Navigating Employment Changes to the Fair Labor Standards Act (FLSA)

Effective December 1, 2016

What is the Fair Labor Standards Act?

The Fair Labor Standards Act (“FLSA”) is a federal law, and the FLSA and its regulations establish minimum wage, overtime pay, time recording, and child labor standards affecting full- and part-time workers in the private sector (including some nonprofits) and in federal, state, and local governments.

- This law requires employers to classify employees as exempt or non-exempt from overtime pay provisions based on their job responsibilities and pay level.
- Exempt employees are narrowly defined under the FLSA.
- Recordkeeping requirements for exempt employees are different than for non-exempt employees. Non-exempt employees must keep records of their time worked.

Who is Exempt from Overtime?

Determining if an employee is exempt from overtime pay is based on the type and frequency of performed duties and responsibilities, and not solely on how often or how much that person is paid, or the preference of the supervisor.

- Exempt status under the FLSA include classifications generally described as:
  - Executive
  - Administrative
  - Professional (learned and creative)
  - Computer
  - Outside Sales

There are three tests to qualify for each type of exemption:

1. **Salary Basis** – Employees receive a pre-determined fixed salary (such as $1,000 per week) that generally is not subject to deductions, except for deductions specifically authorized by the regulations.

2. **Salary Level** – New regulations require a minimum salary level of $913 per week (which equates to $47,476 annually). This is more than double the previous minimum salary level.
3. **Duties Test** – Employee responsibilities must meet the “Duties Test” to qualify for the executive, administrative, professional, outside sales, or computer exemptions.

*Note: Most of your employees, if they qualified for exempt status, would qualify under the Executive or Administrative exemptions if their job responsibilities meet the requirements. These are the exemptions we will discuss in more detail.*

The high-level requirements for the Executive and Administrative are summarized below:

**Executive:**
- Primary duty of managing the enterprise, or a department/division, AND
- Directs the work of two or more full-time equivalent (“FTE”) employees, AND
- Has authority to hire/fire or make significant recommendations as to hiring, discharge, advancement, promotion, or other changes of status of other employees
  - Typical position examples: CEO, President, Executive Director

**Administrative:**
- Primary duty directly related to the management or general business operations of the employer, AND
- Exercises discretion and independent judgement with respect to matters of significance
  - Typical position examples: Accountant, Marketing Manager, Fund-Raising or Development Director (duties, not job titles, are determinative)

**Non-Exempt Jobs Typically Include:**
- Manual laborers and skilled trade workers
- Receptionists
- Administrative Support

Again, to qualify for an exempt position (exempt from overtime pay), a position must meet the duties test, be paid on a salary basis (flat amount per week or pay period), and receive the minimum salary which is now $913 weekly (or $47,476 annually). Every three years this minimum salary level will be adjusted by the federal government.

- This is not a one-time event. You must evaluate your options with both a short-term and long-term focus.
Clergy and Ministers:

As a general rule, courts have held that there is a ministerial exception to the FLSA and its regulations discussed here. Therefore, if a person’s primary duties consist of teaching, spreading the faith or ‘serving’ pursuant to religious obligations, as a member of a religious order, this person may not be considered an ‘employee’ and therefore, shall not covered under the FLSA and its regulations.

Qualifications for the ministerial exception are as follows:

- Must be a spiritual leader whose primary duties are ministerial/religious in nature. This could include associate pastors and youth ministers if their primary duty is ministerial in nature.
- Must be a member of a religious order who serves pursuant to your religious obligations in the church, school, hospital and/or other institute operated by the church or religious order.

What Counts as Salary?

A portion of bonus payments can count toward the standard salary level:

- Up to 10%, $4,747 annually, of the minimum standard salary level can come from non-discretionary bonuses, incentive payments, and commissions
- Bonuses, incentive payments, and commissions must be paid at least quarterly or more frequently; annual bonuses, incentive payments, and commissions do not count towards the standard salary level
- Bonuses, incentive payments, and commissions cannot be discretionary
- Car allowances, per-diems, room and board, and other reimbursements do not count towards the standard salary level

What Should You Do Now?

- Conduct a job analysis and ensure the job descriptions for each position within the organization are accurate and up-to-date. Review to see if they meet the duties test for an exempt position.
• Conduct an audit to identify which employees in exempt/salary positions make less than $913 per week or $47,476 annually. Create a list of the positions and salaries who would fall in this range.
  • Assess how much overtime these employees work in a typical year.
  • Calculate the cost of overtime if this same position was non-exempt based on your state’s overtime rules. (These can vary by state. See www.dol.gov/whd/state/state.htm for more information.)
  • Determine the “worst case scenario” cost associated with these changes.

After Conducting Your Analysis and Audit, Here Are Your Options:

1. Raise the salary for positions that qualify for exempt/salary status based on the duties test to $47,476 annually/$913 weekly. Be sure to evaluate the ripple effect of making this change—will it cause compression with a supervisor or any internal equity issues with other positions?

