

# THE 2016 OVERTIME RULES

*How to Comply*



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# THE 2016 OVERTIME RULES: How to Comply

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# The new rules are here ... *or are they?*

In May of 2016, the Department of Labor handed down new regulations that promised to greatly affect how you pay your employees. However, a federal judge in Texas temporarily blocked the revised white-collar overtime rules from taking effect on Dec. 1.

This guide will bring you quickly up to speed on the steps you must take now to comply with the FLSA's latest changes if and when they take effect, and make sure you stay in compliance in the years ahead. A preliminary injunction issued Nov. 22, 2016 means employers only have to pay overtime to exempt workers who make less than \$23,660 annually—not \$47,476, the salary threshold set out in final rules issued in May. Employers should proceed with caution, advises Steve Pockrass, who chairs the wage-and-hour practice at the Ogletree Deakins law firm. **Since there is no guarantee the new OT rules are gone forever, continue planning for eventual implementation.**

If your concern is paying more overtime than ever, you would have five options to avoid potentially paying overtime to white-collar management employees under the proposed rules:

1. **Increase salaries** of current exempt employees to more than **\$47,476 per year**. Exempt employees earning more than that will not be entitled to overtime.
2. **Reduce bonuses** for exempt employees whose overall compensation exceeds the new minimums. Increase salaries by the bonus amounts.
3. **Reclassify exempt employees** as nonexempt and pay them hourly. Of course, you will still have to pay overtime when they work more than 40 hours per week.
4. **Reclassify exempt employees** and pay them on a commission or fluctuating-workweek basis. Consult your attorney to learn more about the fluctuating workweek system, which pays a salary to nonexempt employees whose schedules vary from week to week.
5. **Increase staffing** levels to eliminate unnecessary overtime.

All of these options would require most employers to spend more money, either in salary increases, overtime premiums or additional staffing.

**The duties tests that define what constitutes administrative, executive and professional work have not changed under the May 2016 rules.** This booklet contains those tests so you can examine each employee's job duties and make the call as to whether they are exempt or nonexempt.

You can be assured that the DOL, which has already increased its investigative force by 33% since 2010, will put employers under even more scrutiny in the months ahead.

You must comply with the FLSA's provisions if your organization is engaged in commerce, has annual gross income of \$500,000, is a public agency or operates a hospital, health care facility or school.

Even employers that don't meet the above criteria may find that an employee during some workweeks engages in interstate commerce: i.e., takes or makes calls to another state or sends or receives emails interstate. Also, be aware that child labor and minimum-wage provisions apply to virtually every employer.

## **Defining 'Hours of Work'**

Any hour when an employee is on duty is considered time worked. The only period usually excluded: when an employee uses the time for personal reasons.

You don't need to count meal periods lasting 30 minutes or more as work time if the employee is completely relieved from duty. But if, for example, you require someone to assist customers or take business calls during lunch, you must count those minutes as paid time. Coffee breaks or other rest periods lasting 20 minutes or less are also considered time worked.

Federal law doesn't require rest or meal breaks for workers over age 18. Nearly half the states, however, mandate that you must provide rest or meal breaks for a specified minimum period each day.

**Caution:** If you require employees to wear contact devices or be recalled to duty during meal breaks, you must pay them for that time. You may incur significant liability if you're not paying entire units of employees on call during breaks. You can be hit with back pay for up to three years, plus an equal amount as liquidated damages—not to mention attorneys' fees.

When an employee engages in his regular duties, you must count the time as work even if it falls before or after his usual shift. (A mere few minutes of work may be excluded as unsubstantial.) If an employee is working at home or any other place outside the job site, you must also count that time if you know, or have reason to believe, that the employee is performing work.

Before the workday begins or after it ends, you don't need to pay for time when an employee may engage in certain activities related to his regular job but not integral to it: for instance, travel between a logging camp and the site of logging operations.

In a 2014 ruling, the U.S. Supreme Court said workers need not be paid to change into and out of protective gear if a union contract has already specified that the time isn't compensable.

Also in 2014, the Supreme Court ruled that employers do not have to pay their employees for time they spend undergoing (and waiting for) security screenings at the end of their shifts. The court said the screening process is not a "principal activity" of the workers' jobs and, therefore, is not subject to compensation.

## **Exempt vs. Nonexempt Status**

When a new hire comes on board, you must determine whether to classify him or her as exempt or nonexempt under the FLSA.

The key consideration: Exempt workers aren't eligible for overtime pay. Rather, they're paid for the job they do, not the hours they keep.

Generally, two requirements must be met before you can classify someone as exempt:

1. You pay the worker on a salary basis.
2. The worker holds a position with certain duties designated by the DOL as appropriate for exempt status. These positions include executive, administrative, professional, computer and outside sales as well as some highly compensated workers.

**Remember:** An exempt worker must meet both the salary and the duties tests.

## **Salary Basis**

Being paid on a salary or fee basis is the quid pro quo of exempt employees. They aren't paid overtime for working more than 40 hours a week; in exchange, their employer must provide a guaranteed salary, which can't be reduced when they work fewer than 40 hours. This reflects the understanding that exempt employees have the discretion to manage their time and are not answerable for hours worked or the number of tasks performed. Rather, they're paid for the general value of the services they provide. In addition, you may not deduct pay for time when work isn't available if the salaried worker is ready, willing and able to work.

