



Complying with the New Overtime Rule under the FLSA

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August 2016

The following FAQ answers some common questions about the new overtime rule under the federal Fair Labor Standards Act (FLSA) and its implications for Community Action Agencies (CAAs). Note that state wage and hour laws may impose requirements that are more favorable to employees than the provisions of the FLSA. 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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Section One: The New Overtime Rule

What is the new overtime rule and what is it trying to achieve?

Under the federal Fair Labor Standards Act (FLSA), employers must 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. Employees who meet specific duties and salary tests are exempt from the FLSA's minimum wage and overtime pay requirements.¹ The new overtime rule updates the salary and compensation levels required for employees to qualify for the most commonly used FLSA exemptions, known as the white collar exemptions, which cover certain executive, administrative, professional, computer, and outside sales employees. Note that there is no general exemption to coverage under the FLSA for Community Action Agencies (CAAs) or nonprofit organizations (see Questions 27 through 33 for a discussion of FLSA coverage).

Specifically, the new overtime rule (1) increases the salary level threshold for the white collar exemptions from \$455 per week to \$913 per week, (2) increases the total annual compensation threshold for highly compensated employees (HCEs), who are subject to a minimal duties test, from \$100,000 per year and \$455 per week to \$134,004 per year and \$913 per week, and (3) provides for automatic updates to the salary and compensation levels every three years to maintain levels at the percentiles indicated in the following chart.² **The new overtime rule makes no changes to the duties or salary basis tests for eligibility for the white collar exemptions** (see Question 20 for a summary of requirements for the white collar exemptions).

In issuing the new overtime rule, the U.S. Department of Labor (DOL) noted that the white collar exemptions are premised on the belief that workers who qualify for the exemptions typically earn salaries well above minimum wage and enjoy other privileges, including above-average fringe benefits, greater job security, and better opportunities for advancement, providing them with more workplace negotiation leverage than workers entitled to overtime pay.³ When it first proposed the new overtime rule, the DOL noted that the failure to update the salary level test over time has resulted in the classification of certain employees who earn less than the poverty level for a family of four as exempt and not eligible for overtime pay, even though they may work far in excess of 40 hours per week.⁴ The new salary and compensation levels required for the white collar exemptions, which have not been updated since 2004, are expected to extend minimum wage and overtime protections to over four million additional employees within the first year of implementation.⁵



The following table summarizes the changes under the new overtime rule that will go into effect on December 1, 2016:

	Current FLSA Regulations (2004 through November 30, 2016)	New FLSA Regulations (Effective December 1, 2016)
Salary Level for White Collar Employees	At least \$455 per week (\$23,660 per year)	At least \$913 per week (\$47,476 per year for a full year employee) Set at the 40th percentile of full-time salaried workers in the lowest-wage Census region (currently the South)
HCE Total Annual Compensation Level	At least \$100,000 per year and at least \$455 per week	At least \$134,004 per year and at least \$913 per week Set at the 90th percentile of full-time salaried workers nationally
Automatic Adjusting	None	Every 3 years Updates will keep the standard salary level at the 40th percentile of full-time salaried workers in the lowest-wage Census region, and the HCE total annual compensation level at the 90th percentile of full-time salaried workers nationally
Bonuses	No provision to count nondiscretionary bonuses and commissions toward the standard salary level (at least \$455 per week)	Up to 10% of standard salary level (at least \$913 per week) can come from non-discretionary bonuses, incentive payments, and commissions, paid at least quarterly (except for HCEs)
Standard Duties Tests	See WHD Fact Sheet #17A for a description of white collar exemption duties tests	No changes to the white collar exemption duties tests

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When does the new overtime rule take effect?

The new overtime rule is effective as of December 1, 2016.⁶ CAAs should, however, begin planning for the change now by analyzing which employees would be affected by the increased salary level test and determining the best options for complying with the new rule (see Questions 4 and 5 for compliance options). CAAs should be prepared to implement the new overtime rule by the pay period that includes December 1, 2016.

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

One of the major changes in the new overtime rule is adding, for the first time, a built-in mechanism that will automatically update the standard salary level and HCE compensation level every three years to maintain the earnings percentiles set forth in the new rule.⁷ The purpose of the automatic updates is to prevent the salary and compensation levels from becoming outdated.

The first updates will take place on January 1, 2020, and subsequent updates will occur every three years thereafter. The DOL will publish a notice of the updated thresholds in the Federal Register at least 150 days before they become effective, and will also publish and maintain the applicable salary and compensation requirements on the DOL Wage and Hour Division's website.⁸

4 What should CAAs do now to prepare for the new overtime rule?

CAAs have a number of options for complying with the new overtime rule, and neither the DOL nor the FLSA recommends or dictates any particular method. A CAA should first conduct a self-audit of its workforce to evaluate the impact of the new overtime rule, then determine which compliance options enable the CAA to implement the new overtime rule most efficiently and cost-effectively.

A CAA should evaluate all exempt employees who currently earn between the current salary level (\$455 per week) and the new salary level (\$913 per week). Then, the CAA should determine which of these employees work more than 40 hours per workweek and would potentially be paid overtime after 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 for conducting the self-audit. If a CAA does not have a practice of requiring its exempt employees to record their hours, it should monitor the number of hours these employees work over a period of time (e.g., one to three months) to approximate the number of overtime hours an employee might be expected to work once the new overtime rule goes into effect.

5 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 the methods described below are supported by the FLSA regulations. However, the choice of which option to use is left to the discretion of the employer.

Raise Salaries to Maintain Exempt Status

If an employee meets one of the white collar exemption duties tests, but is paid less than \$913 per week and regularly works overtime, the CAA may choose to raise the salary of the employee in order 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 (\$913 per week) and whom a CAA expects to work overtime. From an administrative and employee morale standpoint, however, CAAs may want to treat all employees with the same job title and/or job description consistently. If so, CAAs may choose to (but are not required to) increase some employees' salaries more significantly than others' in order to maintain the exempt status of all employees with the same job title or function.

EXAMPLE #1

Ashley, a center director of a CAA's Head Start program, is paid a salary of \$45,000 per year. Her job duties qualify her for the executive exemption. Ashley's job requires regularly working overtime to direct center operations during the full day that the center is open. The CAA may choose to raise Ashley's salary to \$47,476 or more per year to maintain her executive exemption. The CAA may also want to consider whether to raise salaries for all of its Head Start center directors, and the financial impact of doing so if the other center directors' salaries are not as close to the new salary level as Ashley's is.

Convert to Hourly Employee 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 (\$913 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.

EXAMPLE #2

Brian, the director of a CAA's homeless shelter, is currently paid a salary of \$31,200 per year and qualifies for the executive exemption. Although he works a few overtime hours from time to time, Brian typically works no more than 40 hours each week. Thus, beginning on December 1, 2016, the CAA may decide to treat Brian as an hourly, non-exempt employee and pay him an hourly rate of \$15. For typical workweeks where Brian works 40 hours per week, the CAA would pay him \$600 (\$31,200 divided by 52 weeks per year, divided by 40 hours per week), and if Brian works any overtime hours, the CAA must pay an additional overtime premium at time and a half ($\$15 \times 1.5$) for any hours exceeding 40. If Brian works fewer than 40 hours in a workweek, the CAA would pay him for the actual number of hours he works at his regular rate of \$15 per hour.

Reclassify as Non-Exempt, 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, while a CAA must reclassify an employee who earns between \$23,660 and \$47,476 as non-exempt, the CAA can continue to pay the employee a fixed salary, and then pay overtime when the employee works more than 40 hours in a workweek. This means that the CAA would always pay at least the fixed salary amount, even if the employee works less than the agreed-upon number of hours (except for any deductions made pursuant to the CAA's personnel policies). ***Even though the CAA pays the 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.*** This option 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 (\$913 per week).

There are a few different ways a CAA can compensate a salaried, non-exempt employee. **For a comparison of the actual amounts paid to each of the employees under the three compensation structures described in Examples 3, 5, and 6 below, see the chart on page 10.** For example, a CAA could:

- **OPTION A: Pay the employee a salary for the first 40 hours of work per week and overtime at time and a half for any hours worked over 40.** Option A may work best for employees who typically work 40 hours per week and do not frequently work overtime, or who do not consistently work the same amount of overtime each week.

