



HR Toolkit:

Proposed Changes to FLSA White Collar Exemption Rules

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Introduction

In 2015, the U.S. Department of Labor (DOL) issued a proposed rule that would overhaul overtime wage payment in the United States. The new rule would more than double the salary threshold that employees must meet to qualify for an overtime wage payment exemption – a change that could affect 11 million workers across the United States.

The proposed rule has been controversial because, if implemented, employers would need to review employees' exempt status, update overtime policies, notify employees of changes and adjust payroll systems – all of which could result in higher administrative and payroll expenses.

A final rule is expected by July 2016 and the time employers may have to implement any changes could be short. Given the significant impact this rule could have on your company's bottom line, it is important for you to start examining your payroll records and preparing now for any possible changes to overtime regulations so that you're not left scrambling when the final rule goes into effect.

Chapter 1: Overview

What is Changing?

The FLSA requires that eligible employees be paid time and a half for all hours worked over 40 in a workweek. However, overtime rules do not apply to certain “white collar” workers, like executive, administrative, professional, outside sales, computer employees and some highly compensated individuals – these are known as the white collar exemptions. To qualify for a white collar exemption, an individual must pass a salary test, a salary level test and a duties test.

On June 30, 2015, the DOL proposed a rule to modify the “white collar exemptions” provided by the Fair Labor Standards Act (FLSA). The DOL decided to revise the white collar exemptions due to concerns that they were outdated, since the salary thresholds have only changed twice in the past 40 years. For instance, in 1975, more than 60 percent of salaried workers were eligible for overtime pay. Now, only 8 percent of full-time, salaried workers qualify for the exemption due to inflation.

Currently, the salary threshold (salary level test) for overtime pay eligibility under the white collar exemptions is \$23,660 a year or \$455 per week. The proposed rule would more than double the salary threshold to \$50,440 per year or \$970 a week. The proposed rule would also increase the \$100,000 salary level for highly compensated individuals to \$122,148 per year – the 90th percentile of wages earned by workers in 2013. This figure is expected to increase by the time the final rule is implemented.

In order to prevent future salary thresholds from falling behind, the proposed rule is also seeking to automatically update minimum salary level requirements for the white collar exemptions every year. The DOL is considering tying minimum salary requirements to either:

- Fixed percentiles of wages paid (40th percentile for the weekly wage and 90th percentile for highly compensated individuals); or
- Inflation, as measured by the consumer price index.

In addition, the DOL is considering allowing nondiscretionary bonuses and incentive payments to count towards a portion of an employee’s standard salary level – a practice that is not currently permitted. These bonuses could allow employers to more accurately represent employees’ earnings and help determine whether white collar exemptions should apply.

Bonuses and incentive payments, however, would need to be paid monthly or on a more frequent basis, not as a yearly “catch-up” payment. The DOL is also considering special salary tests for employees in American Samoa and workers in the motion picture industry.

While the proposed rule does not suggest making any changes to the white collar exemption duties test, the DOL invited public comments on whether the duties test is working as intended. The DOL included several questions in the proposed rule for commenters to consider. Depending on these results, changes to the duties test could be possible.

Chapter 2: Why does the proposed rule matter?

If implemented, the DOL estimates the new rule would extend overtime protections to approximately 5 million workers who are currently exempt under the white collar exemption rules. It would also clarify overtime compensation eligibility for another 6 million white collar workers.

According to the Obama administration, the new rule could cost employers between \$240 million and \$255 million per year. Business leaders, though, anticipate the costs could be even higher.

Currently, salaried workers who fall above the \$23,660 salary threshold and who are given some managerial tasks are considered “exempt” from overtime pay. Many argue that this exemption has allowed millions of workers to be misclassified as managers, even if the majority of their work is not spent on managerial tasks.

For instance, consider a scenario in which a manager of a fast food restaurant earns \$40,000 a year. This individual continuously fills in for employees who are sick or who don’t show up to work; as a result, she spends the majority of her time preparing food and serving customers – not managerial tasks. She usually ends up working 60 hours a week. Right now, she is not entitled to overtime pay for extra hours worked under the FLSA.

However, under the new rule, managers who make less than \$50,440 a year would be considered “non-exempt,” meaning they would be eligible for overtime pay. Therefore, in the case above, the individual would be entitled to 20 hours of overtime pay – assuming she does not meet all of the exemption criteria (salary basis, salary level and duties test).

While employers can elect to stay the course and start paying overtime, for many businesses – especially smaller ones and nonprofits – this will not likely be fiscally possible. Employers will need to implement substantial changes if they wish to keep payroll expenses constant and avoid adjusting employee schedules too much.

Options for Employers

If the proposed rule is adopted, employers can avoid a lot of hassle by giving a raise to employees who are close to the salary threshold. For instance, consider a situation in which a retail store manager makes \$49,000 a year and regularly works overtime. Rather than paying the manager time and a half, as mandated by the FLSA, the employer could bump the manager’s salary up to \$51,000 a year to avoid incurring overtime expenses.

While this is certainly an option, the DOL estimates that only 0.06 percent of workers in the United States would receive a straight-up salary increase as a result of the new rule. More likely, experts believe that employers will choose to cut hours or reduce base or hourly pay in an effort to find a more neutral cost structure.