Under the DOL's current regulations, the minimum salary a worker must earn to qualify as exempt is \$455 per week or \$23,660 annually.

**Under the new proposed regulations, these salary rates begin at \$913 per week or \$47,476 per year. Up to 10 percent of the salary threshold for non-highly compensated employees (see page 6) can be satisfied by non-discretionary bonuses, incentive pay or commissions—payments that must be made on at least a quarterly basis.**

The salary threshold will automatically update every three years based on overall American wage growth, so as to keep current with inflation rates. It will be tied to the lowest-wage region of the country.

Other characteristics of being paid on a salary basis:

- You pay the employee a set salary even if she works only part of the week.
- You can't dock her pay as a disciplinary measure unless the employee has committed a serious safety infraction (breaking a rule designed to prevent endangering the facilities or other workers). The DOL regulations state that you may deduct for "unpaid disciplinary suspensions of a full day or more imposed in good faith for infractions of workplace conduct rules," such as sexual harassment or workplace violence. (You'll need, however, a written policy that you apply uniformly to all workers.)
- The employee can't be docked for a partial-day absence.
- You must pay the employee for any day he's ready, willing and able to work.

The DOL recently issued opinion letters "clarifying" when you must pay exempt workers for weather-related closings and delays. Essentially, if you shut down the office for at least a full day but less than a full week, no deductions should be made. However, if your company tells exempt workers that they must take the day as a vacation day and they have available vacation time, you may dock pay without risking exempt status. The DOL explained that nothing requires employers to give vacation days, so by its logic, employers are free to set the rules for when they take time off. If a worker doesn't have a vacation day left, no deduction should be made. The answer is different if the office is open but the employee doesn't come to work for an entire day: Then you may deduct from her salary the equivalent of a day's pay. If she simply shows up late, you can't make a deduction.

Make sure you abide by the salary rules. If you don't, the employee is no longer exempt, no matter what his duties and responsibilities are. Destroying his exemption can make you liable for two years' overtime pay for any hours worked beyond 40 per week.

## **Nonexempt: Blue-Collar Workers, First Responders**

Some workers will be entitled to overtime no matter how highly compensated they are. Under the regulations, workers who “perform work involving repetitive operations with their hands, physical skill and energy” can’t be classified as exempt. If you have workers who gain the skills and knowledge required for their jobs through apprenticeships and on-the-job training, they’re probably entitled to overtime.

The regulations list examples of such blue-collar jobs:

- |   |              |   |                                   |
|---|--------------|---|-----------------------------------|
| ✓ | Carpenters   | ✓ | Iron workers                      |
| ✓ | Electricians | ✓ | Craftspeople                      |
| ✓ | Mechanics    | ✓ | Longshoremen                      |
| ✓ | Plumbers     | ✓ | Construction workers and laborers |

In addition, most people involved in law enforcement will continue to be eligible for overtime pay, including police officers, detectives, deputy sheriffs, state troopers, investigators, correctional officers, parole and probation officers, park rangers, firefighters, paramedics, emergency technicians, ambulance personnel and rescue workers.

If their duties are to prevent, control or extinguish fires, prevent or detect crime, conduct investigations, perform surveillance, pursue suspects or supervise them before or after conviction, they’re probably entitled to overtime no matter how well they’re paid.

Thus, first responders and others on the front lines of public safety will likely continue to be paid for the extra hours worked. Although many first responders may hold college degrees, the DOL pointed out, a four-year degree is generally not a prerequisite for employment in their field; therefore, they don’t cleanly fit into any exempt category.

## **Duties Tests**

Workers who earn at least \$455 per week or \$23,660 per year (\$913 a week/\$47,476 per year under the proposed rules) may be exempt from overtime pay if they meet the appropriate tests for their classification: executive, administrative or professional. The last category is subdivided into learned professional and creative professional. In addition, special tests control the classification of certain computer employees and outside sales employees.

### ***‘Highly Compensated Worker’ Exemption***

The DOL rules feature an exemption category for “highly compensated employees.” Essentially, any employee earning more than \$100,000 per year (\$134,004 per year

under the proposed rules) and who regularly performs even one of the exempt duties of an executive, administrative or professional employee is precluded from earning overtime. To qualify as a highly compensated exempt employee, the person must meet the following tests:

- Earns total annual compensation of \$100,000 per year (\$134,004 per year under the proposed rules)
- Primary duty includes performing office work or non-manual duties.
- Customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

Thus, for example, an employee may qualify as an exempt highly compensated executive if she customarily and regularly directs the work of two or more other employees, even though the employee doesn't meet all the other requirements in the standard test for exemption as an executive. The required compensation of \$100,000 per year (\$134,004 per year under the proposed rules) or more may consist of commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period. It doesn't include credit for board or lodging, payments for medical or life insurance, or contributions to retirement plans or other fringe benefits.

Like the \$47,476 threshold, the \$134,004 salary rate would automatically update every three years based on overall American wage growth, so as to keep current with inflation rates.