EXAMPLE #3

A CAA wants to treat Alexa, its development manager, as a salaried, non-exempt employee. The CAA agrees to pay Alexa a fixed salary of \$44,200 per year (\$850 per week) for a 40-hour workweek. Because Alexa's salary covers work for 40 hours per week, her regular rate of pay is \$21.25 per hour. If Alexa works 45 hours one particular week, the CAA would pay her time and a half overtime for the additional five hours at a rate of \$31.88 per hour. Thus, for that week, Alexa should be paid \$1,009.40, consisting of her \$850 per week fixed salary plus \$159.40 in overtime compensation.

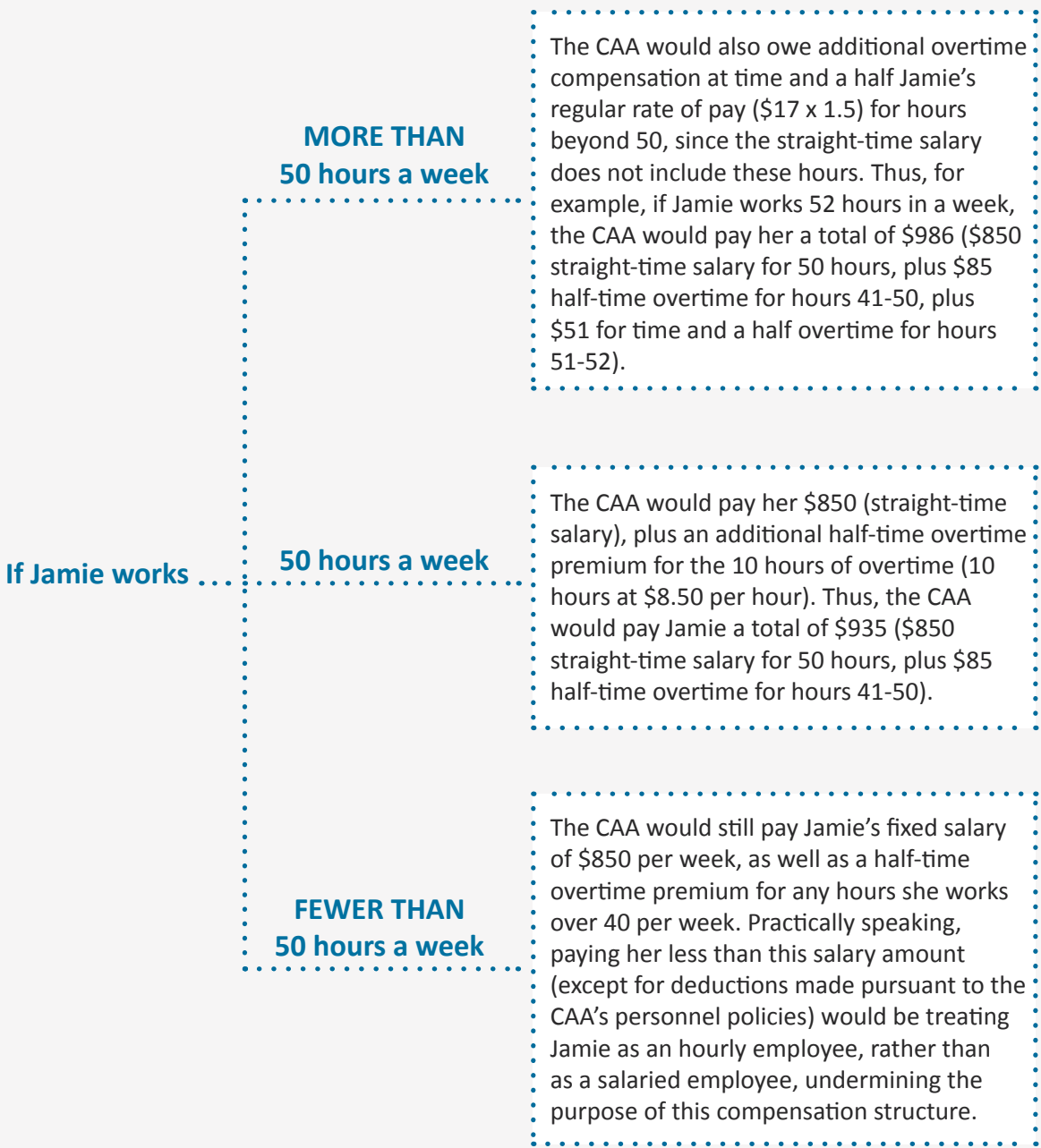
EXAMPLE #4

Javier, the director of a CAA's job training program, qualifies for the executive exemption (under the rules in place before the effective date of the new overtime rule) and is paid a fixed salary of \$42,000 per year. The program is open from 10:00 am - 4:00 pm, Tuesday through Saturday. Javier regularly works from 9:00 am - 5:00 pm, Tuesday through Saturday. Because of the updated salary level test under the new overtime rule, he must be reclassified as a non-exempt employee beginning on December 1, 2016. Nevertheless, the new rule has no impact on Javier's pay because he does not work more than 40 hours in a given week. The program can continue to pay Javier a fixed salary of \$42,000 a year, but because he is no longer an exempt employee, he will be entitled to overtime pay in any week in which he works over 40 hours.

- **OPTION B: Pay the employee a straight-time salary for a workweek of more than 40 hours, pay half-time overtime for hours over 40 that are included in that salary, and pay time and a half overtime for all additional hours worked.** CAAs choosing Option B will pay a straight-time salary for a regular workweek longer than 40 hours, then pay just an additional half-time premium for the overtime hours already included in the straight-time salary, as well as a time and a half premium for any additional overtime hours. The CAA benefits from this option in that the employee's regular rate (on which the overtime premium is based) already takes into account the overtime hours included in the straight-time salary, resulting in a lower regular rate of pay than in Examples 3 and 4 above. A formerly exempt employee may appreciate the flexibility to work up to the number of overtime hours included in the straight-time salary without needing to ask for prior approval to work overtime each week (though the employer may not have the expectation that the employee work all of that time each week). Option B could be cost-effective for employees who regularly work more than 40 hours per week and for whom CAAs want to preserve the flexibility to work up to a certain amount of overtime each week.

EXAMPLE #5

A CAA wants to treat Jamie, its HR manager, as a salaried, non-exempt employee. Jamie usually works between 42 and 45 hours per week, and occasionally works up to 50 hours per week. The CAA tells Jamie that she will earn a fixed salary of \$44,200 per year (\$850 per week) that covers **up to** 50 hours per workweek; however, the CAA does not expect that Jamie will need to work 50 hours every week. The salary does **not** include the overtime premium. Because the salary is for an agreed-upon 50 hours per week, Jamie's regular rate of pay is \$17 (\$850 divided by 50) and does **not** change based on the number of hours Jamie actually works in a week (unlike in Example 6 below).



EXAMPLE #5 (continued)

CAAs electing to use this option should communicate to their employees that the straight-time salary covers *up to* a certain number of hours (exceeding 40). CAAs should think about this number carefully, as it should approximate the maximum number of overtime hours the employee generally works. For example, if an employee regularly works at least 42 hours per week and occasionally works up to 45 hours per week, the CAA may want to tell the employee that the fixed salary covers up to 45 hours per week, even if the CAA does not expect the employee to work 45 hours *every week*. The CAA should indicate that the CAA will pay overtime for any hours the employee works over 40 (at the applicable overtime rates) and document this communication for each employee.