For instance, rather than paying \$45,760 a year (or \$880 a week) to an employee who regularly works 50 hours a week, an employer may decide to lower the employee’s hourly rate, as outlined below.

	Current Pay Structure	Future Pay Structure
Total Hours Worked per Week	50 hours	50 hours
Hourly Pay	\$22 per hour x 40 hours (\$880)	\$16 per hour x 40 hours (\$640)
Overtime	\$0	\$240 <i>(\$24 per hour x 10 hours of overtime)</i>
Total	\$880	\$880

In this case, the employee would still be earning the same wage, but only if he or she works 50 hours a week. If the employee works a normal 40-hour workweek, he or she would miss out on \$240.

In addition, employers may limit overtime pay by developing more stringent overtime policies, so they do not have to pay overtime costs. Employers may also consider cutting or reducing benefits to make up for increased payroll expenses.

Furthermore, employees may see changes to their paid time-off, health benefits, profit-sharing and more if they are switched from exempt to non-exempt status. These changes may be perceived as a demotion, and may lead employees to worry about their financial stability. When employees are financially strained, their work may be negatively affected and employee morale may drop.

In addition, employers can trigger penalties if they cut benefits too much. For example, if an employer cuts benefits to the point where its health plan no longer meets minimum value requirements established by the ACA, all employees earning less than the 400 percent of the federal poverty level could be eligible for subsidized coverage in the Marketplace. As a result, employers would have to pay a penalty for each employee who receives a premium subsidy.

No matter which options are pursued, the new white collar exemption rules will likely have a significant impact on your business. Not only will they influence your bottom line and employee morale, but if not properly executed, they may also result in compliance penalties.

Compliance Penalties

If the proposed rule is adopted, employers that fail to implement overtime changes may face various penalties prescribed by the FLSA, including lawsuits, criminal charges, fines and restrictions in commerce.

Private Lawsuits	The FLSA allows employees who do not receive the overtime wages they are entitled to receive to sue their employers. Employees may do this either individually or through collective action. Either case may present a significant cost for an employer to defend.
Criminal Charges	Employers that <i>willfully</i> violate overtime payment requirements face the possibility of criminal charges. If convicted, employers may be ordered to: <ul style="list-style-type: none"> ▪ Pay a fine of up to \$10,000; and ▪ For a second or subsequent violation, face imprisonment for up to six months (or both a fine and imprisonment). <p>“Willful” under the FLSA applies to a conduct an employer performs while knowing it was prohibited under the law. “Willful” also applies when an employer shows reckless disregard for the requirements of the FLSA.</p>

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Civil Fines	Employers that willfully or repeatedly violated overtime payment requirements are subject to a civil penalty of up to \$1,100 per violation.
“Hot Goods” Provision	In addition to other penalties, the FLSA prohibits employers from shipping goods in interstate commerce if those goods were produced in violation of the law. “Repeated” under the FLSA applies to an employer that commits a violation after receiving previous notice that it was in violation of the law. This notice must be provided by an authorized government agent.

For more information on how the new white collar exemptions will affect your business and what you can do to minimize overtime pay, see Appendix B.

Chapter 3: Calculating Overtime Pay

In order to determine what financial impact the updated overtime exemption could have on your business, it is important to make sure you are correctly calculating overtime pay. This section of the toolkit outlines how to correctly determine overtime pay as established by the FLSA, so you can minimize compliance issues.

Overtime compensation is calculated on a weekly basis, and an employee's workweek is a fixed, regularly recurring period of 168 hours (seven consecutive 24-hour periods). Workweeks may begin on any day, and different workweeks may be established for different employees or groups of employees.

To determine an employees' regular rate for a specific work period, employers should divide the employees' total compensation for a workweek by the number of hours the employee worked during the workweek. Typically, employers are not allowed to average hours over two or more weeks.

What is Total Compensation?

Total compensation refers to all forms of compensation given for employment – whether paid directly to an employee or on behalf of the employee. When calculating total compensation, employers should exclude payments made at the employer's sole discretion and those that are independent of any agreement that may lead employees to expect a payment. The following should be excluded from total compensation:

- Gifts and monetary awards that are not measured by hours worked, productivity or efficiency
- Irrevocable employee benefit contributions (such as life insurance, health benefits and retirement accounts)
- Paid time off (vacation, illness, holidays and production downtimes)
- Payments for overtime hours, holiday hours or work that falls outside a schedule set by an employment contract or collective bargaining agreement
- The value or income derived from an employer-provided grant
- The value or income from stock options or stock appreciation and bona fide stock purchase programs

Chapter 4: What are compensable hours?

The FLSA requires employers to pay their workers for all hours that they are required or permitted to work – this is sometimes referred to as “compensable time.” Compensable time includes all time in which an employee is performing productive work and all hours the individual remains available for his or her next assignment. Compensable time does not include time when an individual is relieved of his or her duties and free to pursue his or her own interests.

Employers must keep track of the number of compensable hours employees work during a workweek. To determine how much of an employee’s time is compensable, several factors must be examined, including whether employees should receive wages for rest and meal periods, while waiting for assignments, when they are on-call or when they are attending lectures or meetings.

On Duty

The first step in calculating compensable time is determining whether an employee is on or off duty. The hours an employee is on duty are considered compensable because the employer is controlling the employee’s time, even if waiting is part of the job or employees are allowed to use the time for their own purposes.

