



Complying with the New Overtime Rule Under the FLSA

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Beginning January 1, 2020, employees earning up to \$35,568 per year may become eligible to receive overtime pay for hours worked in excess of 40 per week. The U.S. Department of Labor (“DOL”) issued a new rule (the “Overtime Rule”) on September 24, 2019, that increased the salary level an employee must earn to be classified as exempt from the overtime requirements of the federal Fair Labor Standards Act (“FLSA”), from \$455 per week to \$684 per week. As a result, an estimated 1.3 million additional employees will become eligible for overtime compensation.

CAPLAW developed the following FAQ to describe the new Overtime Rule and help Community Action Agencies (CAAs) prepare to implement changes. Note that state wage and hour laws may impose requirements that are more favorable to employees than the provisions of the FLSA. If state law establishes more protective standards than the FLSA, those higher standards apply in that state. Therefore, CAPLAW recommends that CAAs consult with an employment attorney licensed in their state to determine how best to comply with the new Overtime Rule and all applicable state and local rules.

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1. What is the new Overtime Rule and what is it trying to achieve?

The federal FLSA requires that employers pay employees at least minimum wage for all hours worked and overtime at no less than one and a half times their regular rate of pay for all hours worked over 40 in a workweek. However, employees who perform specific job duties and meet other salary tests are exempt from the FLSA’s minimum wage and overtime pay requirements.¹ The new Overtime Rule² raises the salary level that employees must earn to qualify for the most commonly used FLSA exemptions covering certain executive, administrative, and professional employees (the “EAP exemptions”).

Specifically, the new Overtime Rule: (1) increases the salary level threshold for the EAP exemptions from \$455 per week (\$23,660 per year) to \$684 per week (\$35,568 per year);³ (2) increases the total annual compensation threshold for highly compensated employees (HCEs), who are subject to a more minimal duties test, from \$100,000 per year and at least \$455 per week to \$107,432 per year and at least \$684 per week;⁴ and (3) allows employers to apply nondiscretionary bonuses, incentive payments, and commissions that are paid at least annually to satisfy up to 10 percent of the standard salary level.⁵ **The new Overtime Rule makes no changes to the job duties tests for the EAP exemptions.** For an overview of the EAP exemptions, see CAPLAW’s [Overview of FLSA Principles FAQ](#).

The following table summarizes the changes under the new Overtime Rule:

	Prior FLSA Regulations (2004 through December 31, 2019)	New FLSA Regulations (Effective January 1, 2020)
Salary Level for EAP Exemptions	At least \$455 per week (\$23,660 per year)	At least \$684 per week (\$35,568 per year)
HCE Total Annual Compensation Level	At least \$100,000 per year and at least \$455 per week	At least \$107,432 per year and at least \$684 per week
Future Adjustments to Minimum Salary Level	No automatic adjustments	No automatic adjustments
Bonuses	No provision to count nondiscretionary bonuses and commissions toward the standard salary level (at least \$455 per week)	May apply nondiscretionary bonuses, incentive payments, and commissions that are paid at least annually towards up to 10 percent of the standard salary level (at least \$684 per week)
Standard Duties Tests	See WHD Fact Sheet #17A for a description of the EAP exemption duties tests	No changes to the EAP exemption duties tests

2. When does the new Overtime Rule take effect?

The new Overtime Rule will become effective on January 1, 2020.⁶ CAAs should start planning for the changes now by analyzing which employees will be affected and determining the best options for compliance with the new rule (see Questions 6 and 7 for compliance options).

3. Will the salary levels be updated on a regular basis?

The DOL intends to update the standard salary level and HCE total compensation threshold more regularly, but the final rule does not commit to updating them on a predetermined timeframe (as was originally proposed). Nor does the final rule require automatic updates. As a result, any future changes to salary levels must be done pursuant to federal rulemaking procedures.⁷

4. Do bonuses count towards the new salary level test?

The DOL is allowing *nondiscretionary* bonuses and incentive payments to satisfy up to 10 percent of the standard salary level test for the exemptions. Such bonuses include, for example, one-time payments for meeting set production goals. *Discretionary* bonuses, on the other hand, where the decision to award the bonus and the payment amount is at the employer's sole discretion and not in accordance with any preannounced standards, do *not* count towards the standard salary level test. An example of a discretionary bonus would be an unannounced, end-of-the-year bonus.⁸

For nondiscretionary bonuses to count towards up to 10 percent of the standard salary level test, employers must pay them at least annually. This means that each pay period, an employer must pay an exempt employee on a salary basis at least 90 percent of the standard salary level (\$684 per week). If, at the end of the year, the sum of the salary paid plus the nondiscretionary bonuses and incentive payments paid does not equal the standard salary level for the year, the employer has one pay period to make up the shortfall by making a lump-sum payment equal to up to 10 percent of the standard salary level.⁹ This catch-up payment will count only toward the prior year's salary amount and not toward the salary amount in the year in which it was paid. If the employer does not make the catch-up payment, the employee will be entitled to overtime pay for any overtime hours worked during the prior year.

