



# CAPLAW Webinar Transcript

## Final Changes to the FLSA Overtime Rule

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**[Emily Center-Bregasi, CAPLAW]**

All right. Hi, everyone. Thank you so much for joining us. I think we can get started. Now hopefully most of you are here at one o'clock. So we'll go ahead and jump right in. Welcome to our discussion of the final changes to the FLSA overtime rule today. And thanks for joining us. I am Emily Center-Bregasi. I'm a staff attorney here at CAPLAW. I'll be presenting with Jon today as well. Jon, did you want to go ahead and introduce yourself as well?

**[Jonathan Cohen, CAPLAW]**

Yeah, sure. Hi, everybody, Jon Cohen, Program Lead and Staff Attorney at CAPLAW. I'm happy to be here to discuss the new overtime rule and all of the changes to be aware of for Community Action. So thanks again for joining us.

**[Emily]**

I also want to mention that all of us CAPLAW attorneys are on the call here today. So, Allison and Savanna are here as well to help facilitate any questions that come through. Please do feel free to write your questions in the chat as we go along. And we'll take some pauses to answer those questions as well.

So here's an overview of what we'll talk about today. We will provide some background and an overview of the FLSA. We will discuss overtime under the FLSA as well as the white-collar exemptions to the overtime rule. And then we'll talk about the new rule. As many of you know, the US Department of Labor issued a new overtime rule in April that made a few key changes that impact employee eligibility for overtime pay. So we will talk about what those changes are, the impact on CAAs, and how you can prepare ahead of that final rule going into effect this July. We'll also touch on classifications for Head Start teachers and recordkeeping requirements as well.

I also want to start with a quick disclaimer as we talk about employment and we talk about wage and hour laws today. This presentation is only addressing federal law and the federal Fair Labor Standards Act, or the FLSA. So we are not addressing state law, which will govern where state law is more protective of employees than the FLSA. The FLSA provides minimum wage and hour standards. But this doesn't prevent states from establishing more protective standards for employees. If state law establishes more protective standards than the FLSA, those higher state standards will apply in that state.

State law also governs where the FLSA doesn't already apply. And while CAAs should generally assume that all of your employees are covered by the FLSA, if your state is not covered by the FLSA,

for any reason, then state laws will instead govern in this area. And I mention that because we won't be talking about those state laws today, we'll be focusing specifically on the federal law.

After that disclaimer, we'll start talking about the FLSA itself. So as most of you know, under the federal Fair Labor Standards Act, or FLSA, employers have to pay employees at least a minimum wage for all the hours that they work, and pay overtime at no less than one and a half times their regular rate of pay for all hours worked over 40 hours in a work week. So this is the case for both public and private sector employees. And these employees can't waive overtime pay either, they have to be paid overtime. That is, unless the employee is exempt. That's largely what we'll be talking about today – are changes to the exemptions in the final rule.

There's what we call white collar exemptions for specific employees who meet certain tests. And employees that meet these tests are then exempt from the FLSA's minimum wage and overtime pay requirements and are not required to be paid overtime. So there are two white collar exemptions that we'll talk about today. The main one we'll discuss today is the EAP exemption, which covers certain executive, administrative and professional employees. To be exempt under that EAP exemption, the employee must meet three tests, which we'll talk about further today. But briefly, these tests are the salary basis test, the salary level test, and duties test. So we call these employees that meet these tests – these exemptions – exempt employees, and then the employees that don't fit any exemptions and have to be paid overtime non-exempt. I also want to note that employers may treat employees who meet all of these tests and are exempt as non-exempt and pay them overtime as well. But this can't go the other way around. So those employees who don't meet the test and are not exempt employees cannot then waive overtime pay.

And the other white collar exemption is the HCE exemption. This covers certain highly compensated employees. The regulations contain a special rule for those that are highly compensated, who are deemed exempt if they're paid on a salary or a fee basis. If the employee earns a total annual compensation level that's quite a bit higher than that EAP exemption, and if the employee's primary duty includes performing office or non-manual work, and the employee customarily and regularly performs at least one of the exempt duties of an exempt, executive, administrative or professional employee. So we'll talk about what that means in a bit. But this is essentially a much more lenient duties test, because the DOL is deeming here, high compensation to be a strong indicator of that employee also being exempt.

And another thing I wanted to note about both of these exemptions, both the EAP and the HCE exemption, is that the employer, the CAA, would bear the burden of establishing the applicability of that exemption. So the employer has to be the one to show that the employee meets all three of these tests and is therefore exempt. We'll go into talking about those tests now.

So we're going to talk about first what the current FLSA rule looks like, with respect to those three tests in the EAP exemption. So again, in order to meet this exemption, such that the employee doesn't have to be paid overtime, the employee must meet all three of these tests. First, we have the salary basis test. To satisfy this test an employee has to be salaried – has to be regularly receiving a predetermined amount of compensation in each pay period. And then we have the salary level test. This test means that employees have to receive at least a certain salary level to be qualified as exempt. So under the current rule, employees have to earn \$684 a week, or \$35,568 a year for a full-year employee. This, again, is the current rule. These numbers will change come July when the new rule comes into effect. Finally, the third test for the EAP exemption is the duties test. This duties test has different requirements for executive, administrative and professional employees, which are laid out here on this slide.

