

## HR Alert

**From:** HRHelp-John Perkins [jperkins@hr-help.info]

**Subject: What Tests have to be met for a job to be Exempt from FLSA Overtime Provisions?**

**The question** – “To be EXEMPT from the overtime provisions of the FLSA, must jobs meet the fixed salary test and the salary test and a job duties test?” – is one that is asked regularly. **Another question** – “Can a job be EXEMPT if the salary is pro-rated for a part-time employee based on hours scheduled?” – is another that is asked regularly.

As you will read below, the FLSA requires a job to meet ALL three (3) tests (Fixed Salary Test, Salary Level Test, AND Job Duties Test) to be Exempt from the overtime and minimum wage provisions of the Act. AND, the minimum salary level (\$684/week, as of 1/1/2020) is absolute, regardless of the hours scheduled; i.e., it cannot be pro-rated for a part-time employee.

### **What is the difference between hourly-paid versus salary-paid employees? Between Exempt and Non-Exempt employees?**

The Fair Labor Standards Act (FLSA) defines employees as either exempt from the overtime payment provisions of the Act or non-exempt from the provisions of the Act. Non-exempt employees can be paid either hourly or by salary.

**NOT ALL EMPLOYEES PAID ON A SALARY BASIS ARE EXEMPT; JUST BECAUSE AN EMPLOYEE RECEIVES A SALARY DOES NOT MAKE HIS/HER JOB POSITION EXEMPT FROM OVERTIME.**

To be exempt, jobs also must meet **ALL** three (3) of the tests established by the Dept. of Labor:

- the Fixed Salary Test; **AND**,
- the Salary Level Test; **AND**,
- one of the Job Duties Tests (Executive, Administrative, Professional, Outside Sales, or Computer- related occupation).

**As of January 1, 2020, the Salary Level threshold is \$684/week (\$1,368 bi-weekly or \$1,482 semi-monthly or \$35,588 annually).**

Exempt employees are those who meet the FLSA fixed salary test, **AND** the salary test, **AND** the job duties test for one of the following categories:

- Computer-related occupations;
- Professional;
- Outside Sales;
- Executive; or,
- Administrative.

**NOTE: Many job positions that are treated as Exempt (because they meet the Fixed Salary test and the Salary Level Test) are NOT exempt because they fail to meet one of the Job Duties Tests.**

Exempt employees do not have to be paid overtime for hours worked that exceed 40 hours in a workweek.

**ALL EMPLOYEES IN NON-EXEMPT JOBS MUST BE PAID OVERTIME FOR THEIR HOURS WORKED THAT EXCEED 40 HOURS IN A WORKWEEK, WHETHER THEY ARE REGULARLY PAID BY THE HOUR OR BY SALARY.**

The Act requires employers to establish a consecutive 168-hour period (7 days x 24 hours/day) as a workweek. The workweek may begin on any day and at any time of the day. (Employers often start the workweek at 12:01 a.m. each Monday and end the workweek at 12 midnight the following Sunday.)

Non-exempt employees must be paid overtime for all hours worked over 40 in the workweek. For hourly employees, payment must be at least 1½ their regular hour rate for overtime hours. Non-exempt salaried employees must, in addition to their regular salary, be paid at least ½ times their hourly equivalent rate for overtime hours.

Payment for overtime must be made with the paycheck for the payroll period in which the overtime was worked. **COMP TIME (COMPENSATORY TIME OFF) CANNOT BE PROVIDED TO NON-EXEMPT EMPLOYEES IN LIEU OF PAYMENT FOR OVERTIME. AN EMPLOYER CANNOT REDUCE THE NUMBER OF HOURS AN EMPLOYEE WORKS IN A SUBSEQUENT WORKWEEK TO "make-up" FOR OVERTIME WORKED IN A PREVIOUS WORKWEEK.**

E.g., if Joe works 50 hours in workweek A and 30 hours in workweek B, he has to be paid overtime for the 10 hours of overtime in workweek A even though he is only paid for the 30 hours worked in workweek B; if the payroll period covered workweeks A + B, Joe would be paid the equivalent of 85 hours: 40 + (10 x 1.5 = 15) + 30. It would be a violation of the FLSA to only pay Joe a combined 80 (50 + 30) hours in a payroll period that covered weeks A + B.

The Salary Level threshold is absolute; it cannot be pro-rated based on the number of hours/week the employee is scheduled to work. E.g., an employee is hired or reassigned to a job that is scheduled for only 20 hours per week; the job normally pays \$807.69/week (\$42,000 annually for a full-time, 40 hour/week employee). The now part-time employee is paid a pro-rated amount \$403.85 (50% or 20/40 times \$807.69). The job does NOT meet the current \$455/week minimum salary level. Thus, the cannot be considered as an Exempt job unless the employee is paid a salary of at least \$455/week (the current Salary Level threshold).

For further information, go to: <https://www.dol.gov/agencies/whd/fact-sheets-numeric> and read Fact Sheets 17a – 17g.

A number of free publications regarding the FLSA are available from the Wage and Hour Division, U.S. Dept. of Labor; go to: <https://webapps.dol.gov/WHPS/Presentation/>.

Questions regarding who which jobs are EXEMPT or Non-EXEMPT, definitions of hours worked or not worked for calculating overtime, record keeping requirements, etc. will be answered by the Wage and Hour Division publications or by calling them.

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## **Wage and Hour Division (WHD)**

<https://www.dol.gov/whd/overtime2019/index.htm>

### **Final Rule: Overtime Update**

**On September 24, 2019, the U.S. Department of Labor announced a final rule to make 1.3 million American workers newly eligible for overtime pay.**

The final rule updates the earnings thresholds necessary to exempt executive, administrative and professional employees from the Fair Labor Standards Act's (FLSA) minimum wage and overtime pay requirements and allows employers to count a portion of certain bonuses/commissions towards meeting the salary level. The new thresholds account for growth in employee earnings since the thresholds were last updated in 2004.

In the final rule, the Department is:

- **raising the “standard salary level” from the currently enforced level of \$455 per week to \$684 per week (equivalent to \$35,568 per year for a full-year worker);**
- raising the total annual compensation requirement for “highly compensated employees” from the currently enforced level of \$100,000 per year to \$107,432 per year;
- allowing employers to use nondiscretionary bonuses and incentive payments (including commissions) paid at least annually to satisfy up to 10% of the standard salary level, in recognition of evolving pay practices; and
- revising the special salary levels for workers in U.S. territories and the motion picture industry.

**The final rule is effective on January 1, 2020.**

## **Additional Information**

- [Federal Register notice for the final rule](#)
- News release (9/24/2019): [U.S. Department of Labor Issues Final Overtime Rule](#)
- Wall Street Journal (9/24/19): [More Overtime Pay May Be Coming Your Way](#) by Patrick Pizzella
- Fact Sheet: [Final Rule to Update the Regulations Defining and Delimiting the Exemptions for Executive, Administrative, and Professional Employees](#)  
([https://www.dol.gov/whd/overtime2019/overtime\\_FS.htm](https://www.dol.gov/whd/overtime2019/overtime_FS.htm))
- [Frequently asked questions](#)
- [Small Entity Compliance Guide](#)
- [Learn more about overtime pay](#)
- [Webinar: FLSA Part 541 – Overtime Final Rule – 2019 Public Presentation Recording](#)
- [FLSA Part 541 – Overtime Final Rule – 2019 Public Presentation Slide Deck \(PDF\)](#)