- **OPTION C: Use the fluctuating workweek method and pay the employee a fixed salary and half-time overtime in addition to the salary.** The “fluctuating workweek” method allows an employer to pay an employee whose work hours fluctuate from week to week a fixed weekly salary, regardless of how many hours the employee works in a given week, and then calculate the employee’s regular rate of pay based on the number of hours *actually* worked in a given workweek.⁹ Under the fluctuating workweek method, the regular rate of pay depends on the number of hours *actually* worked in a workweek (rather than the standard 40-hour workweek in Examples 3 and 4 or the agreed-upon 50-hour workweek in Example 5). This regular rate thus decreases when an employee works more hours in a workweek (though it can never drop below minimum wage). Employers pay overtime at half-time (50% of the employee’s regular rate of pay for that particular week) for any hours worked over 40.
 - • • ► In order to use the fluctuating workweek method, the employee’s work hours must fluctuate from week to week.¹⁰ The employee must also be paid a fixed salary; payment of other forms of compensation as part of or above the fixed salary (e.g., shift pay, incentive bonuses, holiday pay, commissions, etc.) will tend to show that an employee is *not* paid a fixed salary.¹¹ There must be a clear agreement between the employer and employee that the fixed weekly salary is total compensation for all work performed each workweek (apart from any overtime premium), regardless of how many hours the employee actually works.¹² Further, the fixed salary must be sufficiently large to ensure that the employee’s regular rate of pay does not drop below minimum wage.¹³ Since the employee has already received straight-time compensation on a salary basis for all hours worked that week, any overtime pay for hours worked over 40 would be made at one-half (50%) of the employee’s regular rate of pay for that workweek.
 - • • ► The fluctuating workweek method benefits employers in that they have more stable and predictable labor costs, as this method allows them to spread labor costs that would otherwise vary from week to week over the course of the full year. Employees may also benefit from receiving a predictable paycheck each pay period, making it easier to budget for monthly costs that are relatively fixed (e.g., mortgage/rent payments or utility bills).

EXAMPLE #6

Randy, a licensed clinical social worker in a CAA’s home health care program, is responsible for conducting home visits. His hours fluctuate from week to week, depending on his schedule of home visits for that week, but he typically works no more than 50 hours each week (and sometimes he works fewer than 40 hours). If the CAA decides to use the fluctuating workweek method to pay Randy, the CAA must enter into a clear agreement with Randy stating that his fixed salary of \$44,200 (\$850 per week) represents total compensation (excluding overtime premium payments) for **all** work performed in a workweek. This means that the CAA must pay Randy \$850 regardless of the number of hours he actually works, though Randy must receive at least minimum wage for every hour worked that week. If Randy works any hours over 40 in a workweek, the CAA would pay him overtime at a half-time premium (0.5 x his regular rate of pay for all hours over 40). Randy’s regular rate of pay fluctuates each week and depends on the number of hours he **actually** worked that week (as opposed to Jamie in Example 5, whose fixed hourly rate will always be based on the agreed-upon number of hours included in her straight-time salary, even if she works a different number of hours in a particular week).

The following chart illustrates how the three options for compensating salaried, non-exempt employees (for Alexa, Jamie, and Randy described in Examples 3, 5, and 6) result in different overtime payment amounts.

	TOTAL HOURS WORKED	OPTION A: Salary for 40 Hours + 1.5x OT <i>(Example #3: Alexa)</i>			OPTION B: Salary for 50 Hours + 0.5x OT (Hours 41-50) + 1.5x OT (Hours Over 50) <i>(Example #5: Jamie)</i>			OPTION C: Fluctuating Workweek: Salary for All Hours Worked + 0.5x OT (Hours Over 40) ¹⁴ <i>(Example #6: Randy)</i>		
		Regular Rate (40 hrs)	OT Premium	Total Compensation	Regular Rate (50 hrs)	OT Premium	Total Compensation	Regular Rate (Fluctuates)	OT Premium	Total Compensation
WEEK 1	40.0	\$21.25	N/A	\$850	\$17	N/A	\$850	\$21.25 (40 hrs)	N/A	\$850
WEEK 2	37.5	\$21.25	N/A	\$850*	\$17	N/A	\$850*	\$22.67 (37.5 hrs)	N/A	\$850*
WEEK 3	50.0	\$21.25	\$31.88 (1.5x)	\$1,168.80 (\$850 plus 10 hours at \$31.88)	\$17	\$8.50 (0.5x)	\$935 (\$850 plus 10 hours at \$8.50)	\$17 (50 hrs)	\$8.50 (0.5x)	\$935 (\$850 plus 10 hours at \$8.50)

	TOTAL HOURS WORKED	OPTION A: Salary for 40 Hours + 1.5x OT <i>(Example #3: Alexa)</i>			OPTION B: Salary for 50 Hours + 0.5x OT (Hours 41-50) + 1.5x OT (Hours Over 50) <i>(Example #5: Jamie)</i>			OPTION C: Fluctuating Workweek: Salary for All Hours Worked + 0.5x OT (Hours Over 40) <i>(Example #6: Randy)</i>		
		Regular Rate (40 hrs)	OT Premium	Total Compensation	Regular Rate (50 hrs)	OT Premium	Total Compensation	Regular Rate (Fluctuates)	OT Premium	Total Compensation
WEEK 4	48.0	\$21.25	\$31.88 (1.5x)	\$1,105.04 (\$850 plus 8 hours at \$31.88)	\$17	\$8.50 (0.5x)	\$918 (\$850 plus 8 hours at \$8.50)	\$17.71 (48 hrs)	\$8.86 (0.5x)	\$920.88 (\$850 plus 8 hours at \$8.86)
WEEK 5	52.0	\$21.25	\$31.88 (1.5x)	\$1,232.56 (\$850 plus 12 hours at \$31.88)	\$17	\$8.50 (0.5x for hours 41-50) \$25.50 (1.5x for hours 51-52)	\$986 (\$850 plus 10 hours at \$8.50, plus 2 hours at \$25.50)	\$16.35 (52 hrs)	\$8.18 (0.5x)	\$948.16 (\$850 plus 12 hours at \$8.18)
TOTAL				\$5,206.40			\$4,539.00			\$4,504.04

*Note that even though the employees work fewer than 40 hours in Week 2, the CAA would still pay the agreed-upon fixed salary. Practically speaking, paying them less than this salary amount (except for deductions made pursuant to the CAA's personnel policies) would be treating the employees as hourly employees, rather than as salaried, non-exempt employees.

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.

EXAMPLE #7

Roger, a program director at a nonprofit CAA who satisfies the duties test for the executive exemption, is currently paid a fixed salary of \$39,520 per year (\$760 per week) and regularly works 45 hours per week. Under the new overtime rule, Roger will no longer be an exempt employee and will be entitled to overtime pay. If the CAA wants to maintain his overall compensation amount, it can choose to treat Roger as an **hourly** employee and pay him only

EXAMPLE #7 (continued)

for his hours worked. Since the CAA expects Roger to work 45 hours per week, it can set his hourly rate at \$16, his overtime premium rate at \$24, and estimate that he will receive approximately the same total compensation per week as he did when he was an exempt employee (\$760, consisting of \$640 in straight-time wages and \$120 in overtime pay).

$$\begin{array}{r}
 \$640.00 \text{ (40 hours} \times \$16/\text{hour)} \\
 + \quad \$120.00 \text{ (5 OT hours} \times \$16/\text{hour} \times 1.5 \text{ OT premium)} \\
 \hline
 \$760.00 \text{ per week (} \$39,520 \text{ per year)}
 \end{array}$$

EXAMPLE #8

Alternatively, the CAA may choose to treat Roger as a *salaried* employee and pay him a fixed salary of \$640 for 40 hours per week. Because Roger is now a non-exempt employee, the CAA would need to calculate his regular rate of pay (\$640 divided by 40 hours, equivalent to \$16 per hour) and pay time and a half for hours worked over 40. This method also approximates the same total compensation per week that Roger received when he was an exempt employee (\$760, consisting of \$640 in straight-time salary and \$120 in overtime pay).

$$\begin{array}{r}
 \$640.00 \text{ (fixed salary for 40 hours per week, equivalent to } \$16/\text{hour)} \\
 + \quad \$120.00 \text{ (5 OT hours} \times \$16/\text{hour} \times 1.5 \text{ OT premium)} \\
 \hline
 \$760.00 \text{ per week (} \$39,520 \text{ per year)}
 \end{array}$$

CAAs with grants that provide for regular cost-of-living adjustments (COLAs), such as Head Start and Early Head Start, should be mindful of the COLA requirements when adjusting an employee's wages. Example # 9 below illustrates how a CAA receiving those funds that require the grantee to use those funds to increase an employee's hourly rate of pay might use this option for a newly non-exempt employee. Note, however, that the Office of Head Start has not issued any guidance on the interplay between the new overtime rule and a COLA.

