

# Speech

## 5 Tips for Compliance with FLSA on Overtime

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The Fair Labor Standards Act (“FLSA” or the “Act”) is a federal law which, among other things, establishes minimum wage and overtime pay eligibility for employees in both the private and public sectors. When the law was enacted in 1938 it applied to “only about one-fifth of the labor force.” In its original form, the law “banned oppressive child labor and set the minimum hourly wage at 25 cents, and the maximum workweek at 44 hours.”

In 2014, the FLSA’s scope broadened to apply to “more than 130 million workers in more than 7 million workplaces.” President Obama has now directed the Secretary of Labor to update the overtime regulations to reflect the “original intent” of the FLSA and to “simplify and modernize the rules.”

In May 2016, the Department of Labor (DOL) did, in fact, update the overtime regulations. Whether those updates reflect the “original intent” of the Act or “simplified” the rules, however, is debatable.

The Final Rule, which will take effect on December 1, 2016, extends the scope of the FLSA to cover an additional “4.2 million workers across the country.” The DOL accomplished this by making it even more difficult for employers to classify their employees as exempt.

This article examines the recent updates to the FLSA and provides employers with practical guidance for compliance with the Act moving forward.

### **KEY PROVISIONS TO THE 2016 UPDATES**

The Final Rule focuses primarily on updating the salary and compensation levels needed for Executive, Administrative and Professional (“EAP”) employees.

*Specifically, the Final Rule:*

Sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South).

This means an employee can never be considered “exempt” from the FLSA unless they make \$913 per week or \$47,476 annually. The current salary threshold amount is \$455 per week or \$23,660 annually.

Sets the total annual compensation requirement for highly compensated employees (“HCE”) subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally.

This means that for an employee to be subjected to the minimal duties test associated with the EAP exemptions, they must make at least \$134,004 annually. The current HCE salary threshold amount is \$100,000.

Establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles.

Amends the salary basis test to allow employers to use non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard.

These bonus payments must be paid at least quarterly to be included (though it's important to note that this updated rule does not change that bonuses must be included in an employee's regular rate for purposes of calculating overtime).

## 5 TIPS FOR EMPLOYER COMPLIANCE

### 1. Review Work Classifications

Before the new regulations take effect, employers need to review work classifications and decide what to do with employees who are close to the new salary threshold.

To do that, employers should:

- Be aware of the impending changes and understand their options.
- Determine exactly how much time employees spend working before adjusting any exempt employees' classification.
- Examine ways to limit costs of overtime obligations, such as limiting the number of hours employees work or hiring additional workers.
- Assess employees' workloads and look at the big picture to determine whether staff members are effectively managed.

### 2. Train Employees to Track Hours Worked

The ultimate responsibility for maintaining accurate records falls on employers. Consequently, employers must ensure employees and managers are trained on keeping a timesheet or otherwise accurately tracking hours worked.

### 3. Rethink Employment Policies

Employees who were previously exempt may be accustomed to working outside of normal work hours. Employers should consider whether they want employees to continue this practice and, if so, formulate a method by which employees will accurately track their "off-duty" hours.

### 4. Consider How to Most Effectively Break the Reclassification News to Employees

Many employees view earning a salary as a rite of passage of sorts. This perception makes it important for employers to evaluate the best way to break the reclassification news to employees.

With this in mind, employers should:

- Be clear that the change is required by law.
- Remember that within the workplace, employers who do not clearly communicate any changes risk a situation where rumors begin to circulate.
- Communicate the financial impact and that it will not be negative. Employees will assume raises and bonuses will be limited. If that is not the plan, employees should be reassured of that.
- Be open to answering questions from staff.

### 5. Consider a Compliance Audit

Experts agree that now is the time for employers to either hire an outside expert or assign in-house personnel to take a wider look at the company's wage practices and ensure compliance.

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