An employee has to meet just one of these options to satisfy the duties test that I'll walk through really briefly. So for executives, the employee's primary duty has to be managing the organization or a subdivision or department of your CAA, the employee must customarily and regularly direct the work of at least two others, and the employee has to have the authority to hire, fire, promote other employees or at least have a significant input in those kinds of decisions. And then this middle row to qualify as an administrative employee under the duties test, the employee's primary duty must be performing office or non-manual work directly related to the management or general business operations of your CAA. And the employee's primary duty must include exercising discretion and independent judgment on significant matters at your CAA as well.

And then finally, a professional under this test must either have their work require advanced knowledge, which means that the work is predominantly intellectual, it requires consistent exercise of discretion and judgment, and is in a field of science or learning, which would usually be acquired through a course of specialized instruction. Or the employee's work has to require invention, imagination, originality or talent in a recognized artistic or creative field. So one of these three sections here has to be met in its entirety to satisfy the duties test under the EAP exemption. But as I mentioned briefly just a few slides ago, this duties test for the HCE or highly compensated employee exemption is much more lenient.

Okay, so all of that is hopefully setting the stage to now talk about the new overtime rule. This slide lays out what that will look like for the EAP exemption. And as we discussed, the EAP exemption has three tests, one of which is a salary level test that is currently set at \$684 a week. The new overtime rule increases that salary level threshold in two different increments from \$684 a week, up to \$844 a week, or \$43,888 a year as of July 1 of this year, and then up to \$1,128 a week or \$58,656 a year as of January 1, 2025. So when the rule takes effect, those employees who are currently exempt at your organization and earning less than \$844 a week on July 1, or less than \$1,128 a week on January 1 would no longer satisfy the EAP exemption because they wouldn't be meeting that salary level portion that at one of three tests to be an exempt employee so they would then become eligible for overtime pay.

The new overtime rule also increases the thresholds for the salary level test for those highly compensated employees we talked about. So the current salary level test is set at \$107,432 a year, and \$684 a week, which will then increase to \$132,964 a year on July 1 of this year, and then \$151,164 As of January 1 of 2025.

So, as you can see, there's going to be this two-tiered approach to raising salary levels in the final rule. First, there'll be that increase in the threshold on July 1 of this year, when the new rule comes into effect, and the DOL increases the salary levels. But the DOL at that time in July is not changing the methodology for determining that level. And so the second increase then comes into play in January of 2025, when the DOL will update to a new methodology and raise the salary levels accordingly. What this means is that the current rule has a current methodology, where it sets the standard salary level – it sets those numbers we just talked about at the 20<sup>th</sup> percentile of weekly earnings of full time non-hourly workers in the lowest census region. And so it's currently setting it at that 20<sup>th</sup> percentile, that's going to remain the same in July with the DOL really just updating the numbers so that they remain consistent at that current 20<sup>th</sup> percentile. Otherwise, due to inflation, the current rule basically sets the threshold even lower than the 20<sup>th</sup> percentile as it stands right now. So, no changes to the underlying methodology of how the numbers are determined in July, just updating those numbers to be consistent and current with that 20<sup>th</sup> percentile in July of this year. And then to be also consistent with that 80<sup>th</sup> percentile for the highly compensated employees.

Then come January 2025, the DOL announced in this final rule that it's going to update the methodology and then update the salary levels according to that new methodology. So, the DOL starting in January of 2025, is going to use a new methodology, which will increase those numbers to have these thresholds then based on the 35<sup>th</sup> percentile and the 85<sup>th</sup> percentile, respectively. So, then the salary levels will be raised to meet these new higher percentiles.

So that's why we see this larger jump and the second tier happening in the salary level thresholds coming in January of 2025. And so, the salary levels are going to be raised in January, in line with this new methodology. In addition to this two-tiered approach, the final rule is also including an automatic update to the salary levels for the EAP and the HCE exemption, so these automatic updates are going to adjust, without any new rulemaking, the salary level thresholds every three years based on the current methodology at the time. So, as we just talked about, given that change to the methodology that's planned for the final rule in [January] of 2025, then moving forward, these automatic updates every three years would be updated to maintain the earnings percentiles of 35<sup>th</sup>, and 85<sup>th</sup> percentiles that are set out in the new rule. And the purpose of these automatic updates is really to prevent the salary and compensation levels here from becoming outdated. Because the DOL is not going to have to go through this notice and comment period each time just to keep the salary levels at their existing percentages.

The methodology, and this second salary level threshold increase in January, as well as the automatic updates – all of these changes we just talked about might depend on some legal challenges, which I know Jon is also about to discuss further in just a minute. And we talked about the changes in this new rule to the salary level test. But I did want to note explicitly that the new overtime rule makes no changes to the duties test or the salary basis test, only to that salary level test. And here on the side, we also have some resources for you. For those of you looking to get additional information or guidance on the rule, we have these resources on this slide, as well. And I see we have some questions coming in. So I thought we could take a pause to answer some questions before I turn it over to Jon.