For example, consider a situation in which a secretary reads a book while waiting for telephone calls. According to the FLSA, employees engaged to wait are “working” during periods of inactivity and employers must compensate them for this time. The same would be the case for a fireman who plays a card game while waiting for an alarm or a waiter at a restaurant who talks to colleagues while waiting for patrons to arrive.

On Call

On-call time is another area that can be difficult for employees to monitor when it comes to overtime pay. If an employee is required to remain on-site or close to the employer’s location while on call, then it is compensable time because the employee cannot actually use the time for his or her own purposes.

On-call time, however, is not compensable for employees who are merely required to inform their employer of where they can be reached while they are out of the office.

Sleeping Time

Another difficult area for employers can be determining whether sleeping time is considered compensable time. In general, compensable time may include time an employee is allowed to sleep when not busy (if the employee is required to be on duty). However, employers and employees can reach an agreement to exclude sleep time from compensable time if the following conditions are met:

- The employer does not exclude more than eight hours;
- The employer provides adequate sleeping facilities; and
- The employee can enjoy an uninterrupted night’s sleep.

If the employee’s sleep is interrupted by a call to duty, then the employer must count the length of the interruption as compensable time. If the interruption prevents the worker from having at least **five hours** of sleep, the entire eight-hour period is considered compensable time.

Attendance at Meetings, Training Programs and Similar Activities

Compensable time includes any time employees are required to attend meetings, lectures, training programs or similar activities. Participation is considered required (or mandatory) if an employee's job would be negatively affected if he or she did not attend the activity.

Compensable time does not include employment activities when:

- Attendance is voluntary;
- Attendance is outside of the employee's working hours;
- The course, lecture or meeting is not directly related to the employee's job; and
- The employee does not perform any productive work during attendance.

Travel Time

Daily commutes are not considered compensable time. However, if an employee must travel from one job site to another during the workday, this must be counted as compensable time. In addition, if an employee has a special one-day assignment in another city, this is considered compensable time and must be included in the employee's accrued number of hours worked.

Short Breaks

Another area that employers may need to examine as a result of the new overtime rules is rest periods. Short breaks (usually 20 minutes or less) include bathroom breaks, coffee breaks and time for snacks.

Short rest periods are common in certain industries and must be counted as hours worked. In fact, many studies show that workers who take regular, short breaks from mental tasks throughout the day are more productive than those who do not.

Unauthorized extensions of authorized work breaks do not need to be counted as compensable time when the employer has communicated to employees that:

- The authorized break may only last for a specific length of time;
- Any extension of the break is contrary to the employer's rules; and
- Any extension of the break will not be compensable.

Meal Breaks

In general, meal periods of 30 minutes or more are not compensable time if employees are completely relieved from their work responsibilities for the purpose of eating a meal. If an employee is expected to perform any job-related duties, though, whether inactive or active while eating, then the time is considered compensable. Permission to leave the employer's premises during the meal break is not required for an employee to be relieved of all duties.

Nursing Breaks

As a result of the ACA, employers are now required to provide nursing mothers with reasonable break time to express breast milk for their nursing children for up to one year after their birth. This break must be provided each time the employee has the need to express the milk. These breaks do not need to be compensated, though.

In addition, employers must provide a location (other than a bathroom) where the employee can express milk in private. A location is considered private if it is shielded from view and free from intrusion from colleagues, clients and the public. Employers with 50 or less employees are not subject to this requirement if it would impose an undue hardship.

Preparatory and Concluding Activities

Preparatory and concluding activities like inspecting machinery and putting on personal protective equipment are considered compensable time if they are integral to the employee's principal activity. Preparatory and concluding tasks will vary based on each employee's principal activities. As such, each employer should take the time to review these types of activities to determine whether they are compensable time.

Extended Hours and Irregular Work Hour Jobs

It is important to note, though, that the FLSA provides extended hours to certain industries, including retail establishments, employees subject to collective bargaining agreements, health care facilities, small petroleum distributors, the tobacco industry, certain passenger-carrier employees and employees participating in remedial education programs.

In addition, employers that operate within necessary irregular work hours may require their employees to work up to 60 hours per week without having to pay them for overtime. Necessary irregular work hour jobs are considered jobs where neither the employee nor the employer can control or anticipate the number of hours an employee must work. Some examples of these types of professions include on-call servicemen, insurance adjusters, newspaper reporters and firefighters.

Contact your Account Manager for a more detailed list of extended hour and irregular work hour exceptions.

