

### The Fair Labor Standards Act: Executive, Administrative and Professional Exemptions

Wage and Hour Division  
U.S. Department of Labor

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### Fair Labor Standards Act



- Federal Minimum Wage:
  - \$7.25/hour
- Overtime: 1 ½ times the regular rate of pay for all hours over 40 hours in a work week

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### "White Collar" Exemptions



- Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees who are employed in a bona fide:
  - Executive;
  - Administrative;
  - Professional; or
  - Outside Sales capacity.
- Certain computer employees may be exempt professionals under Section 13(a)(1) or exempt under Section 13(a)(17) of the FLSA.

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**Three Tests for Exemption**



- Salary Level
- Salary Basis
- Job Duties

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**New Overtime Rule Overview**



- March 2014 - Presidential Memorandum
- July 2015 – Notice of Proposed Rulemaking
- May 23, 2016 – Final Rule Published
- December 1, 2016 – Final Rule Effective Date

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**New Overtime Rule Changes**



- Salary Level Increases
- Nondiscretionary Bonuses
- Automatic Updates

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### New Overtime Rule Standard Salary Level and Highly Compensated Employees



- Standard salary level - pursuant to 29 CFR 541.600

<u>Current</u>	<u>Effective 12/1/2016</u>
\$455	\$913 per week
- Highly Compensated Employee (HCE) - pursuant to 29 CFR 541.601

<u>Current</u>	<u>Effective 12/1/2016</u>
\$100,000	\$134,004 per annum

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### Minimum Salary Level: \$913



- For most employees, the minimum salary level required for exemption is \$913 per week
- Must be paid "free and clear"
- The \$913 per week may be paid in equivalent amounts for periods longer than one week:
  - **Biweekly: \$1,826**
  - **Semimonthly: \$1,978.16**
  - **Monthly: \$3,956.33**

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### Nondiscretionary Bonuses



- Nondiscretionary bonuses and incentive payments (including commissions) are forms of compensation promised in advance to employees (e.g., bonuses for meeting set production goals, retention bonuses, and commission payments based on a fixed formula).
- May be used to satisfy up to 10% of the standard salary level.
  - Minimum of 90% (approx. \$822) of standard salary level must be paid as a weekly salary.
- Payments must be paid on a quarterly or more frequent basis.

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### Catch-up Payments



- If an employee does not earn enough from the nondiscretionary bonus, commission, or incentive payments in a given quarter to meet the standard salary level – an employer may make a “catch-up” payment within one pay period of the end of the quarter.
- Any such “catch-up” payment will count only toward the prior quarter’s salary amount and not toward the salary amount in the quarter in which it is paid.

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### Customarily and Regularly



- A frequency that must be greater than occasional but which, of course, may be less than constant
- Includes work normally and recurrently performed every workweek
- Does not include isolated or one-time tasks

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### Automatic Updates



- Every three years beginning January 1, 2020, the standard salary and annual compensation levels will be automatically updated.
- At least 150 days before the effective date, the Secretary will publish a notice in the Federal Register of the updated salary and total annual compensation amounts that will be required.

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**Updating the Standard Salary Level** 

Standard salary level – updated to equal the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region.

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**Salary Basis Test** 

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- Need not be paid for any workweek when no work is performed

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**Deductions From Salary** 

- An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the businesses
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available

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### Permitted Salary Deductions



- Seven exceptions from the “no pay-docking” rule:
  1. Absence from work for one or more full days for personal reasons, other than sickness or disability
  2. Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences
  3. To offset any amounts received as payment for jury fees, witness fees, or military pay

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### Permitted Salary Deductions



- Seven exceptions from the “no pay-docking” rule:
  4. Penalties imposed in good faith for violating safety rules of “major significance”
  5. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules
  6. Proportionate part of an employee’s full salary may be paid for time actually worked in the first and last weeks of employment
  7. Unpaid leave taken pursuant to the Family and Medical Leave Act

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### Additional Compensation



- An employer may provide compensation in addition to the \$913 minimum guaranteed weekly salary, such as:
  - Commissions
  - Bonuses
  - Additional pay based on hours worked beyond the normal workweek

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### Hourly, Daily or Shift Basis



- The regulations also allow an employee's earnings to be computed on an hourly, daily or shift basis, if the employer:
  - Guarantees at least \$913 per week paid on a salary basis, regardless of the number of hours, days of shifts worked; and
  - A reasonable relationship exists between the guaranteed amount and the amount actually earned

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### Reasonable Relationship



- "Reasonable relationship" means the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek
- For example, an exempt employee guaranteed at least \$950 per week and who normally works four or five shifts each week, may be paid \$350 per shift without violating the salary basis requirement

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### Fee Basis



- Administrative and professional employees also may be paid on a "fee basis"
- An employee is paid on a "fee basis" if the employee is paid an agreed sum for completing a single job, regardless of the time required to complete the work
- Payment on a "fee basis" is not available for a series of non-unique jobs repeated an indefinite number of times for which payment on an identical basis is made over and over again

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### Fee Basis



- A fee payment meets the minimum salary level required for exemption if, based on the time worked to complete the job, the fee is at a rate that would amount to at least \$913 per week if the employee worked 40 hours
- Example:
  - An artist is paid \$500 to paint a portrait that took 20 hours to complete, the equivalent of \$25 per hour
  - Because working 40 hours at this \$25 per hour rate would yield the artist \$1,000, the fee payment meets the salary requirements for exemption

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### No Salary Requirements



- The salary level and salary basis tests do not apply to:
  - Outside Sales Employees
  - Doctors
  - Lawyers
  - Teachers
  - Certain computer-related occupations paid at least \$27.63 per hour

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### Executive Duties



- Primary duty is management of the enterprise or of a customarily recognized department or subdivision;
- Customarily and regularly directs the work of two or more other employees; and
- Authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees are given particular weight.

