

Coping With the New Overtime Rules Or Waking Up From a Nightmare

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Agenda

- History of rules.
- Exemptions.
- Triannual update of threshold amount.
- Makeup rule.
- What's going to happen to the rules—
 - Because of court decision.
 - Because of Trump's election.
- Strategies for coping with new rules.
- Steps if you change employees from exempt to nonexempt.



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History of New Rules

- President directed the Secretary of Labor to revise the rules in March 2013.
- Proposed rules were announced in July 2015.
- Final rules issued June 13, 2016.
- Rules were to take effect on December 1, 2016.
- On November 22, 2016, U.S. District Court in Texas issued nation-wide injunction.
- Rules are adopted pursuant to the Fair Labor Standards Act (FLSA).



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Basics of the FLSA

- Sets the minimum wage (now at \$7.25 an hour).
- Establishes 40-hour work week.
- Requires employers to pay overtime (time and a half) for any hours over 40 worked during a 7-day period.
- By regulation, U.S. Dept. of Labor (DOL) can **exempt** certain employees from this requirement.



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Categories of Exemptions

- Executives.
- Administrative personnel.
- Professionals.
- Highly compensated employees.
- Outside sales representatives.



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Myths of Exemptions

- Job title is basis for being exempt.
- Paying an employee a salary makes employee exempt.
- There are different rules for exemptions for non-profits than for businesses.
 - Note: there **are** different rules for **volunteering** for non-profits.



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What determines exemption?

- Payment on a “salary basis.”
- Payment of threshold minimum salary.
 - Currently \$455 a week
- Compliance with the “duties tests.”
- **One-sentence summary of new overtime rules:**
 - Changes threshold minimum salary amount for exempt workers to \$913 a week effective December 1, 2016.



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Rationale for Change

	Non-Exempt	Exempt
Hourly rate for 40 hours	\$11.35 an hour	\$11.40 an hour
Gross Pay for 40 hours	\$454	\$456
Gross pay for 60 hours	\$794.60	\$456
Effective hourly rate (gross pay ÷ 60 hours)	\$13.25 an hour	\$7.60 an hour

Threshold amount has been updated only twice in past 40 years:

- In 1975, set at \$250 a week.
- In 2004, set at \$455 a week.



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Percentage of Workers Below Threshold

- Currently, only **12%** of all employees are below current threshold (\$455).
 - Another estimate is that guaranteed overtime rights have fallen to only **18%** of **full-time** salaried workers.
- In 2004, that number was 18%.
- In 1975, that number was 65%.



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Applying tests with NEW amount



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Exemption for Executives

Executives will be exempt if they are (a) paid \$913 or more a week and (b) meet **both** of the following requirements:

1. Direct the work of at least two employees.
2. Have the authority to hire or fire the supervised employees or have significant influence over whether the supervised employees are hired or fired.



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Exemption for Administrative

Administrative employees will be exempt if they are (a) paid \$913 or more a week and (b) meet **both** of the following requirements:

1. Have the primary duty of performing office or non-manual work related to the management or general business operations of an employer or the employer's customers.
2. Exercise discretion and independent judgment in matters of significance.



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Exemptions for Professionals

Professionals will be exempt if they are (a) paid \$913 or more a week and (b) meet **at least one** of following requirements:

1. Their work requires knowledge of an advanced field or learning customarily acquired by prolonged, specialized intellectual instruction and study.
2. They work in a recognized field of artistic endeavor that requires originality and creativity.
3. They work as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.



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Definitely professionals

- Lawyers.
- Doctors.
- Accountants.
- Engineers.
- Architects.
- Pharmacists.
- Clergy.



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Some that might be considered “questionable,” but *are* professionals

- Medical technologists (if certified or registered).
- Nurses.
- Dental hygienists.
- Physician assistants.
- Chefs.
- Athletic trainers.
- Funeral directors or embalmers.



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Definitely not professionals

- Accounting clerks and bookkeepers.
- Paralegals.
- Cooks.



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Special case of computer workers

- They have TWO threshold amounts:
 - \$913 a week OR
 - \$27.63 an hour minimum (\$1,105.20 a week).
- Tests are more complicated.
 - Computer systems analyst.
 - Computer programmer.
 - Software engineer.
 - Similarly skilled worker.



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Computer worker primary duties

1. Application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.
2. Design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications.
3. Design, documentation, testing, creation, or modification of computer programs related to machine operating systems.
4. Combination of duties described in 1, 2, and 3 and the performance requires the same level of skills.



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Computer workers never exempt

- Employees who manufacture or repair computer hardware.
- Employees who merely work with computers.
- Help-desk personnel.



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Special case of teachers

- Teachers **are** professionals, but—
- There is **no threshold amount** to qualify for overtime.
- School administrators must have salary at least equal to salary of beginning teacher.



