **OR** \$27.63 per hour. That is, this exemption does **NOT** have to meet the salary basis requirement to regularly receive a predetermined amount of pay constituting all or part of the employee's salary, which is not subject to reduction because of variations in the quality or quantity of work performed, **IF** paid at least \$27.63 on an hourly basis.

☐ Primary duty consists of:

The application of system-analyst techniques and procedures, including consulting with users to determine hardware, software or systems functional specifications, OR

The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, OR

The design, documentation, testing, creation or modification of computer programs related to machine-operating systems, OR

A combination of these duties which requires the same level of skills.

[Access the DOL's computer-related exemption information.](#)

**OUTSIDE SALES (examples: salespeople, contract negotiators)**

The salary basis and salary requirements do **NOT** apply for this exemption. That is, this exemption does **NOT** have the salary basis requirement to regularly receive a predetermined amount of pay constituting all or part of the employee's salary, **AND** this exemption does **NOT** require payment of a minimum salary. Commission-only pay is allowable under this exemption.

☐ Primary duty consists of making sales or obtaining orders for contracts for services, or for the use of facilities for which consideration will be paid by the client or customer.

☐ Customarily and regularly is engaged away from the employer's place or places of business.

[Access the DOL's outside sales exemption information.](#)

**HIGHLY COMPENSATED EMPLOYEES PERFORMING EXECUTIVE, PROFESSIONAL OR ADMINISTRATIVE DUTIES**

☐ Is paid an annual total compensation of \$107,432 or more, which includes at least \$684 per week paid on a salary basis. The required total annual compensation of \$107,432 or more may consist of commissions, nondiscretionary bonuses and other nondiscretionary compensation

earned during a 52-week period, but does not include credit for board or lodging, payments for medical or life insurance, or contributions to retirement plans or other fringe benefits.

☐ Primary duty consists of performing nonmanual office work. Note: No matter how highly paid, manual workers or other blue-collar workers, including nonmanagement construction workers, who perform work involving repetitive operations with their hands, physical skill and energy are not eligible for this exemption.

☐ Customarily and regularly performs at least one of the exempt duties or responsibilities of the executive, professional or administrative exemption.

[Access the DOL's highly compensated exemption information.](#)