Chapter 5: Common Overtime Payment Mistakes

Below are examples of some of the most common errors that lead to violations of the federal overtime wage laws:

Misclassifying Exempt Status	Giving an employee exempt status to avoid paying overtime wages can be a costly mistake. Employers should not justify a willful misclassification by assuming the employee will not find out or that the cost of having to pay unpaid overtime wages and attorneys' fees and costs is cheaper than paying overtime wages.
Misclassifying Independent Contractors	FLSA overtime and minimum wage provisions apply only to employees, not independent contractors. While there is no single test for determining whether an employee qualifies as an independent contractor, some factors commonly used to differentiate between employees and independent contractors include: <ul style="list-style-type: none"> ▪ The extent to which the services rendered are an integral part of the principal's business ▪ The permanency of the employment relationship ▪ The amount of the worker's investment in facilities and equipment ▪ The nature and degree of control by the principal ▪ The amount of initiative, judgment or foresight in open market competition required for the success of the worker ▪ The opportunity for profit and risk of loss assumed by the worker ▪ The degree of independent business organization and operation
Making Employees Work Off the Clock	The FLSA does not allow employers to ask their workers to clock out and finish their work. Having employees work before their shifts begin or holding an unpaid pre-shift meeting is not allowed. Employers should consider these type of activities and events as compensable time.
Refusing to Pay Unapproved Overtime	Employers that know (or have a reason to know) that an employee is working overtime must ensure that overtime wages are paid, <i>regardless</i> of whether the employer pre-approved the overtime work.
Paying "Straight Time" Rates	The FLSA sets overtime pay at one and one-half times the employee's regular rate, not the employee's contractual (straight) rate of pay. Therefore, if an employee makes \$8.00 per hour, he or she should get paid \$12 per hour for hours worked over 40 in a workweek. Do not simply continue to pay a straight time rate (\$8.00 in the example) for any hours of work over 40 in a workweek.
Automatic Deduction of Meal and Rest Periods	Some employers automatically deduct break times from their employee's timecards to avoid the hassle of maintaining an accurate record of the beginning and ending time of employee breaks. Sometimes, these automatic time deductions take place regardless of whether the employees actually took the break, worked early, stayed late or worked through lunch. This practice is dangerous and the FLSA clearly places the burden on employers to account for all hours of compensable time.
Offering Compensatory Time Off (Private Sector)	Federal law does not allow employers to offer compensatory time off ("comp time") to employees <i>in lieu</i> of overtime work. For example, an employee that works 55 hours in a workweek may not receive time off in some other week to offset the additional 15 hours of work. Employers must pay an employee's overtime wages for the week when overtime work took place.

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Miscalculating Total Compensation	Employers should include productivity bonuses, shift premium pay and other employee payments when calculating an employee's total compensation, and, therefore, the appropriate overtime wage rate. For example, if an employee makes \$8.00 per hour and gets a \$100 productivity bonus per week, the compensation must include the additional productivity bonus when the employer is calculating overtime due. As a result, an employee's overtime rates can be higher than his or her contractual rate of pay.
Allowing Employees to "Waive" Their Right to Overtime	Under the FLSA, overtime compensation waiver agreements are void. An employer must pay overtime wages for overtime work, even for employees who request extra hours and agree to receive regular pay for those hours. Agreements that result in the nonpayment of overtime cannot be used as a defense if the employee later sues the employer for unpaid overtime wages. In addition, store owners cannot circumvent overtime wage requirements (whether intentionally or otherwise) by paying an employee out of different store or corporation accounts.

Chapter 6: Mobile Device Overtime Concerns

As smartphones, tablets and laptops continue to grow in popularity, more employees are checking their email and working outside of “normal working hours.” While the ability to work remotely even after the office is closed has its perks for business, it also can be a source of concern when it comes to calculating overtime expenses.

The main issues employers may encounter when determining whether an employee working remotely is entitled to overtime compensation are:

- Whether the employee is exempt from overtime regulations; and
- Whether the employee’s remote work is compensable time.

An employee working remotely is performing compensable work if he or she is completing a principal activity or if he or she is on duty. An employee’s principal duty includes the activities for which he or she was hired.

If employees are performing compensable work and are not covered by an FLSA exemption, they are entitled to overtime pay. However if the amount of overtime compensable work is negligible, the de minimis doctrine will allow an employer to overlook FLSA requirements.

On-Duty Dilemma

It can be difficult to distinguish between when an employee is expected to work versus when an employee voluntarily chooses to work during his or her free time. Allowing employees to work remotely raises considerations of on-call employment where employees may not be present at the workplace but are still expected to respond to a client or colleague’s request at a moment’s notice.

When considering whether an employee is on or off duty, ask yourself, “Was the employee relieved of all duties at the time of his or her own work?” If the answer is yes, then the time is not compensable. If not, then time spent on remote tasks would be considered compensable hours.

The “De Minimis” Doctrine

The de minimis doctrine deals with negligible amounts of work employees perform when they are off duty. The U.S. Supreme Court has reasoned that penalizing small violations is unnecessary and that if an employee’s remote work is de minimis, the employer should not have to worry about compensating the employee.

To decide whether overtime remote work is de minimis, employers should consider whether:

- It would be practical, from an administrative perspective, to record the additional time;
- The aggregate amount of additional remote work is significant; and
- The employee regularly engages in overtime work.

Prevention

To avoid having to pay employees overtime pay for remote work, employers can implement mobile device policies that outline which employees within their company have access to remote work options. Choosing to limit remote connectivity to employees exempt from overtime regulations can help promote FLSA compliance.

In addition, given the increased DOL attention to overtime issues with mobile devices, employers can monitor work hours and track employee usage of employer-provided mobile devices. To assist in this area, the DOL created a public time-tracking smartphone application to help individuals keep track of their hours of work.

After adopting remote work policies, employers should educate their employees, managers and supervisors on these procedures and on their specific work responsibilities. Employers should also take time during onboarding and training sessions to set clear employee expectations regarding overtime work.