EXAMPLE #9

Using the same facts as in Example 8 above, Roger is currently an exempt employee who receives a fixed salary of \$39,520 per year (\$760 per week) and regularly works 45 hours per week. This \$760 per week salary reflects a 2% COLA increase from the prior year, when Roger earned \$38,745.20 (\$745.10 per week). Beginning on December 1, 2016, the CAA will pay Roger a fixed salary of \$640 for 40 hours per week, equivalent to a regular rate of pay of \$16

EXAMPLE #9 (continued)

per hour (see calculation in Example 8). Assuming Roger kept the same schedule in the prior year (i.e., he regularly worked 45 hours per week), his salary in the prior year converts into a regular rate of pay of \$15.68, or \$744.80 per week (see calculation below), which closely approximates his weekly salary as an exempt employee for that year of \$745.10 per week. Thus, Roger's current regular rate of \$16 satisfies the requirement that the CAA provide a 2% COLA adjustment, as his hourly rate of pay has increased from \$15.68 (prior to COLA) to \$16 (including COLA).

Prior Year Compensation (Prior to COLA)

	\$627.20 (fixed salary for 40 hours per week, equivalent to \$15.68/hour)
+	\$117.60 (5 OT hours x \$15.68/hour x 1.5 OT premium)
<hr/>	
	\$744.80 per week (\$38,729.60 per year) (closely approximates \$745.10 per week, or \$38,745.20 per year)

Current Year Compensation (Including COLA)

	\$640.00 (fixed salary for 40 hours per week, equivalent to \$16/hour)
+	\$120.00 (5 OT hours x \$16/hour x 1.5 OT premium)
<hr/>	
	\$760.00 per week (\$39,520 per year)

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 \$913 per week and will remain exempt, or hire additional employees to take on certain job functions. While this option provides CAAs with 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.



EXAMPLE #10

Emmanuel, the director of a CAA's weatherization program, is currently classified as exempt and receives a salary of \$38,000. Emmanuel currently begins work at 8:00 am, Monday through Friday. Beginning on December 1, 2016, he will no longer be an exempt employee and will be entitled to overtime pay. Among other duties, Emmanuel oversees the intake process, which is typically the busiest between 4:00 pm and 6:00 pm, so he routinely works until 6:30 pm. The CAA may wish to adjust Emmanuel's schedule such that he does not begin work until 10:30 am, or elect to have another employee (either a non-exempt employee who will not work over 40 hours a week or an exempt employee who earns at or above the new salary level test and thus will remain exempt) stay until 6:30 pm, limiting the number of overtime hours Emmanuel will work.

6**Do CAAs need to classify all employees in the same position as exempt or nonexempt?**

No. This is a common problem for CAAs that have employees with different lengths of service in the same position. Both employees may meet the 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. The CAA is allowed to classify one employee as exempt and the other non-exempt,¹⁵ although the CAA should be mindful of the potential administrative burden and impact on employee morale of doing so.

7**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.

8**Are CAAs required to convert salaried employees who will not earn enough to meet the new salary level test to hourly employees?**

No. Nothing in the FLSA or in the regulations governing the white collar exemptions requires employers to pay overtime-eligible employees on an hourly basis. Thus, the new overtime rule does not require previously exempt employees who are reclassified as non-exempt to be converted into hourly employees. A CAA may continue to pay newly non-exempt employees on a salary basis. However, the CAA must still track and record the actual number of hours worked each day by such employees to be

able to show that they received at least minimum wage for every hour worked. Further, if a salaried, non-exempt employee works overtime, the CAA must calculate the regular hourly rate on which the overtime rate is based and pay for all overtime worked based on that regular rate.

Thus, for an employee who works a relatively fixed schedule that rarely varies, the CAA can simply keep a record of the employee's schedule (e.g. 8 hours per day) and indicate the total number of hours the employee actually worked when the employee varies from the schedule. For an employee who works a flexible schedule or whose hours vary from week to week, the CAA does not need to require the employee to punch a clock or to sign in each time s/he starts and stops work. The CAA just needs to keep an accurate record of the total number of daily hours worked by the employee.

9

Can newly overtime-eligible employees still work a flexible schedule or work from home?

Yes. The FLSA neither requires that employees (either exempt or non-exempt) have a predetermined schedule nor restricts where or when the work is performed. Employees reclassified as non-exempt employees may continue to telecommute or work a flexible schedule; however, CAAs must compensate a non-exempt employee for all overtime hours worked and may want to consider monitoring the employee's work hours. For example, if an employee has a flexible schedule, a CAA does not need to require him/her to sign in each time s/he starts and stops work. The CAA just needs to keep an accurate record of the number of daily hours worked by the employee, and so could simply require the employee to provide the total number of hours worked each day as well as the number of overtime hours worked in a workweek.¹⁶

“ Employers may need to revise their personnel policies to set clear expectations about how work time is to be tracked, and if and when employees may work overtime. ”

With telecommuting or flexible work schedule arrangements for non-exempt employees, there is always the risk that employees may underreport the number of hours worked and then later make a claim for additional, off-the-clock work, likely at overtime rates. Or, employees could overstate the time worked, resulting in the employer paying additional overtime compensation. Employers may need to revise their personnel policies to set clear expectations about how work time is to be tracked, and if and when employees may work overtime. CAAs should ensure their policies cover disciplinary actions for unauthorized overtime and consider implementing processes for tracking work hours for employees working from home, such as software programs that monitor work activities.

10

Do an employer's contributions to employee benefit plans count towards the new salary level test?

No. When calculating an employee's salary, an employer may not include payments for medical, disability, or life insurance, or contributions to retirement plans or other fringe benefits.¹⁷



II

Do bonuses count towards the new salary level test?

For the first time, the DOL is allowing **nondiscretionary** bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level test for the white collar exemptions.¹⁸ Such bonuses include, for example, bonuses for meeting set production goals, retention bonuses, and commissions based on a fixed formula. **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 or a spontaneous reward for a specific act.

In order for nondiscretionary bonuses to count towards up to 10 percent of the standard salary level test, employers must pay them at least once per quarter. 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 (\$913 per week beginning on December 1, 2016). If, at the end of the quarter, the sum of the salary paid plus the nondiscretionary bonuses and incentive payments (including commissions) paid does not equal the standard salary level for the 13 weeks in that quarter, 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.¹⁹ This 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 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 quarter.

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 is unlikely to be helpful to most CAAs.

12

Can employers use bonuses to satisfy the compensation level test for HCEs?

The DOL did not make any changes to how employers may use bonuses to meet the compensation threshold requirements of the HCE exemption. To claim the HCE exemption, employers must pay employees at least the standard salary level amount of \$913 per week on a salary or fee basis, and the remainder of the HCE's total annual compensation (which must be at least \$134,000) may include commissions, nondiscretionary bonuses, and other nondiscretionary compensation.²⁰ Because employers may fulfill almost two-thirds of the HCE total annual compensation requirement with commission and bonus payments, the DOL determined that it would not be appropriate to permit employers to also use nondiscretionary bonuses and incentive payments to satisfy the standard salary level amount.²¹

13

Is the new salary level test prorated for employees who work part-time or seasonally?

An employee's exempt status is always determined on a workweek basis. Thus, beginning on December 1, 2016, an exempt employee generally must be paid at least \$913 per week if s/he works any amount of time in the workweek (less any permissible deductions under the salary basis test²²). The salary level test is not prorated for part-time employees who work less than 40 hours in a workweek.²³

For example, a CAA employs supervisors in its youth job training program at a weekly salary rate of \$1,000 (\$25 per hour for a 40-hour workweek). Beginning on December 1, 2016, a supervisor who works part-time—nine hours a day, three days a week (\$675 per workweek)—would no longer qualify for a white collar exemption because the supervisor does not meet the new salary level test (\$913 per week). However, a supervisor who works full-time but only works seasonally (e.g., during the 10-week summer job training program) could qualify for a white collar exemption, so long as the supervisor meets one of the standard duties tests and is paid on a salary basis of at least \$913 for each workweek in which s/he performs any work. If this supervisor works 40 hours per week and is paid \$1000 per week on a salary basis, s/he could be treated as an exempt employee, even though the annual salary the supervisor receives from the CAA is only \$10,000 (10 weeks at \$1,000 per week).

Section Two: General FLSA Principles

14

What if an employee works over 40 hours in a workweek without authorization?

An employer cannot avoid paying overtime by claiming that the overtime work was unauthorized. If an employee works overtime, the employer must pay for that time. The employer may discipline the employee for working overtime without authorization, but it must pay for the work.²⁴

15

Can employees agree to give up their right to overtime pay?

No, the overtime provisions of the FLSA are mandatory and cannot be waived. An employer may not refuse to pay overtime based on an established policy or practice. An employee may not agree to be classified as exempt despite not meeting the requirements of an applicable exemption, and may not volunteer to work overtime for less than one and a half times his or her regular rate of pay.