2. If budgets do not support the new annual salary increase, then here are your options; you can figure their hourly rate two ways:
   a. Reclassify positions that meet the duties test, but not the new exempt/salary threshold of $47,476 annually, to non-exempt/hourly, track their time, and pay them overtime. For instance if their salary is $30,000 per year, divide that salary by 2080 hours (40 hours per week x 52 weeks per year) to determine their hourly equivalent is $14.42 per hour. Note that in this scenario, if the employee did work 40 hours per week and overtime, they would make more than $30,000 at year-end so you will need to budget for any additional pay.
   b. Reclassify positions that meet the duties test, but not the new exempt/salary threshold of $47,476, to non-exempt/hourly, but reduce their hourly equivalent rate to offset the addition of overtime pay. For instance, in the example above, if the employee regularly worked 42 hours per week, and you reclassified them to an hourly equivalent rate of $14.42/hour, and pay overtime, they end up making $32,249.52. So with this option, you would include their expected overtime hours and calculate their hourly rate taking $30,000 / 2236 hours (2080 plus 104 overtime hours) = $13.42/hour so you have a zero net budget increase.

3. Restructure the positions so employees work 40 hours or less per week, transition some full-time positions to part-time, reduce normal "work hours," eliminate positions, and/or change operational processes to stay within your budget.
Other Considerations

Time Policies – You may have to redefine your work day and work week:

- Keeping time records if employees have not previously had to do this
- Defining ‘flex time’ – if they take off work for an appointment, such as a doctor’s appointment, they must now clock out and back in, but can they make up those lost hours? Do they need to use paid time off to replace the two hours they lost during the appointment?
- Emails and/or working from home – is a non-exempt worker expected to take calls or emails from home? If so, this time now needs to be tracked and paid.
- Benefit and Retirement Plans – benefits, such as life insurance and disability, may be a multiple of salary. You should review these plan documents to ensure employees are aware of any changes to their benefits that may be a result of their change in classification from salary exempt to hourly non-exempt. In addition, some paid time off or vacation policies may accrue differently for exempt and non-exempt.

Communication

Consider the emotional impact. This may cause morale issues, as this will be a culture shift for affected employees. They may view salary exempt status as a privilege and a change to non-exempt hourly could make them feel as if they have been demoted. They may feel you don’t trust them since they now have to record their time.

We recommend the following:

- Meet one-on-one with employees who you determine must be changed from salary exempt to hourly non-exempt.
- Explain that this change is a result of new government regulations and reassure them of the value they contribute to your organization.
- Discuss how they should track their time worked, clarify what “normal work hours” are, and identify who approves their time and gives permission to work overtime if needed.
- Employees affected by this change may be used to doing whatever is needed to get their job done, including checking emails after hours or working late to finish a project. If they cannot work overtime, determine together what resources are needed to get the job done.
- As you determine which options work best for your organization, please keep in mind that the spirit of this new law is to help hard-working people get paid for the overtime hours they work.
Commonly Asked Questions

1. I have a part-time salaried employee who does clerical work and does not meet any of the tests for exemption from overtime. Do I have to change them to hourly?
   - Best practices would recommend that you do change a part-time employee in this position to hourly nonexempt and have them track their actual hours worked. Then pay them an hourly rate. The only other option would be to classify them as nonexempt salary, and agree to pay them a fixed salary (must be above minimum wage) for a fixed number of hours per week. For example, you agree to pay them $200 per week for 20 scheduled hours of work. In this instance, you would still want them to track their hours worked, you would pay them $200 per week for 20 hours or less, and if they work over 20 hours, you would need to pay for the additional hours worked.

2. I have a music director who works 1 day through the week and on Sundays. Currently I pay them a flat rate of $150 per week. Do I have to change them to nonexempt hourly and pay them an hourly rate?
   - If the music director’s main duty is a ‘religious function’ on behalf of the church, the music director could fall under the ministerial exception. Best practice would recommend you have them track their hours worked, and either pay them an hourly rate, or per the instance above, give them a flat weekly pay (such as $150 per week) for up to a certain amount of hours (such as 10 hours per week) and you can pay them $150 per week for 10 or less hours worked. If they work more than 10 hours, you would need to pay them for the additional hours.

3. What are other possible church staff positions that would fall under “ministerial exception” and not covered by the FLSA and its regulations?
   - As stated in the Clergy and Ministers section of this communication, if a person’s primary duties consist of teaching, spreading the faith or “serving” pursuant to religious obligations, they shall not be covered under the FLSA and its regulations. Positions could include Associate Pastors, Youth Ministers, and Choir Directors.
Should Church Pre-Schools be handled differently?

FLSA regulation has deemed preschools to be included under the definition of “enterprise” coverage. In other words, they are to abide by the same FLSA regulations and are entitled to minimum wage and overtime protections unless a specific exemption applies.

Common Examples:

**Church Preschool Director** – If their duties are not deemed religious in nature and do not qualify for the ministerial exception, then they would be considered exempt under the Administrative duties test. Their salary would need to meet the $47,476 minimum requirement.

**Preschool Teacher** – Teachers are exempt under the Professional exemption, however there is an exception for teachers, thus a teacher qualifies for the professional exempt regardless of the amount or method of pay.

**Preschool worker** – If their duties are not deemed religious in nature and does not qualify for the ministerial exception, then non-exempt employees must receive at least minimum wage plus any overtime compensation at time and a half.