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**Primary Duty**



- The principal, main, major or most important duty that the employee performs.
- Factors to consider include, but are not limited to:
  - Relative importance of the exempt duties;
  - Amount of time spent performing exempt work;
  - Relative freedom from direct supervision; and
  - Relationship between the employee's salary and the wages paid to other employees for the same kind of nonexempt work.

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**Primary Duty**



- Employees who spend more than 50% of their time performing exempt work will generally satisfy the primary duty requirement
- However, the regulations do not *require* that exempt employees spend more than 50% of time performing exempt work

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**Management**



- Interviewing, selecting, and training employees
- Setting and adjusting pay and work hours
- Maintaining production or sales records
- Appraising employee productivity and efficiency
- Handling employee complaints and grievances
- Disciplining employees
- Planning and apportioning work among employees

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**Management**



- Determining the techniques to be used; the type of materials, supplies, machinery, equipment or tools to be used; or the merchandise to be bought, stocked and sold
- Providing for the safety and security of employees or property
- Planning and controlling the budget
- Monitoring or implementing legal compliance measures

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**Customarily and Regularly**



- A frequency that must be greater than occasional but which, of course, may be less than constant
- Includes work normally and recurrently performed every workweek
- Does not include isolated or one-time tasks

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**Particular Weight**



- Factors include, but are not limited to:
  - Whether it is part of the employee's job duties to make suggestions and recommendations
  - The frequency with which suggestions and recommendations are made or requested
  - The frequency with which the employee's suggestions and recommendations are relied upon

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### Particular Weight



- Suggestions and recommendations may be reviewed by a higher level manager
- The exempt executive need not have authority to make the ultimate decision
- Making an occasional suggestion regarding a change in status of a co-worker does not meet the "particular weight" standard

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### Concurrent Duties



- Concurrent performance of exempt and nonexempt work does not automatically disqualify an employee from exemption
- Exempt executives generally decide when to perform nonexempt duties and remain responsible for the success or failure of business operations
- Nonexempt employees generally are directed by a supervisor to perform the exempt work or perform the exempt work for defined time periods

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### Administrative Duties



- Whose primary duty is 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; and
- Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

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**Management or General Business Operations**



- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Quality Control
- Purchasing
- Procurement
- Advertising
- Marketing
- Research
- Safety and Health
- Human Resources
- Employee Benefits
- Labor Relations
- Public and Government Relations
- Legal and Regulatory Compliance
- Computer Network, Internet and Database Administration

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**Discretion and Independent Judgment**



- The comparison and evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered
- Must be exercised with respect to "matters of significance," which refers to the level of importance or consequence of the work performed
- Decisions and recommendations may be reviewed at a higher level and, upon occasion, revised or reversed

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**Discretion and Independent Judgment**



- Factors include, but are not limited to:
  - Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices
  - Whether the employee carries out major assignments in conducting the operations of the business
  - Whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business

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**Discretion and Independent Judgment**



- Factors include, but are not limited to:
  - Whether the employee has authority to commit the employer in matters that have significant financial impact
  - Whether the employee has authority to waive or deviate from established policies and procedures without prior approval
  - Whether the employee has authority to negotiate and bind the company on significant matters
  - Whether the employee provides consultation or expert advice to management

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**Discretion and Independent Judgment**



- Discretion and independent judgment *does not* include:
  - Applying well-established techniques, procedures or specific standards described in manuals or other sources
  - Clerical or secretarial work
  - Recording or tabulating data
  - Performing mechanical, repetitive, recurrent or routine work

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**Human Resources**



- Human resource managers who formulate, interpret or implement employment policies generally meet the administrative duties requirements
- Personnel clerks who “screen” applicants to obtain data regarding minimum qualifications and fitness for employment generally are not exempt administrative employees

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### Learned Professional



- The employee's primary duty must be the performance of work requiring advanced knowledge
- In a field of science or learning
- Customarily acquired by a prolonged course of specialized intellectual instruction

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### Advanced Knowledge



- Predominantly intellectual in character
- Includes work requiring the consistent exercise of discretion and judgment
- The advanced knowledge is generally used to analyze, interpret or make deductions from varying facts or circumstances
- *Not* work involving routine mental, manual, mechanical, or physical work
- *Cannot* be attained at the high school level

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### Field of Science or Learning



- Occupations with recognized professional status, as distinguished from the mechanical arts or skilled trades

Law	Accounting	Actuarial Computation
Theology	Teaching	Physical Sciences
Medicine	Architecture	Chemical Sciences
Pharmacy	Engineering	Biological Sciences

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**Prolonged Course of Specialized Intellectual Instruction**



- Specialized academic training is a prerequisite for entering the profession
- Best evidence that an employee meets this requirement is possession of the appropriate academic degree

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**Prolonged Course of Specialized Intellectual Instruction**



- The learned professional exemption is *not* available for occupations that may be performed with:
  - Only the general knowledge acquired by an academic degree in any field
  - Knowledge acquired through an apprenticeship
  - Training in the performance of routine mental, manual, mechanical or physical processes
- The exemption also *does not* apply to occupations in which most employees acquire skill by experience

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**Creative Professional Duties**



- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor

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**For More Information**



- New Overtime Rule
- Field Operations Handbook
- Guidance Documents
- Fact Sheets
- Frequently Asked Questions
- Call or visit the nearest WHD Office
  - Visit the WHD homepages at:
    - [www.dol.gov/whd](http://www.dol.gov/whd)
    - [www.dol.gov/whd/overtime/final2016](http://www.dol.gov/whd/overtime/final2016)
  - The WHD toll-free information and helpline at:  
1-866-4US-WAGE (1-866-487-9243)

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