**[Allison Ma'luf, CAPLAW]**

Yeah, thanks, Emily. We had one question come in saying, "I'm having trouble understanding who must fall within the HCE bracket. Does the company have to have any HCEs? So, I think a little more information about the highly compensated employee criteria."

**[Emily]**

Yeah, absolutely. So, to answer the second part of this question, your CAA does not have to have any HCEs. If an individual is being paid above that HCE threshold – and I can just jump back to that slide here. If they're being paid over the salary level threshold, which is much higher than the EAP threshold, then they only need to meet a much more lenient duties test, let's say. So this is just a different way for an employee to fit into one of these exemptions. It doesn't mean that your company has to have any HCEs. But if they're paid over a certain salary level threshold, and they're paid on a salary basis, and meet this more lenient duties test, then they would be an exempt employee under this HCE test, essentially, and you wouldn't be required to pay them overtime. Does that answer the question?

**[Allison]**

Yeah. And I'll just add, I think the thought behind the highly compensated employee threshold is really that if someone is making that level of a salary, then the understanding would be that they would be performing duties that would be in line with making that level of a salary. And so it's likely that they would qualify for an exemption based on that. That's why the duties test is more lenient. And basically,

you can never pay a highly compensated employee less than those threshold levels that are applicable to the EAP exemption. So their salary can be made up with other types of wages like bonuses, or shares from stocks, that sort of thing could make up [the] nondiscretionary . . . [portion of their] compensation [and] could make up the difference between that salary level that applies to EAPs, and that HCE salary level that they have to meet to qualify for the exemption. And they just have to receive that additional compensation within the year – the 52-week period that they’re being assessed.

So somebody asked, “Will these rules and changes apply the same to state associations as CAAs?”

**[Emily]**

Yes, so these rules will apply to any organization that is subject to the FLSA. So it will apply the same to any employer. And most of you, if not all of you, will likely be subjected to the FLSA. So, it would apply in the same way.

**[Allison]**

So we’ve got another HCE question, a follow-up. The follow-up is: if a HCE is paid less than \$132,964, on July 1, 2024, they would be eligible for overtime. And I think at that point, you would look at the other exemptions that are available. So the EAP exemptions. It’s quite likely that this HCE individual would meet those stricter duties tests, you’ll just have to check and look at that position and those duties that that individual’s performing as a part of their position. But my guess is that they will likely meet the duties tests that are required for the executive, administrative or professional exemption level, you’ll just have to look and see.

So then another question: “Can you give an example of someone who might meet the considered an HCE?” Definitely. Do you want me to do it, Emily, or do you want to give it a go? Okay, I’ll try to give an example. So an example could be if you’ve got an executive director, who is making in that range, that salary range \$130,000, give or take a few bits of change, they’re making that salary level, and then their responsibilities would more than likely meet that more lenient duties test, then they would qualify as a highly compensated employee. I think you see highly compensated employees, that threshold really being taken advantage of in more of the for-profit world, because you can use bonuses and other forms of compensation, as I was saying, to help meet the difference between that salary level and that highly compensated salary level threshold. And so that helps those companies sort of put individuals in that bucket when they may not necessarily have [the] sort of managerial duties that go along with that salary and the other exemption areas. Oh my goodness, we really got you guys going.

**[Emily]**

I see a couple other questions came in. We will have copies of the slides going out. The other question I see here is: “Will the HCE and EAP salary difference that might need to be changed – will this need to be changed by July for a nonprofit or any type of business?” So, in terms of next steps and what you might do to address the final rule, that’s what Jon is going to be talking about for the next half of our presentation. So hopefully, he’ll be able to answer your question there.

**[Allison]**

So someone just asked real quickly: “The weekly salaries in the tab is not the same as the annual salary. Should there be a difference? I apologize. I got here a few minutes late.” Emily do you have anything. . .

**[Emily]**

I think what that’s speaking to that question – is the room for including bonus, and that kind of...

[Allison]

Oh, right, what I was just talking about...

[Emily]

Exactly, the numbers that you were just talking about. So that's the reason that the \$684 a week on this slide, for example, doesn't seem to add up to [\$107,432] a year, it's because within that \$107,000 a year, you can include compensation such as bonuses and things like that. The \$684 a week is really just the baseline of what that person has to be paid on a weekly basis. But the difference there comes with the bonus and things like that, that Allison was just explaining.

[Allison]

And basically they need to make that salary level within that 52-week period, that is considered the annual salary that they would be making. So as long as by that 52-week period – whatever that 52-week period is for your organization – they've hit that salary level, then they'll be fine with respect to . . . qualifying for that exemption.