16

What are the potential penalties for violating the FLSA's minimum wage and overtime pay requirements?

The DOL may bring enforcement actions against employers to recover back wages on behalf of employees who have been underpaid in violation of the FLSA.²⁵ Employers may be liable for civil money penalties of up to \$894 for each willful or repeated violation of the minimum wage or overtime pay

provisions of the law.²⁶ In addition, an employee may directly sue his or her employer for failure to pay overtime and claim back wages, as well as an equal amount in additional penalties.²⁷ Generally, a two-year statute of limitations applies to the recovery of back pay; in the case of willful violations, however, a three-year statute of limitations applies.²⁸

17 What about state wage and hour law?

The FLSA provides minimum wage and hour standards, but does not prevent a state from establishing more protective standards for employees. If state law establishes more protective standards than the FLSA, those higher standards apply in that state. For example, a state may apply the requirements of the FLSA to all employers in the state, even if an employer otherwise wouldn't be covered under the FLSA itself, or a state may adopt more stringent tests for exemption from the overtime pay requirements. States may also require employers to pay a higher minimum wage than the FLSA minimum wage.

18 What records must CAAs keep for newly overtime-eligible employees?

CAAs must keep certain records for each non-exempt employee.²⁹ The FLSA does not require any particular form of record, but the records must include certain identifying information about the employee and his or her hours worked and wages earned, including total daily or weekly straight-time earnings and total overtime earnings for the workweek.³⁰ If CAAs are already tracking work hours of their employees (both exempt and non-exempt) for grant reporting purposes, the new overtime rule's impact on recordkeeping should be minimal.

CAAs have options for accounting for employees' work hours, some of which are fairly low cost and minimally burdensome. For example, where an employee works a fixed schedule that rarely varies, the CAA can simply keep a record of the schedule and then indicate any changes to the schedule if the employee's actual work hours vary.³¹ Non-exempt employees are not required to punch a clock, and CAAs do not need to record an employee's specific start and end times, just the total number of hours worked each day. CAAs may use any timekeeping plan (e.g., use a time clock, have a timekeeper keep track of employee work hours, or ask employees to fill out a timecard) so long as it is complete and accurate. For more information about recordkeeping, see [DOL Fact Sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act \(FLSA\)](#).



Section Three: FLSA White Collar Exemptions

19 Who is entitled to minimum wage and overtime pay under the FLSA?

The FLSA establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in federal, state, and local governments. Employees covered by the FLSA must be paid at least the federal minimum wage (currently \$7.25 per hour) and at least one and a half times their regular rate of pay for any hours they work over 40 in a workweek.³² An employer that requires or permits (with or without authorization) a covered employee to work overtime must pay the overtime premium. The FLSA does, however, exempt certain kinds of covered employees from the minimum wage and overtime requirements, including certain executive, administrative, professional, computer, and outside sales employees.³³ To qualify for an exemption, employees generally must be paid on a salary basis, meet specific tests regarding their job duties and, under the new overtime rule, receive a salary of not less than \$913 per week.³⁴

20 What are the requirements of the white collar exemptions?

The white collar exemptions are the most commonly used FLSA minimum wage and overtime exemptions. The exemptions apply to certain executive, administrative, professional, computer, and outside sales employees who satisfy three tests: the salary basis test, the applicable standard duties test, and the salary level test.³⁵

The Salary Basis Test

To satisfy this test, an employee must regularly receive 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; however, the employee does not need to be paid for any workweek in which no work is performed.³⁶ Employers are permitted to make deductions from an exempt employee's salary only under limited circumstances.³⁷ This test is not applicable to lawyers, doctors, or certain teachers.³⁸ The new overtime rule did not make any changes to the salary basis test.

The Standard Duties Test

To qualify for a white collar exemption, an employee's primary job duty must involve the kind of work associated with exempt executive, administrative, professional, computer, or outside sales employees.³⁹ Each white collar exemption has its own set of primary responsibilities that employees need to fulfill, which are described in further detail in the following chart. The new overtime rule did not make any changes to the standard duties tests.

The Salary Level Test

Generally, employees must receive at least the salary required by the salary level test in order to qualify for the white collar exemptions. The new overtime rule directly impacts this test, increasing it from \$455 per week (\$23,660 per year for a full-year employee) to \$913 per week (\$47,476 per year for a full-year employee), effective on December 1, 2016.⁴⁰ This amount equals the 40th percentile of

earnings of full-time salaried workers in the lowest wage Census region (currently the South). Note that the professional exemptions for lawyers, doctors, and certain teachers do not require that such employees satisfy the salary level test and thus, the new overtime rule will not affect the requirements for these exemptions.

	Executive	Administrative	Professional
Salary Basis Test	Employee must be paid on a salary basis	Employee must be paid on a salary or fee basis	Employee must be paid on a salary or fee basis Salary basis test does not apply to doctors, lawyers, or certain teachers
Standard Duties Test	(1) The employee’s “primary duty” must be managing the enterprise or a department or subdivision of the enterprise; (2) the employee must customarily and regularly manage two or more other employees; and (3) the employee must have the authority to hire or fire other employees, or have significant input in the hiring, firing, advancement, promotion, or other change of status of other employees Additional requirements provided in 29 C.F.R. Part 541, Subpart B	The employee’s “primary duty” must: (1) involve office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and (2) include the exercise of discretion and independent judgment with respect to matters of significance Additional requirements provided in 29 C.F.R. Part 541, Subpart C	The employee’s “primary duty” must be to perform work that either: (1) requires advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or (2) requires invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor Additional requirements provided in 29 C.F.R. Part 541, Subpart D
Standard Salary Level Test	\$913 per week (\$47,476 per year for a full-year employee)	\$913 per week (\$47,476 per year for a full-year employee) Special salary level test for certain academic administrative personnel	\$913 per week (\$47,476 per year for a full-year employee) Salary level test does not apply to doctors, lawyers, or certain teachers

21

What is the “highly compensated employee” (HCE) exemption?

Certain employees may be exempt from the minimum wage and overtime pay requirements of the FLSA if they are highly compensated.⁴¹ To qualify for this exemption, an employee must primarily perform office or non-manual work, satisfy a more lenient white collar duties test, and earn at least

the minimum HCE compensation threshold, which has increased from \$100,000 per year to \$134,004 per year under the new overtime rule.⁴² This amount equals the 90th percentile of earnings of full-time salaried workers nationally.