Chapter 7: White Collar Exemptions

Most employees are classified as exempt or non-exempt based on the type of work they do and their salaries. Certain groups of workers are not exempt from the overtime requirements under any circumstances – including most law enforcement officers, firefighters, manual laborers and hazardous materials workers.

The most common type of exceptions are the “white collar” exemption rules, which apply to office workers rather than manual labor or “blue collar” workers. White collar exemptions apply to executive employees, administrative personnel, professional employees, outside sales personnel, computer employees and highly compensated individuals.

To qualify for the white collar exemption, employees must satisfy two tests: the salary test and the duties test. When considering an employee’s duties, employers should focus on the employee’s primary duty – his or her most important responsibilities. Determining an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.

The table below provides a brief overview of current exemptions as well as their salary and duty requirements. Of course, these requirements are subject to change based on the proposed overtime rule.

Exemptions	Salary Requirements	Primary Duty Requirements
Executive Employees	<ul style="list-style-type: none"> ▪ Salary of at least \$455 per week* <p style="text-align: center;">OR</p> <ul style="list-style-type: none"> ▪ 20 percent ownership and actively involved in management 	<ul style="list-style-type: none"> ▪ Employee’s primary duty must be managing the enterprise (or a department or subdivision of the enterprise) ▪ Employee must customarily and regularly direct the work of at least two or more other full-time employees (or his or her equivalent) ▪ Employee must have the authority to hire or fire other employees (or the employee’s suggestions and recommendations on hiring, firing, promotion or other change of status of other employees must be given particular weight)
Administrative Employee	<ul style="list-style-type: none"> ▪ Fee or salary ▪ At least \$455 per week* 	<ul style="list-style-type: none"> ▪ The employee’s 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 customers ▪ The employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance
Professional Employee	<ul style="list-style-type: none"> ▪ Primary duty must be the performance of work requiring advanced knowledge in a field of science or learning ▪ Knowledge must be customarily acquired by a 	<ul style="list-style-type: none"> ▪ Primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (music, writing, acting, graphic arts)

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Exemptions	Salary Requirements	Primary Duty Requirements
	prolonged course of specialized intellectual instruction	
Computer Employee Exemption	<ul style="list-style-type: none"> ▪ Salary or fee of at least \$455 per week* <li style="text-align: center;">OR ▪ Hourly wage of at least \$27.63 per hour 	<ul style="list-style-type: none"> ▪ Job description: Employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below: <ul style="list-style-type: none"> – Application of systems analysis techniques and procedures to determine hardware, software or system functional specifications – Design, development, documentation, analysis, creation, testing or modification of computer systems or programs – Design, documentation, testing, creation or modification of computer programs related to machine operating systems
Outside Sales Personnel	<ul style="list-style-type: none"> ▪ N/A 	<ul style="list-style-type: none"> ▪ Job location: Must be customarily and regularly engaged away from the employer's place or places of business ▪ Primary duty must be making sales or obtaining orders or contracts for services or for the use of facilities
Highly Compensated Individuals Exemption	<ul style="list-style-type: none"> ▪ Total annual compensation of at least \$100,000*; AND ▪ Receives at least \$455 per week on salary or fee basis 	<ul style="list-style-type: none"> ▪ Must perform office or non-manual work ▪ Must customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption

**If the proposed rule is implemented, the DOL may adjust \$455 per week rate to its 2016 projected equivalent of \$970. The minimum salary level for highly compensated individuals would increase to \$122,148 for 2016.*

Chapter 8: Other Exemptions

In addition, the FLSA offers the following exemptions from overtime wage requirements:

- **Agricultural workers** participating in farm-related operations, including water storage and water supply operations used for agricultural purposes and the sale or auction of livestock as a secondary activity, even when this secondary activity is subject to overtime regulation;
- **Amusement park and recreational establishment** employees are exempt for **up to 56 hours** of work in a workweek. Overtime regulations apply for any additional work time;
- **Babysitters** and **companions** for the elderly when their employment is casual and they provide services for individuals who are unable (because of age or infirmity) to care for themselves;
- Cotton, beet, sugar beet molasses or sugar cane processing employees receiving, handling and storing these products are exempt for **up to 10 hours** per day or **48 hours** per week during any 14 consecutive weeks in any 52-week period;
- **Country elevator production** workers working for an employer with **no more than five employees**, even when country elevator operations include the sale and service of farm equipment;
- **Crew** members and **seamen** working on foreign vessels;
- **Criminal investigators** receiving **availability pay** (compensation provided to criminal investigators for unscheduled services beyond the investigator's 40-hour workweek in activities that require irregular or unscheduled work hours);
- **Delivery drivers** and their **helpers** receiving tip rates or a delivery payment plan;
- **Domestic service** employees residing in the household where they work, whose compensation is not classified as wages under the Social Security Act or who work for **less than eight hours** in a workweek;
- Electric **railway, trolley** or **motorbus** employees engaged in charter activities when their participation is voluntary and is not part of their regular duties;
- Employees subject to regulations from the U.S. Department of Transportation;
- Fruit and vegetable transportation employees;
- Individuals employed with their spouse by a nonprofit educational organization to watch over orphans or boarding school children who receive from their employer **free board and lodging** and wages of **at least \$10,000 per year**;
- Individuals who make natural pine, holly or other evergreen wreaths;
- Maple sap and syrup processing employees;
- Motion picture theater employees;
- **Newly hired** employees **under 20 years** of age during the **first 90 consecutive calendar days** following their hiring date (as long as the employer does not displace, fully or partially, other employees' work hours or benefits to accommodate new hires);
- **Newspaper** employees when the newspaper has a circulation of **less than 4,000** and its major circulation is within the county (or contiguous counties) where the paper is published;
- **Newspaper delivery** employees;
- **Outside buyers** of raw or natural poultry, eggs, cream or milk;
- Radio or television **announcers**, news **editors** and chief **engineers**;
- Rail and air carrier employees;
- **Retail** and **service employees** when their regular rate is at least one and one-half times the minimum wage and they derive **at least 50 percent** of their income from commissions;
- **Salesmen** and **mechanics** working for a nonmanufacturing establishment primarily engaged in selling and servicing vehicles to ultimate purchasers;