Someone asked "Does the extra compensation include health insurance?" And I do not believe that it does. I think it does not include fringe benefits. It's other type of [non] discretionary payments that you might give an employee which is why it doesn't fit so neatly in the nonprofit sector, because in the for-profit [world] with sales, people get perks and bonuses and additional payment for sales that they might make.

Okay, I'm going to press pause real quickly. And I promise, we'll pick back up with the questions, but I want to give Jon time to do his part of the webinar. Someone did ask about the duties test, and is there a way to sort of quickly see the different responsibilities that fall with each exemption. And there is a slide in here that we already went through – and we will be sharing the slides afterwards – that does have a nice chart that kind of quickly walks through the different duties, and you can see them side by side. So we'll be sharing that with you after the webinar. Alright, go for it, John.

[Jon]

Thank you. Thank you, everybody for all your questions and interest. I know this is a hot topic. So I'll try to go quickly through these slides, and then have more time for your questions at the end.

I'm going to talk a bit right now about some recent history with regard to these updates because it plays a role. And I think the DOL is thinking that in what they've come up with – the final rule and the way they've decided to phase in the changes over time. So I'll briefly say in 2016, the the Obama administration actually tried to update the overtime rule. They published a final rule, that increases the threshold from \$455 a week to \$913 a week which was quite a jump. However, consider that the \$455 a week had not been updated since 2004 by that time, and so that partially accounted for the jump. They also included automatic updates every three years and changed the methodology for determining the salary level to be the 40<sup>th</sup> percentile of weekly earnings of full-time non-hourly workers in the lowest census region.

This was, of course, challenged in court and and eventually blocked and struck down. And really the thinking of the court and the reasoning of the court was that the salary level methodology that was implemented created too high of a jump in salary so that it would essentially eliminate the need for things like the duties test, and was essentially a test based solely on salary at that point. So the court basically blocked that implementation of that rule. And so things remained at \$455 until the Trump administration in 2019 published an another final rule to update the overtime salary threshold from

\$455 to \$684 a week and no automatic updates every three years to the threshold. And they did not include a new methodology either; they really tied it to the prior methodology, which stood at the 20<sup>th</sup> percentile. And so, you know, that's what we have today – that that rule survived. And that's what's currently in effect at this time.

And if you move to the next slide, I'll explain a little [about] why this is important. So the rule that's been published now will be effective on July 1, 2024. And Emily talked about how the different salaries low salary levels would be phased in. So the salary level that's going to be phased in on July 1 is based on the same methodology used by the Trump administration, that 20<sup>th</sup> percentile. And so the hope I believe there is that – there's a couple of hopes – I think one, the sort of phased in approach, doing it on July 1, and then again, on January 4, a first to a higher level, will be a little easier for employers to implement. But also, I think a big a big motivation of the the DOL in doing it this way is to really consider that there likely would be legal challenges to the new rule based on what they had seen in the past. And so they based that first salary increase on what the Trump administration had done, what had sort of what had survived at that time, in terms of the final rule. And they base their second phase in on January 1 on a new methodology, as Emily was mentioning that 35<sup>th</sup> percentile methodology.

And so they included in the rule, an intention that the changes be what is known as severable. And this was really in anticipation of those legal challenges. Separable means, if a court finds any provision in the final rule to be invalid or unenforceable, the other provisions could survive. So let's say a court basically said the new methodology that the DOL wants to implement on January 1 is invalid and unenforceable. Well, that would still mean that what went into effect on July 1, based on the same methodology that's been used since 2004, really would survive. And so that first increase would survive that particular challenge – that hypothetical challenge.

I mentioned all this to say, the DOL was anticipating legal challenges and their anticipation or their foresight came true. Actually, last week, we saw the rule has been challenged already in a Texas federal court. And so really, it's a case of “stay tuned to see what might happen” and how that court might rule on this particular overtime rule. But again, their intention was that things can be separable. So we'll see what happens really, with regard to the whole rule.

So in the meantime, what does this all mean for your organizations and the uncertainty that it lands in? Well I think right now, what all CAAs, all employers really can do is assess your workforce. You'll need to get a sense of what employees you have currently who are exempt – might become non-exempt if these different phases of salary level increases go into effect. And so know who's exempt and non-exempt in your workforce and how an increase in salary may impact that classification. As Emily was saying, on July 1, if everything goes into effect as planned, those employees who are making between \$684 a week, which is the current threshold, and the new threshold of \$844 a week, you'll need to take a look at them and say, “well, then they'll no longer qualify for an exemption based on that salary so what are some of the options?” We'll talk through some of the options for employers in a second. And similarly, again, on January 1, if everything survives the legal challenges, then you'll need to do that analysis, again, or you know, all at the same time at the beginning for employees who are making up to that \$1,128 per week salary. So let's talk a bit more about how to prepare.

So if you do your assessment, you look at your employees and the ones that are currently exempt and making a salary that will now fall below one of those thresholds. You need to have a sense of how many hours that they're working a week because they will be eligible for overtime for those hours worked over 40. After they no longer qualifying for the exemption and so you need to get a sense of how many hours they're working because that will inform maybe some of your decisions about how you want to classify or treat those workers moving forward once these changes do go into effect.