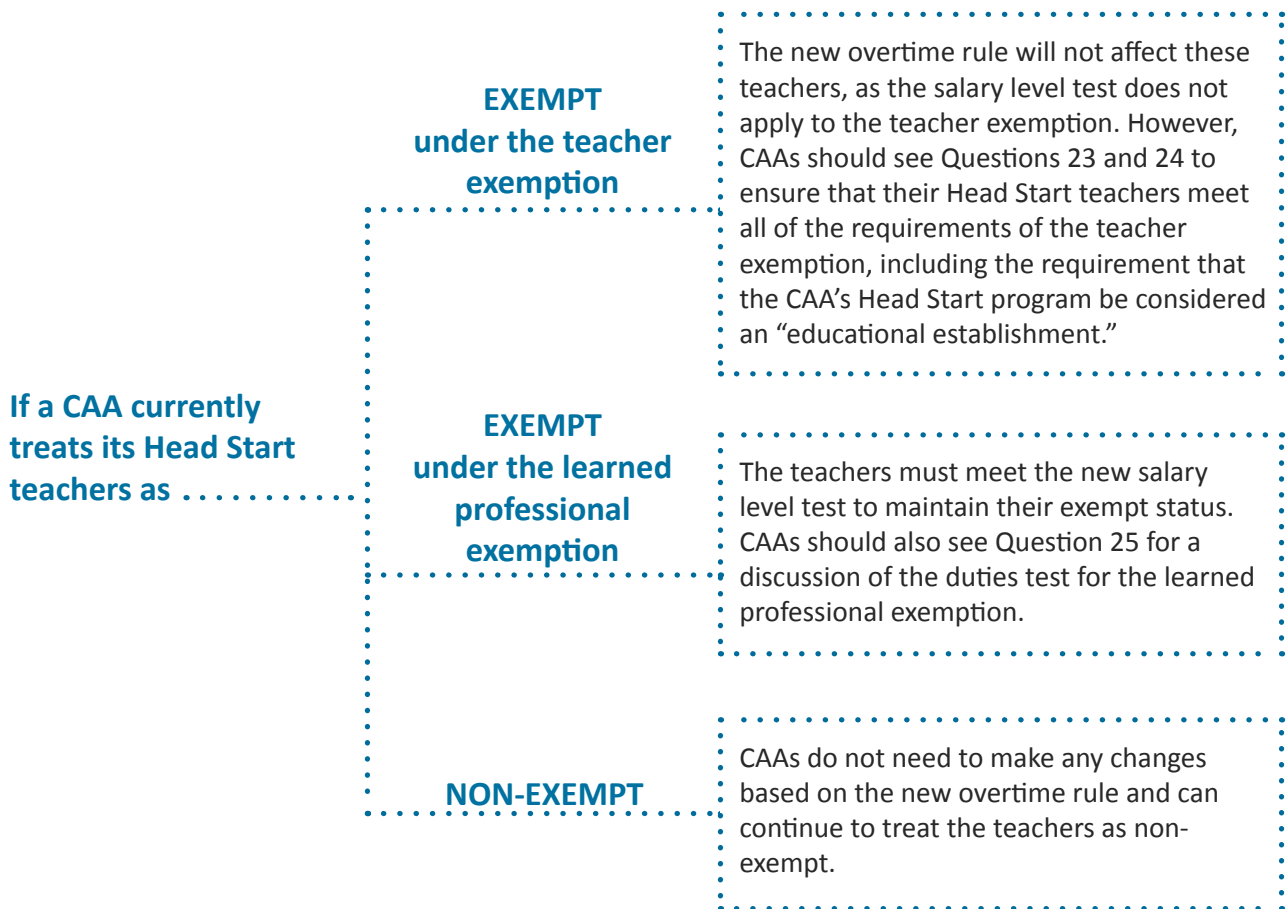
Because the DOL deems high compensation to be a strong indicator of an employee’s exempt status (i.e., high compensation is likely to correlate with job duties that include the exercise of independent judgment and/or supervision of others), an HCE employee will qualify for the exemption if s/he customarily and regularly performs any **one** of the exempt duties or responsibilities of a white collar employee.⁴³ Thus, for example, an employee may qualify as a highly compensated executive employee if s/he customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other duties required for the executive exemption under [29 C.F.R. §541.100](#).

Section Four: Head Start Teachers

22

How does the new rule affect Head Start teachers?

There are three options for classifying Head Start teachers—as exempt under the “teacher exemption” or the “learned professional exemption,” or as non-exempt. The new overtime rule only affects the “learned professional exemption,” as illustrated by the graphic below.



If a Head Start teacher does not meet the requirements for either the teacher or the learned professional exemptions, CAAs must re-classify the teacher as non-exempt and may consider using one of the options described in Question 5 to comply with the new overtime rule. If some but not all of Head Start teachers qualify for one of the exemptions, the CAA will need to decide whether it makes sense from an administrative burden and employee morale standpoint to classify some teachers as exempt and other teachers as non-exempt.

Other Head Start positions that may be affected by the new overtime rule include Head Start managers, coordinators, and education, health, family engagement, and disabilities services specialists. CAAs should evaluate the FLSA exemption eligibility of Head Start employees other than teachers as they would for any other employee. Depending on how a CAA decides to comply with the new overtime rule, it may need to revise its budget to account for staff salary increases or overtime pay, and depending on the amount of the budget revision, the CAA may need to obtain prior approval from the Office of Head Start.⁴⁴

23

What are the requirements of the teacher exemption?

Certain teachers may qualify for the teacher exemption, a subcategory of the professional exemption.⁴⁵ Unlike most of the other white collar exemptions (including the learned professional exemption), the teacher exemption does **not** require that qualifying teachers be paid a minimum salary or on a salary basis; to qualify, teachers only need to meet a duties test.⁴⁶ Thus, the new overtime rule does not make any changes to the analysis of whether Head Start teachers qualify for the teacher exemption.

“ Unlike the learned professional exemption...
the teacher exemption contains no minimum
educational or academic degree requirements. ”

To be eligible for the teacher exemption, an employee’s primary duty must consist of the performance of “teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge” and s/he must be “employed and engaged in this activity as a teacher in [a] school system or educational establishment or institution.”⁴⁷ Unlike the learned professional exemption, for which certain teachers may also qualify, the teacher exemption contains no minimum educational or academic degree requirements.⁴⁸ The FLSA regulations specifically mention nursery school teachers as an example of an exempt teacher.⁴⁹ Thus, eligibility for the exemption for Head Start teachers depends on two primary issues: (1) what the teacher’s actual duties are and (2) whether the CAA’s Head Start program is considered an “educational establishment.”

First, a CAA must determine whether the primary duty of a particular Head Start teacher, or category of teachers within its Head Start program, consists of teaching or instructing in the activity of imparting knowledge, as opposed to taking care of the physical needs of the children, ensuring their physical safety, or as some might call it, “babysitting.” The increased emphasis on literacy, school readiness, and educational qualifications of teachers found in the 2007 reauthorization of the Head Start Act⁵⁰

certainly suggests that the primary duties of Head Start teachers (and, depending on the circumstances, teaching assistants) include “imparting knowledge.” Early Head Start teaching staff who are involved in developing and implementing a formal curriculum designed around school readiness for infants and toddlers may also meet the duties test.

Next, a CAA must determine whether it is considered an “educational establishment,” since the teacher exemption requires that a teacher be employed by a “school system or educational establishment.”⁵¹ The FLSA regulations define the term “educational establishment” as a school system that provides elementary or secondary education, as determined by state law, or an “other educational institution.”⁵² In a 2008 opinion letter, the DOL stated that a child care center is *not* an “educational establishment” unless its state’s laws include nursery school or kindergarten programs within the scope of elementary education.⁵³ According to the DOL opinion letter, the fact that a child care center is licensed by a state agency responsible for the state’s educational system (as opposed to a different state agency, e.g., the Department of Public Welfare), serves as an indication that the state considers the child care center to be providing educational services.⁵⁴

Thus, to determine whether a CAA’s Head Start program is considered an “educational establishment,” the CAA should first look at whether its state considers Head Start or other preschool or nursery school programs to be part of a school system that provides elementary education, including whether its Head Start sites are licensed by the state’s education department. If the state’s elementary education system does not include preschool, or if the Head Start program is licensed by a department other than the state’s education department, the safest approach would be for the CAA to treat its Head Start teachers as non-exempt, unless the teachers meet the requirements of the learned professional exemption, including the requirement that they be paid at least \$913 per week.

24

What if a CAA has universal pre-kindergarten classes funded by the local public school system or directly from the state?

Universal pre-kindergarten (UPK) classrooms of a CAA that receives funding from the local public school system to run UPK classes would likely be considered an “educational establishment” for purposes of the teacher exemption, as those classrooms would seem to be an extension of the local public elementary school system. However, it is likely that only the CAA’s UPK classrooms (and not its other Head Start classrooms) would qualify as an “educational establishment.” If the CAA’s Head Start program does not otherwise qualify as an “educational establishment,” the CAA must consider whether



it makes sense from an administrative and employee morale standpoint to classify teachers in the UPK classrooms as exempt under the teacher exemption, while treating its other Head Start teachers as non-exempt employees.

If the CAA receives UPK funding directly from the state and not through the local public school system, it would need to look for documentation that the state considers its UPK program part of an elementary school system.

25

What is the learned professional exemption and how does it differ from the teacher exemption?