It is somewhat unusual for CAAs to make incentive payments or to pay bonuses, given the strict federal grant law requirements and tax rules applicable to such payments. Thus, this provision of the new Overtime Rule may not apply to most CAAs.

5. How many employees will be impacted by the new Overtime Rule?

As a result of the new Overtime Rule, an estimated 1.3 million more employees will become eligible for overtime pay, 1.2 million of whom will become eligible as a result of the increase to the standard salary level threshold from \$455 per week to \$684 per week.¹⁰

6. What should CAAs do now to prepare for the new Overtime Rule?

The new Overtime Rule goes into effect on January 1, 2020. While neither the DOL nor the FLSA recommends or dictates any particular method of compliance, an important first step for any CAA is to conduct a self-audit of its workforce to evaluate the impact of the new Overtime Rule. The CAA may then use that information to determine which compliance option enables it to implement the new Overtime Rule most efficiently and cost-effectively.

As part of a self-audit, a CAA evaluates all exempt employees who currently earn between the current salary level (\$455 per week/\$23,660 per year) and the new salary level (\$684 per week/\$35,568 per year). Then, the CAA determines which of these employees work more than 40 hours per workweek and will need to be paid overtime when the new rule goes into effect.

Many CAAs already require employees to track their hours for grant allocation and reporting purposes, and this documentation will be useful when conducting the self-audit. If a CAA does not have a practice of requiring its exempt employees to record their hours for grant purposes, it should monitor the number of hours these employees work over a period of time to approximate the number of overtime hours an employee might be expected to work once the new Overtime Rule is in effect.

7. What are some of the options that CAAs have for complying with the new Overtime Rule?

CAAs have various options for complying with the new Overtime Rule, and may use the methods described below, which are supported by the FLSA regulations. The choice of which option to use is left to the discretion of the employer. In general, CAAs may:

Raise Salaries to Maintain Exempt Status

If an employee meets one of the EAP exemption duties tests, but is paid less than \$684 per week and regularly works overtime, the CAA may choose to raise the salary of the employee to keep him or her as an exempt employee. This may be an option for employees whose current salaries are close to the new salary level (\$684 per week) and whom a CAA expects to work overtime. From an administrative and employee morale standpoint, CAAs may want to consider how selective raises for employees at or near the exemption threshold could affect other employees, especially those with similar job titles and/or job descriptions.

Reclassify Employee as Hourly, Non-Exempt and Pay Overtime for Hours Worked Over 40

A CAA could convert its currently exempt employees who will not earn at least the new salary level (\$684 per week) to hourly, non-exempt employees and pay for all hours worked by the employees, including time and a half for hours worked over 40 in a workweek. This may be an option for employees whose salaries are not close to the new salary level, who do not regularly work overtime, or who do not work a consistent number of hours per week.

Reclassify Employee as Non-Exempt, Continue to Pay a Fixed Salary, and Pay Overtime Above the Salary

Because “salaried” status is often perceived as more prestigious and/or offering greater flexibility, converting employees who have been accustomed to working as exempt employees to hourly employees may result in a loss of morale. The FLSA does not require that non-exempt employees be treated as hourly employees, so long as the employees receive overtime pay for hours worked in excess of 40 in a workweek. Thus, a CAA can pay a fixed salary to a non-exempt employee, and pay overtime when the employee works more than 40 hours in a workweek. There are two primary ways to structure this:

- **Option A:** The CAA can pay the employee a fixed salary for the first 40 hours of work per week, and overtime at *time and a half* for any hours worked over 40. This option may work best for employees who typically work 40 hours per week and do not frequently work overtime, or those who do not consistently work the same amount of overtime each week.
- **Option B:** The CAA can agree in advance to pay the employee a fixed, straight-time salary for a workweek of more than 40 hours, then pay *half-time* overtime for hours over 40 that are covered by that agreed-upon salary, and finally pay *time and a half* overtime for all additional hours worked. For example, the CAA and an employee can agree in advance that the employee will receive a fixed, straight-time salary of \$540 per week for working up to 45 hours per week (for a rate of pay of \$12 per hour). The