## **Exempt executive employee**

To qualify for the executive exemption, an employee must currently earn a minimum of \$455 per week or \$23,660 per year (\$913 a week/\$47,476 per year under the proposed rules) and meet the following tests:

- Primary duty: manages the enterprise or a customarily recognized department or subdivision of the enterprise.
- Customarily directs the work of two or more other employees.
- Has 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 must be given particular weight.

***A rule of thumb:*** The executive should devote substantial time to supervision. That includes interviewing, selecting and training workers, setting and adjusting pay rates and hours, handling complaints and disciplining employees, directing work and determining what materials, supplies, machinery or tools to buy, sell or stock. That's not to say that an executive can't perform other tasks such as stocking shelves or serving food. If the worker remains responsible for the success or failure



of the operations under her management while performing nonexempt work, she may be an executive. In addition, if she controls when nonexempt work is performed, her exemption is valid.

The more time the employee spends doing the work of the enterprise as opposed to directing the work, the more likely he is an “executive” in name only and thus eligible for overtime pay.

The phrase “directs the work of two or more employees” means two full-time workers or their equivalent. Thus, an executive could supervise four part-time workers and meet the qualifications, but not one full-time and one part-time employee.

Executives must do more than supervise to be classified as exempt. They must have actual authority over those they supervise or at least have some say in those decisions. It doesn’t matter if the final decision rests with a higher-level manager. Factors that weigh in favor of meeting this requirement include:

- Whether recommendations on hiring and firing are part of the executive’s job description.
- Whether the executive frequently makes suggestions and recommendations.
- How often his suggestions and recommendations are followed.

## **Exempt administrative employee**

To qualify for the administrative exemption, an employee must earn a minimum of \$455 per week or \$23,660 per year (\$913 a week/\$47,476 per year under the proposed rules) and meet the following tests:

- Primary duty: performs office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers.
- Exercises discretion and independent judgment with respect to matters of significance in performing her primary duty.

Selling goods or services in retail isn’t work directly related to the management or general business operations of the employer. Examples that do meet the test include working in tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, human resources, labor relations, governmental relations, computer networking, Internet and database administration, and legal and regulatory compliance. In addition, if you have employees who perform the same sort of functions for your customers, they may also be exempt. Thus, if you employ tax experts or financial consultants who advise your customers, they’re probably exempt provided they meet the salary requirement.

The administrative exemption applies only if the employee also exercises discretion and independent judgment. In general, independent judgment means that the employee compares and evaluates possible courses of action and makes a decision after considering the options.

The employee must have the authority to make an independent choice, free from immediate direction or supervision. Even though her decisions may be revised or reversed after review, she's still exercising independent judgment. However, the term means more than the use of a skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

Examples of jobs that qualify for the administrative exemption:

- Insurance adjusters who analyze claims and make recommendations on litigation or settlement.
- Financial service industry workers who analyze customer assets, needs and investments and make recommendations, but not employees whose primary responsibility is to sell a financial product.
- Executive or administrative assistants who, without specific instructions or prescribed procedures, have delegated authority regarding matters of significance.
- Human resource managers who formulate, interpret or implement employment policies.
- Purchasing agents with authority to bind the company on significant purchases.
- Employees of educational establishments who serve as administrators, principals and department heads. Specialists such as counselors, social workers and dietitians don't qualify under this exemption but may fall under the learned professional exemption (*see below*).

Examples of workers who don't qualify for the administrative exemption include inspectors who follow strict guidelines such as electrical or building codes and comparison shoppers who report competitor prices.

## **Exempt professional employee**

The specific requirements for exemption as a bona fide professional employee are summarized below. These employees fall into two general categories: learned professionals and creative professionals.

## ■ Learned professional exemption

To qualify for the learned professional exemption, an employee must earn a minimum of \$455 per week or \$23,660 per year (\$913 a week/\$47,476 per year under the proposed rules) and meet the following:

- Primary duty: performs work requiring advanced knowledge, defined as work that's predominantly intellectual in character and requires consistent exercise of discretion and judgment.
- Has advanced knowledge in a field of science or learning that is customarily acquired by a prolonged course of specialized intellectual instruction.

In other words, a learned professional performs work that usually involves analysis, interpretation or making deductions from facts and circumstances. The learned professional works with his intellect, not with his hands. The regulations go so far as to state that the advanced knowledge can't be attained in high school but must ordinarily be in specialized academic training at a higher level. That doesn't always mean a four-year degree, however; the test is whether the academic training is a standard prerequisite for entrance into the profession.

The types of learning cited in the regulations include the traditional professions of law; medicine; theology; accounting; actuarial computation; engineering; architecture; teaching; physical, chemical and biological sciences; pharmacy and similar occupations. The list will be open to expansion as new professions are created and academic training and specialized degrees are offered in the fields of science and learning. If an advanced specialized degree becomes the standard for a particular occupation, that occupation will become a learned profession.