The learned professional exemption is a specific subcategory of the professional exemption available for employees who are paid at least the minimum salary level and whose duties require an advanced educational background.⁵⁵ To qualify for the learned professional exemption, an employee must be paid at least \$913 per week (under the new overtime rule) and on a salary basis, and his or her primary duty must involve performing work that requires advanced knowledge that is “customarily acquired by a prolonged course of specialized intellectual instruction.”⁵⁶ Thus, it is not enough that an individual possesses the advanced knowledge credentials; the job itself must require the credentials. The employee’s work must also be “predominantly intellectual in character,” as opposed to “routine mental, manual, mechanical or physical work.”⁵⁷ Having a high school degree does not qualify as having advanced knowledge customarily acquired by a prolonged course of specialized intellectual instruction, and jobs that can be performed by either general knowledge acquired by an academic degree in any field or skills acquired by experience do not qualify for the exemption.⁵⁸ The DOL has also said that jobs that require only a four-year degree in any field or a two-year degree as a prerequisite for entrance into the field do not qualify for the learned professional exemption.⁵⁹

While the FLSA regulations explicitly recognize teaching as a field that may qualify for the learned professional exemption,⁶⁰ CAAs will need to evaluate each individual Head Start and Early Head Start teacher’s educational credentials to determine whether s/he qualifies for the exemption. Currently, the Head Start Act requires only that 50 percent of Head Start teachers nationwide have a bachelor’s or advanced degree in early childhood education (or coursework equivalent to a major relating to early childhood education)⁶¹ and that all Early Head Start teachers have a child development associate (CDA) credential and have been trained (or have equivalent coursework) in early childhood development.⁶² Thus, many Head Start teachers and likely most Early Head Start teachers will not have the specialized academic training required for the learned professional exemption.⁶³

26

How does the new salary level test apply to Head Start teachers and other Head Start staff who are not paid during their annual summer breaks?

An employee’s exempt status is always determined on a workweek basis. Thus, as long as Head Start employees meet the duties test for one of the white collar exemptions and are paid at least \$913 per week on a salary basis for the weeks they work during the Head Start program year, they would be considered exempt. Remember that if a Head Start teacher qualifies for the teacher exemption discussed in Questions 22 through 24, the salary level requirement does not apply. See Question 13 for general information about employees who work seasonally or part-time.

Section Five: Coverage Under the FLSA

27 Are public CAAs subject to the FLSA?

Yes, the FLSA has long applied to employees of federal, state, and local governments.⁶⁴ However, the FLSA contains several provisions unique to public sector employees, including the ability of state and local government employers to grant compensatory time (comp time) in lieu of paying overtime in certain circumstances.⁶⁵ Under the FLSA, state or local government agencies, including public CAAs, may enter into an agreement with employees (prior to the employees performing the work) to earn comp time instead of receiving a cash payment for overtime hours.⁶⁶ This agreement may take the form of a notice to the employee that compensatory time off will be given in lieu of overtime pay—a public CAA, for example, could provide its employees a copy of its personnel policies on granting comp time. The comp time must be provided at a rate of one and a half hours for each overtime hour worked.⁶⁷ For example, if a public CAA employee works 44 hours in a single workweek (4 hours of overtime), the employee would be entitled to 6 hours (1.5 x 4 hours) of comp time off. When used, the comp time is paid at the employee's regular rate of pay. Most state and local government employees may accrue up to 240 hours of comp time.⁶⁸ Public CAAs should check with an attorney familiar with their state's wage and hour law to determine whether comp time permitted under the FLSA is also allowed under state law.

28 Is there a general exemption for nonprofit organizations from FLSA coverage?

No, nonprofit organizations are subject to the same “enterprise” or “individual employee” FLSA coverage rules as for-profit entities.⁶⁹ As discussed in Questions 29-32, the coverage rules are fact-specific and broadly construed, so the safest approach for nonprofit CAAs is to assume that the FLSA applies to all of their employees.

29 How might a nonprofit CAA be subject to enterprise coverage under the FLSA?

Nonprofit organizations will be subject to enterprise coverage if they engage in ordinary commercial activities that result in annual sales made or business revenue of at least \$500,000.⁷⁰ Grant funds, charitable donations, membership fees, and dues do not count towards the \$500,000 threshold so long as the donor does not receive a benefit of more than token value in return. Further, activities that are charitable in nature and normally provided free of charge do not count as ordinary commercial activities.⁷¹ Examples of such activities include: providing temporary shelter; providing clothing or food to homeless persons; providing sexual assault, domestic violence, or other hotline counseling services; and providing disaster relief provisions.

The DOL has indicated, however, that if a charity charges fees for its services, even if on a sliding scale based on income, it will likely be deemed to be engaging in commercial activities, especially if the

services compete with other commercial enterprises.⁷² Examples of charitable services that will likely be deemed to be commercial activities include: a nonprofit organization that provides mental health and counseling services to the local community, charging clients a fee on a sliding scale; and a homeless services organization that manages a job training program, which includes a catering business that teaches clients various skills.⁷³ Any revenue generated from these activities would count towards the \$500,000 threshold for enterprise coverage. For a nonprofit organization, enterprise coverage applies only to its commercial activities; it does not apply to the organization’s charitable activities.⁷⁴

Note that the following “named enterprises” listed in the FLSA are automatically subject to enterprise coverage: hospitals; institutions primarily engaged in the care of the sick, the aged, or the mentally ill who reside on the premises; schools for mentally or physically disabled or gifted children; preschools; elementary or secondary schools; or institutions of higher education (whether operated for profit or not for profit).⁷⁵ Thus, because preschools are a named enterprise, employees of CAA Head Start programs will be protected by the FLSA under enterprise coverage (see Question 30).

30 Are Head Start grantees subject to the FLSA?

Yes, as noted in Question 29, FLSA coverage applies to preschools as “named enterprises,” regardless of whether they are operated by for-profit or nonprofit entities and whether they engage in commercial activities generating at least \$500,000 in annual sales or business revenue.⁷⁶ [Head Start Program Instruction PI-HS-01-01 \(2001\)](#) specifically states that private nonprofit and for-profit agencies operating Head Start or Early Head Start programs are subject to the requirements of the FLSA.⁷⁷ Thus, employees of Head Start programs are covered by the FLSA under enterprise coverage.⁷⁸

31 Could individual employees of a nonprofit CAA be covered under the FLSA even if the CAA itself is not subject to enterprise coverage?

Yes. Even if the enterprise coverage rules described in Question 30 do not apply, nonprofit CAAs must analyze each employee individually to determine if he or she engages in interstate commerce or the production of interstate commerce—if so, that particular employee will be covered by the FLSA.⁷⁹ CAA employees who would likely be considered to be engaging in interstate commerce include those who: work in communications or transportation; order supplies from out-of-state vendors (e.g., Amazon or other online or chain retail stores); communicate with out-of-state individuals or entities via telephone or email (e.g., federal funding sources, CAPLAW, or other regional or national Community Action



partner organizations); keep records of transactions that cross state lines; handle, ship or receive goods moving in interstate commerce; or travel across state lines for work purposes. Given how broadly “interstate commerce” has been interpreted and how easy it is for employees to communicate with people and/or engage in transactions that cross state lines, nonprofit CAAs should generally assume that all of their employees are covered under the FLSA.

32 What if a nonprofit CAA is unsure of whether it is covered by FLSA?

The safest approach for a nonprofit CAA is to assume that the FLSA applies to all of its employees. The tests around enterprise coverage are not always clear about the types of revenue and funding that count towards the \$500,000 threshold. Even if it seems fairly safe to say that a CAA does not meet the enterprise coverage test and is not a “covered” enterprise, it is highly likely that many (if not most) of the CAA’s employees will be subject to individual coverage. Practically speaking, it may not be administratively feasible for a CAA to have certain employees covered under the FLSA and others not covered. It is safer, and easier from an administrative standpoint, to assume the CAA and employees are covered and that non-exempt employees should be compensated for all overtime work. If the DOL or current or former employees bring legal claims against the CAA for FLSA violations, the CAA can attempt to use lack of coverage as a defense.

33 Are volunteers covered by the FLSA?

Generally speaking, individuals may freely volunteer for charitable and public purposes without being covered by the FLSA. Volunteers must provide their time freely for public service, religious, or humanitarian objectives; they generally may not, however, volunteer in commercial activities run by a nonprofit organization (e.g., a thrift shop).⁸⁰ Volunteers may not receive compensation other than expenses, reasonable benefits or nominal fees, and they cannot displace or perform the work that is ordinarily performed by regular employees.⁸¹

34 Can a CAA’s employees volunteer for the CAA?

Exempt CAA employees may volunteer for the CAA. However, since all non-exempt employees must be paid for every “hour worked” and time and a half for hours worked over 40 in a workweek, a CAA must be careful about having its non-exempt employees volunteer their time for the CAA. The FLSA regulations state that time spent working for charitable purposes “at the employer’s request, or under his direction or control, or while the employee is required to be on the premises,” counts as hours worked.⁸² For information about using staff volunteers, see the CAPLAW article, [“May Employees Lend a Helping Hand?”](#)

End Notes

¹ 29 U.S.C. § § 206, 207 and 213; [29 C.F.R. Part 541](#).