Now hopefully you're tracking hours. I know that a lot of CAAs are certainly required to track hours for things like grant allocation purposes and grant reporting purposes. So I know that many organizations have that already built into their systems. If you have exempt employees who you have not been tracking hours for, you want to get a sense of how many hours typically they're working in a week. One way to do that is to monitor how many hours they worked over a certain period of time. Based on how many they've been working from today to next week, or next month or so, to really approximate the number of overtime time hours they're going to be typically working so that can really, again, inform what you might do as an organization or as an employer for those employees. So consult your documentation, you'll certainly conduct that self-audit to see which employees are now going to be below that threshold, and to – of those employees – how many of them are working overtime. So how big of an impact is this going to have on your organization, and its financials really.

There's a number of approaches to the new rule when it goes into effect. When you find you have employees who are no longer going to be eligible for the exemption, there's a number of things you can do. And I'll talk through some of these. I'll also say that, hopefully, you saw CAPLAW updated and reissued some FAQs on this recently – last week – to really account for the new numbers. And so hopefully you saw that release. But a lot of what I'm going to be talking about is spelled out in a lot more detail in those resources. And you'll see them at the end of this presentation, but they're available on our resources page. And so if you're like me, and when people start talking about salary thresholds, and percentiles, and methodologies and things like that, your eyes glaze over – know that that's also in the written word on CAPLAW's website, if that's easier for you, with some more detail, as well.

So if you find that an employee is no longer going to be eligible for an exemption, one thing that you can do is raise their salary, basically, to maintain that exempt status. So I think this is, you know, a little easier for those employees who are closer to the threshold. So let's say someone is going to be earning or has been earning \$830 per week, once July 1 hits, they're no longer going to be eligible for the exemption. So you as an employer could consider raising their salary up above \$844 per week, to continue to allow them to be eligible for the exemption and not have to pay overtime for that employee.

Keep in mind, though, January 1, there's going to be another increase. So does that make sense really, for your organization to do that, again, when that time hits? And so that's something else to consider with regard to raising salaries. Anytime that's done, I think there's an administrative, as well as perhaps an employee morale standpoint that employers need to think about. You know, why are some employees getting raises and others not, to really comply with this change that's happening in the overtime rule. And so selective raises, I think, can certainly be an issue. And so that's another consideration, I think that organizations are going to have to think through if they're considering this particular option.

You can also reclassify any employee who's now below the threshold as hourly and non-exempt. I think this is certainly an option to consider. You would, of course, have to pay overtime for any hours that are worked over 40 per week, but maybe because of your self audit, you've determined that these particular employees typically work 40 hours a week, and so it's not going to be that big of a change in terms of the amount that you're paying them if you just reclassify them as hourly, non-exempt. Another big issue here, I think, is current salaries, not close to the new levels. And so another consideration there, you know, it may not be possible economically to raise employee salary because you're not close to the new threshold. And so raising those up just doesn't make sense and is not a possibility. So, you might have to reclassify them as hourly and non-exempt in that situation. And again, these are employees if they don't regularly work overtime, it may not be that big of an issue financially, it's just a case of reclassifying them.



So on the next slide, I'll talk through a few options. These are the options that are available if you want to reclassify an employee as non-exempt so they're no longer meeting that salary threshold. You can reclassify them as a non-exempt. You can also still pay them a salary, even though their pay is going to be below those thresholds, you can still pay them on a salary basis. And so there's a few ways to structure this. One is essentially to pay them a straight salary for their 40 hours a week, and then any hours they work over 40 hours a week, you're paying them time and a half based on whatever that standard rate would be. So important, again, you're paying them on a salary, but they're still non-exempt, so you have to pay them for any hours worked over 40 in a work-week. And so that stresses the importance of even though they're on a salary basis, you still need to be tracking, they still need to be tracking and recording their hours in that way.

Another different way to structure this particular arrangement – let's say you conduct your self audit, and you find out that an employee typically works, let's say 45 hours per week. You can basically structure their salary to say you are going to be paid this certain amount as a salary for your set number of 45 hours a week. And so in that situation, it's an understanding between the employer and the employee, that the employee is supposed to work 45 hours a week, that's typically what they work, doesn't really change or alter that amount that much. And so their salary is for that amount. Now, keep in mind, if that's the case, if you're paying them a certain amount for 45 hours a week, then you still need to pay them an overtime pay for those five hours over 40 in that situation. However, that would be halftime pay over that 40 hours because their regular time pay is taking into account those five extra hours. So that's again explained pretty well in the resource that we've released for that. But just know, that's available as well. Also in that situation, if they work less or fewer than 40 hours a week, then in that situation, you can sort of adjust their salary down in that situation where they're supposed to be working 45 hours a week.