The overtime regulations go to great lengths to demonstrate what types of professions the DOL believes fit in the learned professional category:

- Doctors and lawyers who hold advanced academic degrees in medicine or law, are licensed in their professions and actually practice their profession. The exemption also covers doctors engaged in internships and residency programs who have completed the requisite academic degree for the general practice of medicine. They include medical doctors, osteopathic physicians, podiatrists, dentists and optometrists. The salary requirement doesn't apply to doctors or lawyers.
- Teachers employed by educational establishments whose primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge. Teachers may be certified by a state agency or may work in private schools or other settings without certification, so certification alone is not the sole standard. The salary requirement doesn't apply to teachers.
- Postdoctoral researchers who engage only in research activities and do not teach are not covered by the teaching exemption. These employees are generally considered professional employees and are subject to the salary

threshold for exemption from overtime. Many postdoctoral researchers in the humanities also teach. If their primary duty is teaching, they will be subject to the teaching exemption and not entitled to overtime compensation. If they do not teach, however, and earn less than the new threshold, they will be eligible for overtime.

- Registered or certified medical technologists who have completed three academic years of pre-professional study at an accredited college or university, plus a fourth year of course work in a school of medical technology approved by the American Medical Association.
- Nurses who are registered by their state board of nursing as RNs and have completed a specialized academic degree as a prerequisite for being licensed. Under the regulations, licensed practical nurses (LPNs) or other paraprofessionals don't meet the learned professional exemption.
- Dental hygienists who have completed four years of pre-professional or professional studies at an accredited college or university approved by the American Dental Association.
- Physician assistants who have completed four years of academic training and graduated from a program certified by one of two professional associations.
- Accountants who are certified public accountants or hold jobs similar to public accountants. Accounting clerks and bookkeepers who do routine financial work aren't included in this category.
- Chefs with four-year academic degrees in the culinary arts. However, cooks who perform routine mental, manual, mechanical or physical work don't qualify for this category.
- Athletic trainers who have completed four years of academic training in a specialized program accredited by the Commission of Accreditation of Allied Health Education Programs and are certified by their professional board.
- Funeral directors and embalmers licensed by and working in a state that requires a four-year academic degree program accredited by the American Board of Funeral Service Education.

The regulations exclude most paralegals or legal assistants from the exempt professional category because entry into this field doesn't require an advanced academic degree. Most paralegals have two-year associate degrees or certificates rather than four-year specialized degrees in the field. *Exception:* If you hire someone in another learned profession to work as a paralegal, she's probably exempt (for example, a registered nurse who's hired as a paralegal to help evaluate medical malpractice claims).

**Note:** Because medical coders have no recognized educational program at the college level, the DOL has concluded that they aren't professionals. (It's not enough that they have a professional certification program available.)

## ■ Creative professional exemption

To qualify for the creative professional exemption, an employee must earn a minimum of \$455 per week or \$23,660 per year (\$913 a week/\$47,476 per year under the proposed rules) and meet the following:

- Primary duty: performs work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. The exemption doesn't apply to work that a person could perform with general manual or intellectual ability and training.
- Works in a recognized field of artistic or creative endeavor, including music, writing, acting and the graphic arts.

Generally, the following are exempt creative professionals:

- Musicians, composers and soloists.
- Actors.
- Painters and artists who are given general guidelines as to subject matter.
- Cartoonists who are given only the title or underlying concept for a cartoon and must rely on their own creative ability to express the concept.
- Essayists, novelists, short-story writers and screenplay writers.
- Writers in advertising agencies.
- Journalists working for newspapers, magazines, television and other media who contribute a unique interpretation or analysis to a news product or those who appear as on-air personalities, conduct interviews or serve as narrators or commentators.

Examples of workers who don't qualify for the creative professional exemption: reporters who only rewrite press releases, report on routine community events like school board meetings and the like; animators who illustrate cells for motion picture cartoons; photographers who only retouch photos.

## Computer-related professional exemption

To qualify for this exemption, a computer employee must:

- Be compensated either on a salary or fee basis at a rate not less than \$455 per week or \$23,660 per year (\$913 a week/\$47,476 per year under the proposed rules)
- Be a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below.

Primary duty must consist of:

1. Application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications.
2. Design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications.
3. Design, documentation, testing, creation or modification of computer programs related to machine operating systems.
4. Or a combination of the aforementioned duties that requires the same level of skills.

No specific educational requirement applies to this exemption. The Labor Department says, however, that workers who simply use computers to aid in their work, such as drafters and others in computer-aided design, don't qualify. This exemption also doesn't include those who repair computers or assemble them.

## **Outside sales employee exemption**

Outside sales employees also may be exempt if their primary duties are one of the following:

- Making sales or
- Obtaining orders or contracts for services or use of facilities for which a consideration will be paid by the customer and
- Who are customarily and regularly engaged away from the employer's place or places of business while selling or obtaining orders or contracts for services.

Essentially, an outside sales employee spends most of her time away from the employer's office facilities "on the road" making sales calls. The person doesn't lose exempt status by performing a few tasks that aren't directly related to sales. For example, she may restock display cases, attend sales conferences, write sales reports and revise sales catalogues as work incidental to the main task of getting orders.