² [81 Fed. Reg. 32391, 32549](#) (May 23, 2016).

³ [81 Fed. Reg. 32391, 32392](#) (May 23, 2016).

⁴ [80 Fed. Reg. 38515, 38521](#) (July 6, 2015).

⁵ [81 Fed. Reg. 32391, 32393](#) (May 23, 2016).

⁶ [81 Fed. Reg. 32391](#) (May 23, 2016).

⁷ [29 C.F.R. § 541.607\(a\)\(2\);\(d\)\(2\)](#).

⁸ [29 C.F.R. § 541.607\(h\)](#).

⁹ [29 C.F.R. § 778.114](#).

¹⁰ The FLSA regulations do not specify how much a schedule must fluctuate. Courts and the DOL suggest that the key element of a fluctuating schedule is that the employee's hours vary from one workweek to another; thus, working pursuant to a written, fixed, regular, repeating, or perpetual cycle (e.g., 20 hours in one week and 60 hours in the next week, or a regularly-recurring three-day cycle of 24 hours on duty followed by 48 hours off duty) could satisfy the requirement of having fluctuating work hours, so long as the employee's hours vary from workweek to workweek. See *Overnight Transportation Co. v. Missel*, 316 U.S. 572 (1942); *Flood v. New Hanover County*, 125 F.3d 249, 253 (4th Cir. 1997); [DOL Field Operations Handbook §32b04b](#).

¹¹ The DOL considered, but ultimately rejected, a proposed rule that would permit employers to pay non-overtime bonuses and incentives without invalidating the guaranteed salary criterion required for the half-time overtime pay computation of the fluctuating workweek method. See [76 Fed. Reg. 18832, 18850 \(April 5, 2011\)](#).

¹² [29 C.F.R. § 778.114\(a\)](#).

¹³ [29 C.F.R. § 778.114\(c\)](#).

¹⁴ [29 C.F.R. § 778.114\(b\)](#).

¹⁵ [DOL Opinion Letter FLSA2005-20](#).

¹⁶ [29 C.F.R. § 516.2](#).

¹⁷ [81 Fed. Reg. 32391, 32426](#) (May 23, 2016); see also the DOL's [Questions and Answers from the Overtime Webinar for the Non-Profit Sector](#).

¹⁸ [29 C.F.R. § 541.602\(a\)](#).

¹⁹ [29 C.F.R. § 541.602\(a\)](#).

²⁰ [29 C.F.R. § 541.601\(b\)](#).

²¹ [81 Fed. Reg. 32391, 32427](#) (May 23, 2016).

²² [29 C.F.R. § 541.602\(b\)](#).

²³ See [DOL Opinion Letter FLSA2008-1NA](#).

²⁴ See [DOL Fact Sheet #23: Overtime Pay Requirements of the FLSA](#).

²⁵ [29 C.F.R. Part 578](#).

²⁶ [29 C.F.R. § 578.3](#).

²⁷ 29 U.S.C. § 216.

²⁸ 29 U.S.C. § 255(a).

²⁹ [29 C.F.R. § 516.2](#).

³⁰ [29 C.F.R. § 516.2\(a\)](#).

³¹ [29 C.F.R. § 516.2\(c\)](#).

³² 29 U.S.C. §§ 206(a), 207(a).

³³ [29 C.F.R. Part 541](#).

³⁴ [29 C.F.R. Part 541](#).

³⁵ [29 C.F.R. Part 541](#).

³⁶ [29 C.F.R. § 541.602](#).

³⁷ [29 C.F.R. § 541.602\(b\)](#).

³⁸ [29 C.F.R. § 541.303\(d\)](#); [29 C.F.R. § 541.304\(d\)](#).

³⁹ [29 C.F.R. § 541.700](#).

⁴⁰ [29 C.F.R. § 541.607](#).

⁴¹ 29 U.S.C. § 213(a)(1); [29 C.F.R. § 541.601](#).

⁴² [29 C.F.R. § 541.601\(a\)](#).

⁴³ [29 C.F.R. § 541.601\(c\)](#).

⁴⁴ [45 C.F.R. § 75.308\(c\)\(1\)\(viii\)](#).

⁴⁵ [29 C.F.R. § 541.303](#).

⁴⁶ [29 C.F.R. § 541.303\(d\)](#).

⁴⁷ [29 C.F.R. § 541.303\(a\)](#).

⁴⁸ [DOL Opinion Letter FLSA2005-39](#) (stating that as "there is no minimum educational or academic degree requirement for bona fide teaching professionals in educational establishments," the exemption is not dependent on possessing an advanced academic degree).

⁴⁹ [29 C.F.R. § 541.303\(b\)](#).

⁵⁰ 42 U.S.C. §§ 9835, 9843(a).

⁵¹ [29 C.F.R. § 541.303\(a\)](#).

⁵² [29 C.F.R. § 204\(b\)](#).

⁵³ [DOL Opinion Letter FLSA2008-13NA](#).

⁵⁴ [DOL Opinion Letter FLSA2008-13NA](#).

⁵⁵ [29 C.F.R. § 541.301](#).

End Notes

⁵⁶ [29 C.F.R. § 541.301\(a\); \(d\)](#).

⁵⁷ [29 C.F.R. § 541.301\(a\)](#).

⁵⁸ [29 C.F.R. § 541.301\(b\); \(d\)](#).

⁵⁹ [DOL Field Operations Handbook 22d02\(d\)](#); [DOL Opinion Letter FLSA2005-35NA](#).

⁶⁰ [29 C.F.R. § 541.301\(c\)](#).

⁶¹ 42 U.S.C. § 9843(a)(2)(A).

⁶² 42 U.S.C. § 9840A(h).

⁶³ When the Office of Head Start issued a Notice of Proposed Rulemaking to update the Head Start Program Performance Standards in June 2015, it noted that 71% of Head Start teachers had a bachelor's degree, but only 27% of Early Head Start teachers had their bachelor's degrees. [80 FR 35429, 35487](#) (June 19, 2015).

⁶⁴ 29 U.S.C. § 203(s)(1)(C).

⁶⁵ 29 U.S.C. § 207(o); [29 C.F.R. Part 553](#); [DOL Fact Sheet #7: State and Local Governments Under the Fair Labor Standards Act](#).

⁶⁶ 29 U.S.C. § 207(o)(2)(A); [29 C.F.R. § 553.23](#).

⁶⁷ 29 U.S.C. § 207(o)(1); [29 C.F.R. § 553.23](#).

⁶⁸ 29 U.S.C. § 207(o)(3)(A); [29 C.F.R. § 553.24](#).

⁶⁹ In the preamble to the final overtime rule, the DOL explicitly noted that the FLSA regulations for the white collar exemptions have never had special rules for nonprofit organizations and that nonprofit employees have been removed from minimum wage and overtime protection pursuant to the white collar exemptions only if they satisfied the same salary level, salary basis, and duties tests as other employees. [81 Fed. Reg. 32391, 32420](#) (May 23, 2016).

⁷⁰ 29 U.S.C. § 203(s)(1).

⁷¹ [DOL Guidance for Non-Profit Organizations on Paying Overtime under the Fair Labor Standards Act \(May 2016\)](#).

⁷² [DOL Wage and Hour Division, Fair Labor Standards Act Non-Profits Presentation \(June 7, 2016\)](#).

⁷³ [DOL Wage and Hour Division, Fair Labor Standards Act Non-Profits Presentation \(June 7, 2016\)](#).

⁷⁴ [29 C.F.R. § 779.214](#).

⁷⁵ 29 U.S.C. § 203(s)(1)(B).

⁷⁶ 29 U.S.C. § 203(s)(1)(B).

⁷⁷ [ACF PI-HS-01-01 \(2001\)](#).

⁷⁸ [DOL Field Operations Handbook § 12g07](#).

⁷⁹ 29 U.S.C. §§ 206(a), 207(a).

⁸⁰ See [DOL Fact Sheet #14A: Non-Profit Organizations and the Fair Labor Standards Act \(FLSA\)](#).

⁸¹ See [DOL Fact Sheet #14A: Non-Profit Organizations and the Fair Labor Standards Act \(FLSA\)](#).

⁸² [29 C.F.R. § 785.44](#).