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Creative Professionals

- **Creative professionals** will be exempt if they are (a) paid \$913 or more a week and (b) their job requires one of the following:
 - Invention.
 - Imagination.
 - Originality.
 - Talent
- In recognized field of artistic or creative endeavor.



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Typical creative professionals

- Authors, screenwriters, playwrights.
- More “responsible” advertising writers.
- Actors.
- Musicians.
- Composers.
- Conductors.
- Painters (who are not limited too much).
- Cartoonists (who are not limited too much).



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Not creative professionals

- Copyist.
- Animator of motion-picture cartoons.
- Retoucher of photographs.
- Artists and cartoonists who are restricted in what they draw or paint (closely supervised).



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Iffy category: Journalists

- Reporters of facts are generally **not** creative.
 - Collect, organize, and record information.
 - Subject to substantial control by employer.
- Journalists who contribute a unique interpretation or analysis to a news product **are** creative (editorials and opinion pieces).
- On-the-air journalists **performing** on radio, television, or in a film documentary **are** creative.



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“Trickiness” of Professional Exemption

- **Case study:** *Perez v. Mortgage Bankers Association* (decided by U.S. Supreme Court in 2015).
- WHD = Wage and Hour Division of DOL.



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- **1999:** The WHD issued an opinion letter indicating that mortgage-loan officers were **exempt**.
- **2001:** The WHD issued a letter similar to the one issued in 1999.
- **2004:** The WHD issued a new rule that said financial services employees whose primary function was selling financial products were **non-exempt** employees.
- Mortgage Bankers Association (MBA) requested a new opinion letter about whether mortgage-loan officers were exempt.



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- **2006:** The WHD issued an opinion letter indicating that mortgage-loan officers **were exempt** under the new regulation.
- **2010:** The WHD issued a new opinion letter reversing its 2006 decision and saying that mortgage-loan officers were **not exempt** under the 2004 regulation.
- **2010:** MBA filed suit in the U.S. District Court for the District of Columbia, attacking the 2010 letter. Three mortgage-loan officers intervened in the case.



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- **2012:** The district court agreed with the 2010 letter, affirming that mortgage-loan officers were **not exempt**.
- **2013:** U.S. Circuit Court of Appeals for D.C. Circuit **reversed** the district court's decision.
- **2014:** But U.S. Supreme Court **affirmed** the district court's decision.
- **Bottom line:** Mortgage-loan officers aren't exempt (must be paid overtime).



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Another tricky area

- To be exempt, an employee's **primary duties** must be exempt.
- **General rule:** If employee spends 50% or more of time doing exempt duties, then employee **is** exempt.
- But if under 50%, employee may still be exempt.



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Example: Assistant Manager at Dollar Tree

- Primary duties are supervising and directing work of others, ordering merchandise, managing budget, and authorizing payment of bills.
- But may spend 55% of time running cash register.
- Manager paid \$913 a week. Employees supervised are paid \$10 an hour.
- Will be exempt despite not working 50% of time doing exempt duties.



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Another Example: Assistant Manager at Shell Station

- Has job title of assistant manager.
- Occasionally supervises and directs employees when part-time assistants are available, but—
 - Spends 75% of time running cash register.
 - Paid 25 cents an hour more than employees supervised.
- Not exempt.



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Exemptions for highly compensated employees (HCEs)

Highly compensated employees will be exempt if they meet **all three** of these requirements:

1. Are paid at least \$913 a week.
2. Are paid at least \$134,000 for the whole year.
3. Regularly meet **at least one** of the tests of an exempt executive, administrative, or professional employee.



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Certain employees are NEVER HCEs

- HCEs must perform office or nonmanual work.
- Regardless of how much paid, HCE exemption doesn't apply to—
 - Non-management, production-line employees.
 - Employees who perform work involving repetitive operations with hands, physical skill, and energy.



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Definitely not exempt HCEs

- Carpenters.
- Electricians.
- Mechanics.
- Plumbers.
- Iron workers.
- Craftsmen.
- Operating engineers.
- Longshoremen.
- Construction workers.
- Laborers.



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Outside sales representatives (OSRs)

- No change to these rules.
- There is no threshold amount for this exemption.
- To be exempt, OSRs must—
 - Have as primary duty to make sales.
 - Obtain orders for goods or contracts for services.
 - Work away from employer's place of business.
- Sales can't be made by telephone, mail, or the Internet (except incidentally).



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Threshold amount updated

- Will now be done every 3 years.
- This is a completely new rule.
- So every 3 years, employers have to re-evaluate how they are going to have to pay employees.
- WHD will just announce new threshold amount, not issue a new rule about amount.
 - Similar to what they do with car mileage amount each year.