So there's also an option for what's known as a fluctuating workweek. This can get a little bit complex, but I'll go through the basics here. And again, this is explained nicely with the help of some examples in our resource that we just reissued. And this may not be applicable to a lot of CAAs. But for employees who you find are working basically a different number of hours from week to week. So one week, they're at 40, one week they're at 37, one week they may be at 45. You can basically have what's known as a fluctuating workweek arrangement with them, where in this situation, you know – and the employee knows – under this method, their hours must fluctuate from week to week, so they can't be the same from week to week, they must be paid a fixed salary.

And in that situation, you can say, "well, we'll pay you a fixed salary for let's say 45 hours a week," then, no matter how many hours they work in that particular week, you have to pay them what their salary is. Where the difference might come in and where it gets a little complex to explain is if let's say they're working 42 hours one week, or 48 hours another week or 45 hours another week, then their rate upon which their overtime compensation is based – so upon which you apply that 1.5 times to that rate – would fluctuate a bit in there. And so it's a bit mathematical and complex. But just know that that example is another option for those employees who are really fluctuating in the number of hours that they're working.

A couple other options to keep in mind for employees, and when you're thinking about employees who are no longer going to be eligible for the exemptions. Another option is to adjust wages of the employees to approximate the same overall compensation. And so there's someone who you find is no longer going to be exempt from overtime, but they work, you know, 5-10 hours of overtime a week, organizations may consider maybe dropping their hourly earnings with their base pay down a bit to account for whatever their overtime would be so that they're earning around the same amount that they earn already. Keep in mind that rate that you adjusted to can't be lower than the minimum wage. Also

consider as an employer, how that's going to really play with employees if you're essentially adjusting the amount that people are getting paid their rate of pay, to sort of work within the confines of this new overtime rule. I think from a morale standpoint as well, anytime you adjust someone's pay a little bit down, or their base rate of pay a little bit down it can have implications and can cause some morale issues there.

Some other things to consider, if you're finding that your non-exempt employees who are no longer exempt have been working a lot of overtime, maybe consider why they're working a lot of overtime and think about restructuring some job duties so that their work can be completed within 40 hours a week. And so, how can you either reallocate those job duties, or, possibly hire others. I know, this one could be difficult as well, given that someone else might have to take on new work, and that could have some similar morale issues. But that's another option that is out there. And so consider taking a look at those job duties to see what might be possible there as well.

So I know many Community Action Agencies have Head Start programs, so I just wanted to mention this really quickly. Head Start teacher classifications – there are some teacher exemptions that that maybe some Head Start programs do use essentially to make teachers exempt from overtime requirements. Those really haven't changed, according to the new rule. And so the teacher exemption that you see at the top, there is an exemption for teachers where the salary level test doesn't apply. Head Start teachers, in these situations must meet the exemption requirements, basically, which is their primary duty is teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge. And they're employed and engaged in this activity as a teacher in a school system, or educational establishment or institution. That educational establishment piece is very state specific. And so you'll need to look to your states to see if your Head Start programs sort of fall under that definition of an educational establishment. So again, I won't go too much into that, because that really hasn't changed that much. If your Head Start programs are using that now, then they have gone through that analysis. Just know that that's still there.

Also, there's the learned professional exemption, which is sort of a subcategory under the the professional exemption that's available. Salary level tests apply to that. And so that would be a bit of a difference there. But that really hasn't changed either, that learned professional exemption is available to those in teaching positions who have an advanced degree. So not just a four-year degree or, or a field that requires a two-year degree. But a really solid indication of being eligible for this exemption, in addition to the salary, is really holding one of those advanced academic degrees, so no big changes there. And then non-exempt, you may always choose this option to treat teachers as non-exempt as well. And, and of course, pay them for any hours over 40.

So a couple scheduling myths to go through. I know I've heard these myths out there too. And so I just wanted to highlight these. One myth is non-exempt employees need to punch a clock. That is certainly a myth. And we'll talk about why in a second. But basically, there's no set method under which non-exempt employees need to track their time or record their time. Similarly, non-exempt employees must sign in and out each time that they start and stop work. Also, that is a myth – not required. To do that. Non-exempt employees must have a predetermined work schedule. As you might expect, since it's on this slide, that is certainly a myth. Again, we'll talk about that. And then non-exempt employees may not telecommute or work a flexible schedule, also a myth, also incorrect.

And if we go to the next slide, I'll start to dive in as to why that's the case. So basically, the key to FLSA recording record-keeping requirements is that you need to have records that are complete and an

accurate reflection of how much time or how many hours non-exempt employees are working. And so basically employers can use any timekeeping method that works for them, as long as that leads to complete and accurate records of employees and the hours that they're working. Employees with relatively fixed schedules – so let's say your agency is open from nine to five and employees generally work at their desks from nine to five. And so they have a set number of hours they work per day then go home. When that's the case, you can keep the record of their schedule and just note that the employee followed the schedule in that case.