The outside sales exemption doesn't apply to salespersons who work in-house or may work from a home office. The regulation specifies that "outside sales does not include sales by mail, telephone or the Internet . . ." unless the person is following up on a personal sales call. The crucial factor distinguishing outside salespeople from others is the emphasis on face-to-face selling.

Under the regulations, a driver who also sells may be an exempt outside sales employee if he:

- Provides the only sales contact between the employer and the customers visited and takes orders, delivers them from the truck then or later and is paid based on the volume of goods sold.
- Obtains or solicits orders along the route or solicits new customers during his stops.

Not everyone who drives a truck full of goods qualifies. For example, drivers who stock vending machines or drivers who get the occasional order or simply deliver and set up displays are not exempt outside salespersons.

No minimum salary requirement applies for outside sales employees. Many are paid straight commission rather than a salary.

## **'Fee Basis'**

Administrative, professional and computer employees may be paid on a "fee basis" rather than on a salary basis. If an employee is paid an agreed sum for a single job, regardless of the time required to complete it, the person will be deemed paid on a "fee basis."

A fee payment is generally paid for a unique job rather than for a series of jobs repeated a number of times and for which identical payments are repeatedly made. To determine whether the fee payment meets the minimum salary level requirement, the test is to consider the time worked on the job and whether the payment is at a rate that would amount to at least \$913 per week if the employee worked 40 hours.

## **Classifying Workers**

Every employer should regularly review job descriptions to ensure all workers are classified properly. You could do this annually in conjunction with performance appraisals for current employees. Compare their job descriptions to the exemptions allowed by the DOL. Then specify in every job description whether the position is exempt from overtime or is hourly, nonexempt.

When you create a new position, consider the implications of the classifications. If you can design the job to fit an exemption, do so. That may mean raising the minimum salary to meet the test or adding a minimum education requirement that qualifies the position for the administrative or professional exemption.

Also, some states have more generous overtime rules than the federal ones. So, be sure to check with your state labor department before making changes to employee overtime classifications.

## **Audit: Test Your Compliance**

To be considered exempt from overtime, an employee must generally be paid on a salary basis and his or her job duties must meet the DOL's standards for one of the six exemption categories discussed below. Answer the following questions to determine whether you've misclassified a worker as exempt:

### **■ Executive Employee**

1. Is the employee's primary duty managing the enterprise or a department or subdivision of the enterprise?
2. Does the employee customarily direct the work of two or more other employees or their equivalent?
3. Does the employee have the authority to hire or fire, and do her recommendations carry significant weight if unauthorized to make the final decision?
4. Is the employee paid the equivalent of at least \$455 per week or \$23,660 per year (\$913 a week/\$47,476 per year under the proposed rules) on a salary basis?

If you answered "No" to any of these questions, you may have misclassified the worker as an exempt executive.

**Note:** If the employee is at least a 20% owner of the business and meets requirements #1 and #2 above, he or she need not meet the salary requirement in #4 or the authority requirement in #3.

### **■ Administrative Employee**

1. Is the employee's primary duty performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers?
2. Does the employee exercise discretion and independent judgment with respect to matters of significance? That is, does he or she evaluate and compare possible courses of action and then make a decision or recommendation after considering the various possibilities?
3. Is the employee paid the equivalent of at least \$455 per week or \$23,660 per year (\$913 a week/\$47,476 per year under the proposed rules) on a salary basis?



If you answered “No” to any of these questions, the employee may be misclassified as exempt administrative.

### ■ **Learned Professional Employee**

1. Is the employee’s primary duty to perform work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction?
2. Is the advanced knowledge obtained by completing an academic course of study resulting in a four-year college degree or leading to certification?
3. Is the employee paid the equivalent of at least \$455 per week or \$23,660 per year (\$913 a week/\$47,476 per year under the proposed rules) on a salary basis?

If you answered “No” to any of these questions, the employee may be misclassified as an exempt learned professional. Exception: Those who have completed the educational requirements for a law or medical degree need not meet the minimum salary requirement. Also, teachers need not be certified or meet the minimum salary requirement to qualify as learned professionals.

### ■ **Creative Professional Employee**

1. Is the employee’s primary duty to perform work requiring invention, originality or talent in a recognized field of artistic endeavor such as music, writing, acting and the graphic arts?
2. Does the work require more than intelligence, diligence and accuracy (i.e., does it require “talent”)?
3. Is the employee paid the equivalent of at least \$455 per week or \$23,660 per year (\$913 a week/\$47,476 per year under the proposed rules) on a salary basis?

If you answered “No” to these questions, you may have misclassified a worker as an exempt creative professional.

### ■ **Computer Professional**

- Is the employee paid at least \$455 per week or \$23,660 per year (\$913 a week/\$47,476 per year under the proposed rules) on a salary or fee basis?

Is the employee’s primary duty:

1. Application of system analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; or
2. Design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or
3. Design, testing, documentation, creation or modification of computer programs related to machine operating systems; or
4. A combination of the aforementioned duties requiring the same level of skills?

If you answered “No” to #1 or were unable to answer “Yes” to any parts under #2, you may have misclassified the worker as an exempt computer professional.