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- **Seafood processing** employees (individuals employed in the canning, catching, cultivating, farming, harvesting, packing, processing, propagating or taking of any kind of fish, shellfish, crustaceans, sponges, seaweeds and other aquatic forms of animal and vegetable life);
- Switchboard operators working for an independently owned public telephone company having **no more than 750 stations**;
- **Taxicab drivers**; and
- **Timber workers** engaged in the planting, tending, cruising, surveying, transporting or felling of timber and working for employers with **no more than eight** employees.

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Chapter 9: Preventing a DOL Overtime Audit

It is estimated that more than 50 percent of all employers groups have misclassified their employees under the FLSA, although many do not realize it. Payroll errors can trigger a DOL audit, which not only opens your business up to significant fines but can also harm your company's reputation and can be an administrative burden.

During a DOL audit, the DOL will visit your company to conduct interviews, examine time clocks and ensure that all employment notifications are available to your employees. The auditor will also review up to three years of wage and hour records to determine if there are any violations in your payroll practices.

Audit Prevention Strategies

To minimize compliance risks, consider the following recommendations:

- Review your employees' job descriptions to make sure they are accurate and reflect the jobs that employees are actually doing. Having outdated or inaccurate job descriptions can leave companies vulnerable to FLSA lawsuits.
- Review your employee's job duties to evaluate whether they fall within the "white collar" exemptions.
- Determine whether you have properly calculated overtime for non-exempt employees based on FLSA and state laws.
- Make sure that all required employment postings are hung up and visible to your employees.
- Assess your company's timekeeping procedures and methods for calculating regular rate pay.
- Conduct an internal audit to reveal any misclassifications before the DOL has the opportunity to do so. Internal audits should be held annually if possible.
- Pay employees who were misclassified for overtime pay under the supervision of your attorney.

Joint Employment

Complicating matters even further, the DOL recently released guidance regarding joint employment that may make many employers think twice about relying on contracted labor and staffing firms. Currently, many employers use these types of services but do not consider themselves to be joint employers. Employers should use this guidance to determine whether they are in a joint employment situation. Employers in a joint employment situation should coordinate with each other to ensure compliance with the FLSA.

Joint employment occurs when an employee works for two or more related employers. When joint employment exists, all joint employers are jointly and severally liable for compliance with the FLSA. The concept of joint employment is possible because the FLSA has adopted a broad definition of employment – "to suffer or permit to work." According to the DOL, a broad definition of employment is necessary to ensure that employers do not use "middlemen" to evade their responsibilities under the law.

When joint employment exists, an employee's hours worked for all of the joint employers during the workweek are aggregated and considered one employment. As a result, that employee's overtime compensation depends on whether his or her aggregate hours of work exceed the limits set by the FLSA and the MSPA.

Under this new guidance, the DOL classifies joint employment in two categories – horizontal joint employment and vertical joint employment. The key to determining joint employment under both scenarios is economic dependence, regardless of whether an employer exercised control or supervision over the worker.

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Horizontal joint employment exists when a worker is employed by two or more employers that are “sufficiently associated or related.” This means that the employers are technically separate entities but are related or share some administrative or employment functions.

Vertical joint employment situations exist when employers contract with intermediary employers for labor, such as in situations involving staffing agencies, subcontractors and labor providers.

The first step in determining whether vertical joint employment exists is to assess whether the intermediary employer is an “employee” of the potential joint employer. If the intermediary employer is the potential joint employer’s employee, then the intermediary’s employees are also the potential joint employer’s employees, and a joint employment determination is not necessary.

If the intermediary employer is not an employee, determining whether vertical joint employment exists depends on the outcome of an economic realities test. This test shows the degree of economic dependence a worker may have on a potential joint employer. The particular factors used to conduct this test vary from court to court.

Chapter 10: Preparation Strategies

By conducting an internal audit (as described in the previous section), employers can identify any misclassifications and determine who will be eligible for overtime if the proposed rule is implemented. Make sure to review job descriptions for accuracy, especially for employees whose roles may have changed over the years.

You can then use the information gathered from an internal audit to develop the best course of action for your business. Since the new rule will affect so many facets of your business, thoroughly understanding what employees will be impacted and how much these changes could cost your business is key.