CAA must pay the employee the straight-time salary of \$540 per week, even if the employee works fewer than 45 hours in a given week. To calculate additional overtime pay, if the employee works 47 hours in one week, the CAA would pay the employee's straight-time salary (\$540), plus half-time overtime pay for 5 hours (\$6 per hour), plus time and a half overtime pay for 2 hours (\$18 per hour), for a total of \$606 for the week.

Note that under either Option A or Option B, the CAA is guaranteeing a fixed salary amount and must pay the employee that amount even if he/she works less than the agreed-upon number of hours in a week (except for any permissible deductions made pursuant to the CAA's personnel policies). Also, even though a CAA pays a non-exempt employee on a salary basis, it must still track and record the actual number of hours worked by the employee, and, if the employee works overtime, the CAA must calculate the regular hourly rate on which the overtime rate is based, and pay for all overtime worked. These options may be more cost-effective than raising salaries to maintain exempt status if an employee works limited overtime, or if the employee's current salary is significantly below the new salary level (\$684 per week).

Adjust Wages to Approximate Same Overall Compensation

If a CAA wants to maintain an employee's total compensation at approximately the same amount, it can reallocate an employee's earnings between hourly wages (or base salary) and overtime pay to account for working over 40 hours per week. An employee's regular rate of pay cannot, however, be less than the highest applicable minimum wage (federal, state, or local). The CAA must still record the number of hours an employee works each week and pay for overtime work based on the employee's regular rate.

Restructure Job Duties

A CAA could redistribute or eliminate job duties to enable employees reclassified as non-exempt to complete their work within 40 hours each week. The CAA could then transfer these job duties to employees whose salaries are at or above \$684 per week and will remain exempt, or hire additional employees to take on certain job functions. While this option provides CAAs an opportunity to examine and update current job descriptions and responsibilities, it may also generate employee concerns about fairness if CAAs shift job duties from newly non-exempt employees to exempt employees.

8. Do CAAs need to classify all employees in the same position as exempt or non-exempt?

No. This is a common problem for CAAs that have two employees with different lengths of service in the same position. Both employees may meet the job duties test and the salary basis test, but the more senior employee's salary may be at or above the new salary level, while the newer employee's salary may fall below the threshold. The CAA is not required to raise the salary of the newer employee. Though the CAA is allowed to classify one employee as exempt and the other non-exempt,¹¹ it should be mindful of the potential administrative burden and impact on employee morale of doing so.

9. What if all or part of a CAA's workforce is covered by a collective bargaining agreement?

Collective bargaining agreements are subject to the FLSA, and employees covered by such agreements are not exempt from the new Overtime Rule. Thus, if a CAA has a unionized workforce, it should check the collective bargaining agreement(s) currently in place and

consult with a labor attorney before making any changes to a unionized employee's job description and compensation structure, including adjusting an employee's wages or regular rate of pay, converting a salaried employee to an hourly employee, shifting an employee's job duties, or restructuring an employee's job assignments. These issues will likely be subject to mandatory bargaining under the collective bargaining agreement.

For more information about compliance with the FLSA, the EAP exemptions, and HCEs, see CAPLAW's [Overview of FLSA Principles FAQ](#).

ENDNOTES

- ¹ 29 U.S.C. §§ 206, 207 and 213; 29 C.F.R. Part 541; [Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act \(FLSA\)](#).
- ² Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, [84 Fed. Reg. 51,230](#) (Sep. 27, 2019) (to be codified at 29 C.F.R. Part 541).
- ³ [84 Fed. Reg. 51,230, 51,238](#).
- ⁴ [84 Fed. Reg. 51,230, 51,250](#).
- ⁵ [84 Fed. Reg. 51,230, 51,248](#).
- ⁶ [84 Fed. Reg. 51,230](#).
- ⁷ [84 Fed. Reg. 51,230, 51,251](#).
- ⁸ [84 Fed. Reg. 51,230, 51,248](#).
- ⁹ [84 Fed. Reg. 51,230, 51,249](#).
- ¹⁰ [84 Fed. Reg. 51,230, 51,260](#).
- ¹¹ [DOL Opinion Letter FLSA2005-20](#).

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