## ■ Outside Sales Employee

- Is the worker’s primary duty making outside sales?
- Does he or she regularly work away from the company’s place of business?
- Does the worker sell tangible or intangible items, such as goods, insurance, stocks, bonds or real estate, or obtain orders or contracts for services or the use of facilities?

If you answered “No” to any of these questions, you may have misclassified the worker as an exempt outside sales employee.

## Other pay considerations

### Travel Time

Many nonexempt (hourly) employees are entitled to pay for time spent traveling. Some general guidelines:

- **Travel between home and work.** Regular commuting back and forth to work doesn’t count as paid time unless the employee performs work en route. Travel time does count, though, when an employee must travel a substantial distance for an emergency job at a customer’s premises.
- **Travel as a regular part of the job.** When an employee’s duties regularly involve travel, you must count that as paid time.
- **One-day travel assignments.** You must count all such time as work, except meal periods and the ordinary commute.

- **Extended trips.** Travel during normal working hours, no matter the day of week, counts as work time.

In addition, the time an employee spends waiting for work counts as paid time: for example, when an administrative assistant waits for her boss to give her an assignment or a mechanic stands around while a machine's being repaired. Both have been "engaged to wait": Their employers require them to be present even though they may not have tasks available for the entire shift.

**Employees on call:** Thanks to a recent decision in a class action case, it's now clear that if you have employees report to their regular workplace location in response to a call, they aren't entitled to extra pay for their trip time. That's counted as regular commuting time, which is always unpaid.

Your organization can take advantage of this rule only if the employees report directly to their regular workplace first. If you send them to another location (such as a customer's property), you must pay for their travel time.

## Sleeping Time

In certain circumstances, you must pay for the time an employee working an extended shift spends sleeping. If she's on duty fewer than 24 hours, the entire period counts as work time even though she may sleep or engage in other personal activities during her shift. If the shift extends beyond 24 hours, you and the employee may agree to exclude meal periods and sleeping periods of not more than eight hours from her hours worked.

You may also exclude sleeping periods of not more than eight hours per day if you provide adequate sleeping facilities and allow for uninterrupted rest. But when the job interrupts an employee's sleep, you must count each interruption as paid time. If an employee can't get at least five hours' sleep, you must pay for the entire period as time worked.

## Training Programs and Lectures

You must pay an employee for time spent attending training programs and lectures unless the following apply:

- Attendance is outside regular working hours.
- Employees don't perform any productive work during the sessions.
- The program doesn't directly relate to their jobs.
- Attendance is voluntary.

If you give employees the impression that they must attend or risk losing their jobs, their attendance isn't considered voluntary. If the training is intended to help an

employee perform her job better, it's directly related to her job. But if the purpose is to upgrade an employee's skills in hopes of advancement—and you haven't required her to attend—you don't have to pay her for training time.

What about any hours spent in an apprenticeship program? Usually, you can exclude this period from paid time if the apprenticeship meets the standards of the DOL's Bureau of Apprenticeship and Training and the instruction doesn't involve productive work or performing regular duties. You must count instruction time, however, if the written agreement specifically provides for it.

## **Civic and Charitable Work**

The DOL regulation defines civic and charitable work as “hours of service for a public agency for civic, charitable or humanitarian reasons.” Examples include volunteering for nonprofit organizations such as food banks, churches and religious organizations, and fund-raising events designed to raise money for disease research and the like.

Essentially, you must pay for hours spent on civic or charitable work if:

- The activity takes place during normal business hours or
- If outside normal work time, it's the same type of work the employee would do as part of her job or
- You require employees to participate.

You needn't pay for civic or charitable work if:

- You don't require participation or penalize those who don't.
- The work doesn't occur during normal work hours.
- The duties performed are outside their normal work duties.

## **Minimum-Wage Compliance**

As of this writing, most states have higher minimum wage rates than the federal rate of \$7.25 per hour. Where the state wage is higher, you must pay workers the state minimum rate.

Beginning in 2015, the DOL increased the minimum wage to \$10.10 per hour for workers on federal construction and service contracts.

In addition, some cities and municipalities have raised their minimum wages through so-called “living wage” laws, which establish higher minimum pay rates for businesses that receive contracts or subsidies from local governments.

Based on the success of living-wage campaigns, many cities are enacting broader minimum wages that cover most, if not all, employers operating within the city.

Under the federal minimum-wage law, employers may pay some workers at lower rates: student-trainees, full-time students, tipped employees, workers under age 20 during their first 90 days of employment, apprentices and disabled workers.

For example, you may pay workers under 20 years old \$4.25 per hour during their first 90 consecutive calendar days—not working days—after their hire dates, but only if they don't replace workers who would have earned the minimum wage. Full-time students may be paid at the rate of 85% of the minimum wage under certain circumstances. Before paying less than the minimum wage, be sure to check with the DOL about any special circumstances required.

For workers paid on a piece rate, commission, fee or salary basis, you can usually determine whether you're meeting the minimum-wage requirements by dividing their total straight-time earnings by their hours worked in the week. Straight-time earnings include all pay other than extra compensation for overtime. No matter how many hours an employee works during a given workweek, her straight-time pay for all regular hours worked must at least equal the minimum wage.