The following are a list of strategies your business should consider when determining how to best prepare for the new overtime rule.

Adjust Wages

As previously mentioned, one way for employers to get around the new overtime requirements is to give employees who are close to the salary threshold a raise. The infographic below outlines the benefits of this approach.

What are your options?

Increase employee salary to a new minimum

OR

Prepare to pay non-exempt employees for overtime



Assess Benefits

Employers may also consider cutting benefits to make up for increased payroll expenses, as discussed above.

Any benefit cuts must be carefully assessed. The financial impact of the changes (the additional money that would be spent paying overtime or bumping up their salaries) should be carefully compared to the indirect financial impact of the changes (employee satisfaction). Other indirect impacts could be increased turnover costs if employees decide to look for better paying jobs or for jobs that offer overtime pay.

Review Overtime Policies

To limit overtime expenses, some employers may develop more stringent overtime policies that send employees home after exactly eight hours. While such a policy can encourage a healthier work-life balance for employees, it may also result in output decrease.

To maintain productivity, employers may choose to hire additional part-time staff, who can often be hired at a lower hourly rate and without offering benefits. Depending on your industry, though, this may not be a viable option if it is difficult to find qualified part-time staff for certain, more skilled positions. In addition, you will also have to worry about the joint employment relationship and FLSA compliance if you are hiring workers from an external staffing agency.

Review Time Tracking

Another area that employees need to worry is time tracking. Because more employees will now be eligible for overtime pay, having a system in place that carefully records their time spent working will be crucial.

Set up a meeting with management to talk through overtime changes and make sure that your system is capable of efficient time tracking. Allow IT plenty of time to develop and install new procedures, and to test out any system changes prior to the overtime rule taking effect, so you can identify and resolve any bugs early on.

In addition, because some employees will be changing from exempt to non-exempt status as a result of these rules, it is important that these employees understand how the time tracking system works. Recognize that there may be some backlash from these new policies, especially if employees are not used to punching in and out. Having to punch a clock may be seen as a demotion in these employees' eyes.

Analyze Workflows

Employers should use the proposed overtime rule as an opportunity to examine existing workflows to identify areas for improvement. If employees are regularly staying late, it is important to understand why and see if there are any processes that can be streamlined. For instance, if employees are being burdened by paperwork or spending hours manually tracking performance metrics, ask yourself if there is a way to automate the process.

Consider asking managers and supervisors for input on how to improve workflow, or even distribute a short survey that employees can take anonymously that asks questions like "What process slows down your productivity?" or "What could we do differently to make your job easier?" When creating these surveys, make sure the message centers on making the employees jobs easier rather than on saving the company money.

Feedback can then be used to drive workflow changes. Employees will appreciate being asked for their opinions and will be thankful that repetitive or burdensome tasks are eliminated or reduced as a result.

Develop a Communication Plan

Given the significant impact the new rule could have on employee satisfaction, developing an effective communication plan is key. The earlier you start the better. Employees may have already heard news about the overtime changes, so it is important to get ahead of any rumors and reduce employee anxiety and stress by presenting the facts and informing them about upcoming changes.

Determine who will be in charge of communication efforts. Depending on the size of your company and the scale of the changes, you may want to form a small group dedicated to managing communications. The group may include individuals from the marketing, public relations, human resources, accounting and legal departments as well as the executive team. Identify a point person for questions (often a human resources professional), and make sure this person's name and contact information is available on all communications.

Educate department heads and front line managers on changes. Employees may ask initial questions to their direct supervisors, so make sure these individuals are prepared and know how they can escalate questions if necessary.

To ensure that your message is reaching your employees, use a wide variety of communication platforms – including email, intranet postings, group or individual meetings, PowerPoint presentations and social media. When crafting your message, consider the following strategies:

- **Explain the “why.”** In addition to providing an overview of the new overtime rule, explain why changes are being made and how these changes will support the company's goals.
- **Be transparent and honest in your message.** Don't sugarcoat things, but try to be positive (even if benefits are being cut). Make sure to emphasize that each employee and the work he or she does is appreciated.
- **Avoid legal jargon.** Avoid getting into too many legal or technical details since this may confuse employees. Keep language simple and straightforward.
- **Provide an FAQ.** Consider putting together a list of frequently asked questions so employees have an easy resource they can reference for their questions. This may also help reduce the amount of emails or questions human resources professionals will get on the issue.

Chapter 11: Timeline

According to the DOL, the final rule is likely to be released July 2016. The last time the FLSA overtime requirements were updated was in 2004, and the DOL gave employers 120 days to comply. This time, employers may only have 30 to 60 days to make necessary changes (depending on the time between the release of the final rule and its effective date).

Because of upcoming presidential elections, there is pressure on the DOL to make the final rule effective shortly after it is published. Requiring compliance before transitioning to a new administration could significantly decrease the chances of a repeal of the rule. For this reason, some speculate that employers may be required to be in full compliance with any changes before the end of the year. A short implementation timeline would be more likely if changes are small or simple, such as changes to the salary threshold.

On the other hand, others believe that a progressive or phased-in implementation is more likely because of the significant amount of changes employers will have to make in order to comply. A progressive implementation timeline is more likely if the final rule adopts more significant or comprehensive changes, including changes to the duties test.