Let's say your agency has a half day for example, then you would want to note any exception like that on that schedule for that employee, and really report those – the actual numbers of hours work there. But but just know that that's an option out there. If your employee has flexible and varying schedules, you don't need to sign in or out or punch a clock as that myth suggests, you really need to come up with some method of time tracking or hourly work scheduling recording that works for your organization. There's a number of ways to do it – I'm sure you all know about it – the different types of ways that can happen and that are used at your organizations. Just know, it doesn't have to be one or two set ways, you just have to come up with a system that works – complete and accurate reflection is the key.

So just to include this here, there are some FLSA record-keeping requirements and the citation to the Code of Federal Regulations is there. These are records that employers must maintain for all non-exempt employees. If you head to that citation, you'll see things not on this slide such as obviously the person's name, social security number, their address, things like that, must include. But I just wanted to give you a sense of the type of records that that the employer has to keep for non-exempt employees.

It's also a very informative Department of Labor fact sheet that walks through a lot of this as well. It's DOL Fact Sheet 21, which talks about all of this. It also talks about how long these types of records have to be retained. So each employer has to preserve, for at least three years, things like payroll records, other things, you know, collective bargaining agreements, things like sales and purchase records – obviously not here – but records on which wage computations are based should be retained for two years. So things like timecards, piecework tickets, wage rate tables, work and time schedules. So those types of things, which I think are duplicated on in these requirements would have to be kept for two years. So just keep that in mind. If you want additional details on that, again, DOL Fact Sheet 21 is a really great resource for that.

So I mentioned that CAPLAW has a couple of FAQs it updated. I just wanted to mention those here as well. It contains details on everything that we talked about today. There's a an overview of FLSA principles, which is the second one there, which is exactly what you might expect. So please take a look at that. If you have any questions, that one actually talks in more detail about the Head Start exemptions as well. So that's there. And then 2020 for complying with the new FLSA overtime rule, talking about some of those ways in which organizations can go about – exactly as you might expect – complying with the new rules. And what are the options for things like raising salaries, adjusting job duties, fluctuating work weeks, things like that. If you have any questions about that, and want more details on that, that's where that can be found.

So we have about 13-14 minutes if anyone has questions, happy to field those now. As I mentioned, this is a very relevant and hot topic. So I'm sure there's some questions out there.

[Allison]

Yeah. Thanks, Jon. So someone asked a question about comp time, and whether or not you could

provide that in lieu of overtime hours. That was very kindly addressed by another attendee. I did put a note in the chat that our principles, our overview of the FLSA Principles document – does talk about comp time, but it's in connection with public employees, so non-exempt employees that work for public entities. So we do have public CAAs and they may be eligible, but in general, comp time is not available for [non-exempt] employees of private entities. It could be available in a form for exempt employees, but it's often times not referred to as comp time. It's more referred to [as] giving additional PTO or holiday time in different forms.

Someone also asked about using incentives, bonus, other types of discretionary pay to meet the EAP, the executive administrative professional level exemption. I included an FAQ in the chat, that is for the Department of Labor. They specifically address this and you can meet the salary level for the EAP exemption. Up to 10% of that salary level can be paid for out of those non-discretionary sources. They do have to be received within that 52-week period, in order for you to count them up to 10% of that salary level.

[Jon]

There's a question about, "Do you know the foundation of the legal challenge in Texas?" I think they've challenged the entire rule, really, and one of the major things they've said is that DOL has exceeded its federal rulemaking authority, you know. I saw one thing with regard to the automatic update issue. One key piece of that is that the automatic updates that DOL has put into the final rule, you wouldn't have to go through the rulemaking process in three years, in order for those updates to apply. And so that's one thing I saw that was challenged, and then basically exceeds their authority to do that, and to update things without going through the process. Again, I think similarly to why the rule was struck down in 2016, in that, you know, this is essentially creating strictly a salary basis or salary level test without consideration of the duties is likely one of the one of the foundations of that challenge. I haven't read the the challenge itself, but just what I've gathered from different things so far, I think that would be what they're going for with that.

[Allison]

Great, thank you, Jon. Someone also asked, "What if your organization's typical work week is 35 hours a week, not 40 hours a week?"

[Jon]

That's great. I don't think you're in danger of exceeding those. So the 40 hours a week really is the is the federal requirements. So if your organization does 35 hours a week, typically your employees are going to fall under that. If you still do your self audit and see if there are any employees who, you know, maybe who are being paid on a salary basis now who are no longer exempt. If they're working greater than 40 hours a week, then you would need to pay for greater than 40. But that's really the the federal requirement. And so that's what I would say.

[Allison]

Someone also asked if a non-exempt employee is salaried and then required to be paid overtime, can they work less than 40 and still get paid the set salary? So what that question is describing is really the way an exempt employee operates. The number of hours they work are not counted because their exemption enables an employer to assess their work based on the quality of the work that they're producing, the quantity of work that they're producing, not the number of hours that they're actually working. For a non-exempt employee, you would just need to think about if you're going to try to continue to pay them a set salary, even though they may not work a full 40 hours a week, if they don't qualify for that fluctuating work week example, there's no obligation that you do that. Then you need to

think about, “well, what does that mean for all the rest of my employees?” Because once you engage in one practice, you’re going to need to be consistent with respect to that practice across the board.