**Caution:** The longest period over which you may average earnings to determine if you're paying wages at the minimum rate is one workweek: a fixed 168-hour period. For example, if an employee works 30 hours one week and 50 hours the next, she must receive overtime pay for the hours worked beyond 40 in the second week, even though her average in the two weeks is 40.

## Difficult Calculations

Some situations make it difficult for you to calculate whether you're meeting the minimum-wage requirements:

**1. Employees working at two or more rates.** If an employee does two or more jobs for you with different hourly rates, you would normally calculate the regular rate by taking his total earnings from all rates for the week and dividing that by the total hours he worked at all jobs.

**2. Piece rates.** An employee working on a piece-rate basis (paid his rate of production rather than a set hourly wage) must earn at least the minimum wage. To determine that, you should divide her total earnings for the workweek by her hours that week. If the rate is less than the legal minimum, you must make up the difference. In other words, in each pay period you must pay her either actual piece-rate earnings or the minimum wage, whichever is greater. Also, you can't withhold

pay in a second week to make up the difference between her earnings in the first week and the legal minimum.

**3. Commissions.** Employees paid on a commission basis must receive at least the minimum wage for each hour worked in a week. If you pay an employee a salary plus commissions and the salary is high enough to cover the minimum each week, this requirement poses no problem. But if you pay him solely on commission, you must make up the difference for any week in which commission earnings fall short of the minimum wage. Also, the payment must be made free and clear: You can't recover any part of the minimum-wage payment from earnings in weeks when his commissions exceed the minimum wage.

**4. Tipped employees.** Workers who regularly receive more than \$30 a month in tips are considered "tipped employees." Under the FLSA, employers that claim a tip credit against their minimum-wage obligation must pay tipped employees a cash wage of at least \$2.13 an hour. If an employee's tips and cash wages don't equal the minimum wage, the employer must make up the difference. The tip credit doesn't apply unless the employee has been made aware of the credit provisions and has been allowed to retain all the tips he or she received.

**Caution:** Many states don't allow a tip credit against the minimum wage or they set the rate higher than the federal \$2.13 per hour.

## Payroll Deductions

Ordinarily, you must avoid making payroll deductions that might cut into the legal minimum wage. But employers are permitted to make the following deductions for hourly workers even if they bring pay below the minimum:

- Reasonable cost of board and lodging.
- Taxes.
- Union dues under a bona fide collective bargaining agreement.
- Insurance premiums paid to independent insurance companies, assuming the payments are voluntary and the coverage doesn't yield any benefit to the employer.
- Savings plans and bonds requested by the employee.
- Repayment of loans, as long as the employer has no connection to the lender. (Exception: This restriction doesn't apply to repayment via payroll deductions of free-and-clear cash advances to an employee.)
- Payments on store accounts at the employee's request if the stores are wholly independent of the employer.
- Wage attachments, including court-ordered support payments.
- Deductions for lateness or absence. You can deduct any time an employee doesn't work, whether due to lateness or absence, because hourly workers

are paid only for time worked. However, you can't deduct for more than the time missed as punishment if this would drop the worker's pay below the minimum wage for the time he did work.

- Meal periods. Be careful if you automatically deduct time for meal periods instead of having hourly employees clock in and out before their lunch or dinner break. Make sure employees take the full meal period and don't work. Lately, so-called "working off the clock" has spurred many class-action lawsuits, and employees have been winning big awards.

The following deductions are illegal to the extent they reduce wages below the legal minimum:

- Fines for infractions, poor work, other disciplinary reasons.
- Deductions for damage to employer's property.
- Repayment of cash register shortages, including those resulting from mathematical errors or customers walking out without paying the check. The Wage and Hour Division has limited deductions for employee thefts to cases in which the person has been found guilty in court.
- "Voluntary" payments from employee to employer that don't involve deductions from wages, such as a cash bond required from an employee at the time of hiring.
- Wardrobe costs deducted from paychecks to cover employee clothing purchases when dressing in the store's signature style is required or "encouraged." Several class action cases addressing this issue are pending across the country. Lawyers for the employees argue that not-so-gentle persuasions to buy employers' stylish fashions to wear on the floor amount to forced deductions from hourly rates and violate the FLSA by bringing the hourly wage below the minimum.

## Computing Overtime

You must pay overtime to every nonexempt employee who works more than 40 hours in a single workweek. The overtime rate is one and a half times an employee's hourly rate. If an employee earns a fixed hourly rate with no other compensation, computing her base rate is easy. But in many cases, it's not so simple:

- **Fixed hourly rate plus other pay:** Divide the employee's total earnings for the week (hourly wages plus bonus, for example) by his total hours of work.
- **Different rates in the same week:** Divide total earnings for the week by the employee's total number of hours worked.
- **Pieceworkers:** Add the total earnings for the workweek (including bonuses) and any sums paid for waiting time or other hours worked. Then divide the sum by the number of hours worked in that week.