Chapter 12: Future Considerations

While it is possible that the 2016 elections could change some aspects of the new rule, it is highly likely that overtime pay changes will be implemented in some fashion. Given the significant impact this new rule could have on your business, it is important to start preparing now for changes to the FLSA. Waiting until the final rule is released will leave you scrambling and could increase your risk of FLSA-related lawsuits and compliance penalties.

By conducting an internal audit and using the strategies and compliance information found in this toolkit, you can prepare for the implementation of the final rule and minimize the impact it will have on your business.

For additional questions or information, contact your Account Manager today.

Appendix A: Glossary

The following is a list of definitions of terms associated with the proposed overtime rule.

- **Affordable Care Act (ACA)** – Piece of health care reform legislation signed into law by President Barack Obama in March 2010.
- **Compensable time** – Includes all hours during which an employee is performing productive work and all hours an employee is required by his or her employer to remain available for the next assignment.
- **Duties test** – An evaluation of whether employee job responsibilities meet all of the criteria specified in the white collar exemptions in order to be exempt from overtime rules.
- **Exempt** – Not subject to overtime pay under the FLSA.
- **Fair Labor Standards Act (FLSA)** – Enacted in 1938, FLSA regulates minimum wage, overtime pay, child labor, recordkeeping and special minimum wage standards applicable to most private and public employees.
- **Overtime pay** – Employees are entitled to one and one-half times their regular wage rate for all hours worked over 40 in a workweek.
- **Non-exempt** – Subject to the FLSA.
- **Preparatory and concluding activities** – A task that is closely related to an employee's principal activities and is indispensable to the performance of the principal activities.
- **Principal activity** – The tasks, duties and responsibilities that relate directly to an employee's job or position.
- **Salary level test** – An evaluation of how and how much employees receive as compensation for their labor. Currently employees making less than \$455 per week or \$23,660 annually are eligible for overtime pay. Under the proposed rule, this amount would increase to \$970 per week or \$50,440 per year.
- **Total compensation** – Includes all forms of compensation given for employment, whether paid directly to or on behalf of the employee.
- **White collar exemptions** – FLSA exceptions that apply to executive employees, administrative personnel, professional employees, outside sales personnel, computer employees and highly compensated individuals.
- **Workweek** – A seven-day period of 168 hours established by a company that begins on the same day every week. It is used as the basis for paying employees.

Appendix B: Additional Resources

For more information about the proposed overtime rule, contact your Account Manager and check out the following resources:

- Overview of Proposed Changes to FLSA White Collar Exemption Rules
- Proposed Changes to Overtime Wage Payment
- Employee Letter about Proposed Changes to the FLSA White Collar Exemption Rules
- DOL Proposes Changes to FLSA White Collar Exemption Rules
- Overtime Concerns for Employees with Mobile Devices
- Fair Labor Standards Act: Administrative Exemption
- Fair Labor Standards Act: Computer Professional Exemption
- Fair Labor Standards Act: Outside Sales Exemption
- Fair Labor Standards Act Reference Guide
- Overtime Approval Form
- Fair Labor Standards Act: The White Collar Exemption Rules
- DOL Wage and Hour Audits
- The Importance of Accurate Job Descriptions
- Fair Labor Standards Act Reference Guide
- Overtime Wage Payment Compliance: Avoiding Lawsuits and Liability
- Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees – <https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-0001>
- Notice of Proposed Rulemaking: Overtime – www.dol.gov/whd/overtime/nprm2015/
- DOL Feature Overtime – www.dol.gov/featured/overtime/

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Appendix C: Communication Strategies

The following is a list of common questions you may get from employees regarding the new overtime rule and some sample responses. For additional resources to communicate changes to employees, contact your Account Manager today.

Note: Some of these pieces will require customization.

- What is the new overtime rule?
 - In June 2015, the Department of Labor released a proposed rule that would overhaul overtime pay requirements. Currently, employees who meet certain criteria are eligible for overtime pay if they make less than \$23,660 per year – under the new rule, this amount would increase to \$50,440 per year.
- How will this affect me?
 - If implemented, the new rule may impact whether you are eligible for overtime pay. This determination would be based on a variety of factors, including your annual salary and the type of work you perform.
- I work over 40 hours a week now; why don't I get overtime?
 - Under federal law, not all employees are eligible for overtime if they work more than 40 hours in a workweek. For instance, if you have a certain type of job (like outside sales or computer employees), or currently make more than \$23,660 per year (would be changed to \$50,440 under the proposed rule), you are likely not eligible for overtime pay.
- When does the new rule go into effect?
 - The Department of Labor anticipates the final rule will be released in July 2016. The implementation date is not yet known, but [Insert Employer Name] is doing everything we can now to prepare for this change and ensure a smooth transition.
- Why are my benefits being cut?
 - [Insert Employer Name] strives to provide employees with benefits packages that are all-encompassing and competitive. However, as a result of the federal government's new overtime rules, we have come to a difficult decision. Effective [insert date], [describe benefit or salary changes].

We understand the impact this change will have on you and your family. We reviewed several options, though, and we believe these changes will best support long-term growth and will have the least amount of impact on our employees overall.

We value you and appreciate all the hard work you do. Our success would not be possible without you, and we look forward to continuing to have you on our team.

If you have any questions, please feel free to reach out to [insert contact name].