You want to think about that from a financial perspective; do you actually have the budget and if so then maybe think about increasing their rate or some other way to compensate that individual, while still staying true to the fact that now they’re in a non-exempt status as opposed to the exempt status. I don’t know if anyone else has anything to add to that.

[Jon]

No, that was good. I think.

[Allison]

Someone asked about, “Can you speak to how this addresses Head Start employees who don’t work in the summertime?”

[Jon]

Well, I think the key here is looking at weekly hours, and so how many hours are they working a week? If they don’t work in the summertime, hopefully you have a sense of how many hours they’ve been working typically in their work week so that you could do that self assessment of when they returned to work in the fall. And if they are non-exempt – so if they don’t fall into one of those exemptions that I talked about for Head Start – you can get a sense of who might be working overtime, because it is July 1 when these rules go into effect, at least the first phase. So you want to get a sense of that. But I think that question was getting at, “is it a weekly computation of hours worked or hours taken on a yearly basis?” But hopefully I answered both if that was not the case.

[Allison]

Yeah, if it’s not the case, let us know. Someone asked if personnel activity reports are still required under the Uniform Guidance. And those used to be required, they are only required under the Uniform Guidance – the set of federal financial rules that govern the federal grant funds that you receive – the personnel activity reports are only required if you are at risk. In other words, you failed to meet the criteria for having a system in place by which you can determine the actual hours that are being worked and you’re charging those hours to the grant. If you are monitored and found that you’re not able to do that with whatever system you have in place, then the default system is the personnel activity report system. Even though that changed when the Uniform Guidance came into existence in 2000, and late 2013, early 2014. A lot of Community Action Agencies maintain their personnel activity report framework, because they had already spent a lot of time setting it up. Some did change the way in which they are accounting for individual’s time and charging it to the grant. So there’s a lot of variety there.

[Jon]

Someone asked, “If you have an executive director that does not currently meet the 1/1/25 threshold, are they always considered an HCE?” You can’t use the EAP exemption threshold. I believe this is addressed. But basically, the HCE is a higher salary threshold. And because it’s higher, they basically apply a minimal duties test. And so let’s say that when the threshold is increased in January, if your executive director no longer meets that threshold, they could still qualify for the EAP exemption, they would just need to go through the analysis and the test, based on the job duties test that exists for that exemption at that lower salary threshold, if that makes sense.

[Allison]

And someone asked to clarify about not providing comp time in exchange for overtime for non-exempt employees. You cannot do that, that is correct. You cannot provide comp time in exchange for overtime for non-exempt employees if you are a nonprofit community action agency, a private entity. If you are a public Community Action Agency, there are rules around that within the regulations for the FLSA that talk about how to do that and how you can set that up.

Let's see.

[Jon]

Some nice takeaways from the meeting listed there. Great.

[Allison]

Yeah, someone asked, "Can you flex time as long as it is in the same work week?" Oh, that was directly to us as panelists. . . Yeah, within your pay period, there is a way to use flex time. We can follow up separately about that. . . [It] could get a little complicated to explain on this call – on this meeting – but we can try to include something about that in our follow up on this webinar.

So I think that might be it. Is that right? For questions?

[Jon]

We have one more question about – it's been brought up multiple times at this person's agency so they just want confirmation. Overtime is based on hours worked, not holiday or benefit time, correct? So if someone works 30 hours in three days has two PTO days for eight hours, they don't have to pay overtime for the 16 hours. Correct? Yeah.

[Allison]

That is my understanding; overtime is only for hours worked, not the PTO time that you take.

[Jon]

I was just going to say, I saw a number of questions about recording and slides. So those will be made available.

[Allison]

Yes. And then someone asked, "Can you add incentive pay to an EAP employee to determine if exempt?" And so there is an FAQ that I included in the chat a little ways up, I'll see if I can include it again right now, I think I can. That [FAQ] specifically talks about this; you can use up to 10% of the employees wage level, the salary level, up to 10% of that can be paid out of incentive compensation [and non-]discretionary funds and bonuses to meet that level. And that FAQ talks about that.

[Another question] do the [salary level] thresholds apply to both HCE and EAP exempt classifications? They do, but in slightly different ways. For the EAP exemption, you have to meet the salary level of pay. And then the two other tests, the salary basis test and the duties test in order to be considered exempt. For the HCE exemption, on a weekly basis you cannot make less than that salary level that also applies in the EAP exemption. So you always have to make that on a weekly basis. And then on an annual basis, you have to make. . . [approximately \$132,000] on a yearly basis in order to meet the HCE exemption.

All right. Anything else?

[Jon]

Check out the FAQs if you have further questions and CAPLAW is always here. If you want to reach out, we'll happily talk to you and answer your question. Otherwise, thank you for joining.

[Allison]

Yes, and hopefully we'll see some of you at the CAPLAW conference next week. A little plug there at the end. Thanks, everybody.

[Jon]

Thanks, everyone.

[Emily]

Thank you.

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