- **Workers on day rates or job rates:** When you pay an employee a flat sum for a day's work or for doing a particular job (regardless of the number of hours) and he receives no other form of compensation, total all sums received at such day rates or job rates in the workweek. Then divide by the total hours worked.
- **Salaried workers whose pay covers more than a workweek:** You can convert a monthly salary to its equivalent weekly wage by multiplying the salary by 12 months and dividing it by 52 weeks.
- **Fixed salary for fluctuating hours by agreement with employee:** Divide the salary by the number of hours worked in that week. Because you already paid straight time, the employee must receive additional pay for each overtime hour worked that week, at not less than one-half the regular rate.

## Special Types of Payments

When calculating a worker's base hourly rate, you must take into account any other wages you pay her, including commissions, bonuses and other money she regularly receives.

Whether an employee is paid on salary plus commission or on a straight commission basis only, you must count commission earnings when calculating the employee's regular hourly rate. A problem may arise when you allocate deferred commissions for overtime purposes.

A commission paid on a workweek basis is added to the employee's other earnings for that workweek. The total divided by the number of hours worked in the week equals the employee's regular rate for that particular week.

The FLSA requires that you include all compensation in the regular rate, except some specific exclusions. These include discretionary bonuses, gifts and payments in the nature of gifts on special occasions, contributions to certain welfare plans, payments made to the employer for certain profit-sharing, thrift and savings plans, as well as stock options.

Types of supplementary, one-time payments that are usually considered part of the employee's base rate include:

- Attendance bonuses.
- Productivity bonuses.
- Bonuses for quality and accuracy of work.
- Nonmonetary awards. You must include in an employee's regular hourly rate any prize awarded for the quality, quantity or efficiency of the work he performs. The sum to be allocated would be the cost of the prize to you.
- Premiums paid for hazardous work or night work.



- Overtime premiums. Some workplaces use collective bargaining agreements (in a union workplace) or a written employment contract (in nonunion workplaces) that specify workers will be paid extra if they work more than eight hours in a shift even if the total number of hours worked in the week doesn't exceed 40 hours. Similarly, such agreements may call for extra pay if the employee works more than 40 hours in a workweek but less than 80 hours over a two-week period. In those cases, the FLSA would not require extra pay. The arrangement is voluntary between the parties. Add the extra payments to the base rate unless the extra payment equals or exceeds time and a half.

**Example:** Assume a worker usually earns \$10 per hour and a union contract provides that if she works more than eight hours in a shift, the extra hours will be paid at a rate of \$12 per hour. Add the extra dollars to her base pay when you calculate overtime. If, however, the agreement provides for the extra hours to be paid at \$15 per hour, don't add the extra pay to the base pay.

## Exclusions from Base-Rate Formulas

You needn't count the following when calculating a worker's base rate of pay:

✓ **Holiday pay.** You can't credit holiday pay against any overtime pay due to the employee. In some instances, employees entitled to holiday or vacation pay forgo the holiday or vacation and work on that day. If they receive their customary rate (or higher) for working that day, you can exclude the additional sum given as holiday or vacation pay from the regular rate of pay.

✓ **Discretionary bonuses.** You may exclude such bonuses, as well as those paid as gifts for Christmas and other occasions, from your workers' base-rate computation when the amount is solely within your discretion.

✓ **Sick pay.** When you pay an employee for occasional periods of work loss caused by illness, you needn't include that in his regular time. But you can't credit such payments against overtime pay.

✓ **Show-up and call-back pay.** Some employment agreements provide for a stated number of hours' pay if the employee isn't provided the expected amount of work. For example, an employee might be guaranteed at least four hours' pay for reporting to work or being called back to work after her scheduled hours are over. If the employee works only two hours but is paid for four, you don't need to count the pay for the two hours not worked toward her regular rate of pay.

✓ **On-call pay.** If on-call employees are required only to leave work where you can reach them and they aren't confined to a particular place, their hours spent on-call aren't considered work time. However, any payment for such time, while not attributable to any particular hours of work, must be included in the employee's regular rate. If an on-call employee is called out, the time he spends on the assignment is treated as hours worked; the employer must count it and pay for it.

## **Should you track exempt employees' hours?**

You also may want to track the number of hours exempt employees work. If an employee is reclassified as hourly, you must be able to show how many hours he worked. If you can't, a court may force you to accept the employee's estimates.

Nothing in the law prevents you from requiring all employees (exempt and nonexempt) to record their hours by punching a time clock or filling out a time sheet. That way, you'll have the records in case you need them. Just make sure you don't base exempt employees' compensation on those hours, or you will jeopardize their exempt status.

Tracking actual hours worked may turn out to be useful if you end up converting employees who are currently exempt into hourly workers when the new regulations take effect. You will have to estimate how many hours the exempt employees are putting in to determine what their new base hourly rate will be. For example, if exempt managers are now working on average 60 hours per week, and you expect them to continue at that pace, you will have to calculate what the hourly rate should be for the first 40 hours and the anticipated extra 20 hours at the 1.5 times base hourly pay rate to end up paying the newly hourly employees approximately the same.

More about the rules from the Department of Labor:

<https://www.dol.gov/WHD/overtime/final2016/>

A fact sheet for employers from the DOL's Wage and Hour Division:

<https://www.dol.gov/whd/overtime/final2016/general-guidance.pdf>

Download a full PDF of the final proposed overtime rules:

<http://federalregister.gov/a/2016-11754>