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NEW RULE: Employers can “make up” threshold amount

- Suppose part of what makes up \$913 weekly minimum is based on nondiscretionary bonuses, incentives, or commissions.
- But minimum is not met by these bonuses, incentives, or commissions.
- Employer can “make up” the deficiency to keep the employee exempt.



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Requirements of makeup

- Must be done on a quarterly basis.
- So minimum quarterly amount must be $\$913 \times 13$ (\$11,869).
- Payment of makeup amount must be made by next payday after preceding quarter.
- Makeup payment for past quarter doesn't apply to payments for current quarter.
- Makeup amounts are limited to 10%. (\$1,186 in this example.)



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Example: Fast-Food Restaurant

- Manager is paid a base salary of \$500 a week.
- Pay period ends on Fridays.
- Additional amounts are paid if store sales goals are met:
 - \$413 if sales exceed \$10,000 a week.
 - \$1,000 if sales exceed \$15,000 a week.
 - \$1,600 if sales exceed \$20,000 a week.



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Example (continued)

- Sales are between \$10,000 and \$15,000 for 12 of 13 weeks in a quarter.
- For 1 week, sales are only \$9,000.
- So for 1 week, manager is paid only \$500.
- That means manager will not be paid minimum quarterly minimum of \$11,869.



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Example (continued)

- Last payday of first quarter is April 1, 2016.
- So employer pays \$413 on or before April 8 so that manager continues to be exempt.
- This \$413 applies to the previous quarter and can't be used to calculate the threshold amount for the second quarter.
- Makeup amounts for quarter (in our example) can't exceed \$1,186.



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What's Going to Happen To the New Rules?



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Because of the court decision

- Rules are enjoined.
- Could change while I'm making this presentation to you.
- Congress is already considering putting rule into effect, but phased in, not one big increase.
- Same strategies apply to a phased-in approach as apply to one big increase.



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What Does the Future Hold?

- Intriguing quandary for Obama administration: **file an appeal?**
 - DOL website says DOL “strongly disagrees” with the decision and is “considering all . . . legal options.”
 - Does **not** say appeal is forthcoming.
- Signature piece of Obama’s regulatory policy but also an executive power grab.
- If unsuccessful, appeal could limit power of executive in regulatory realm, potentially jeopardizing other Obama initiatives, including—
 - Financial and retirement advise rules, OSHA regulations, background checks, FDA labeling rules, E-cigarettes, federal contractor requirements, education rules, energy efficiency.
- Trump could refuse to prosecute appeal.



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Because of Trump's election

1. Congressional "veto."
2. Current lame-duck Congress can pass law.
3. U.S. Department of Labor (DOL) can postpone rules.
4. DOL could decide not to enforce rules.
5. After Trump takes office, DOL can issue new rule.
6. After Trump takes office, new Congress can pass law.
7. Trump could choose to drop any appeal.



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Fate 1: Congressional "veto"

- Both houses of current lame-duck Congress can pass a resolution to stop new rules.
- Must act within 60 days of day final rule was announced (June 13, 2016).
- But involves a complex system of counting days.
- Unlikely with current lame-duck Congress:
 - House has passed a bill, but no traction in Senate.
 - Only a few days left for the 60-day deadline.



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Fate 2: Congress can pass law

- This applies to current lame-duck Congress.
- House has already passed a bill.
 - Threshold amount would eventually be the same, but would be phased-in over several years.
- Unlikely because—
 - Obama would veto.
 - Already no traction in Senate.



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Fate 3: Postpone

- DOL could postpone the effective date of new rules.
- Unlikely because current administration is committed to new rules.



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Fate 4: Not enforce

- DOL could refuse to enforce the new rules.
- But dangerous for employers because employees could sue for back pay.



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Fate 5: New “new” rule

- Would be promulgated after Trump takes office.
- Under ideal conditions, it would take at least 41 days after Trump takes office before repeal or replacement rules could probably be in place.
- If Texas district court’s injunction is lifted, employees will have almost 3 months in which to enjoy their new overtime payments.
- Makes changes politically difficult.



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Fate 6: Congress can pass new law

- Remember we're speaking of the new Congress.
- Problematic because Republicans don't have enough votes to stop debate in Senate.
 - 51 to 52 Republican senators in new Senate.
 - 60 senators needed for cloture (stopping debate to vote on bill).
- If they get enough votes, could pass quickly after Trump takes office.



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Fate 7: Trump drops appeal

- On January 20, 2016, Donald Trump will be in charge of the Department of Justice.
- The Department of Justice is the “law firm” of the United States. The Department of Justice could be ordered to cease prosecution of any appeal, and it would be dismissed by the courts as a result.
- Injunction would stand.



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Ultimate Fate: *What do I do?*

- Depends more on presidential decision whether to appeal than on Congressional action at this particular stage.
- Right now, you don't have to make any changes. If you've already adapted to the new rules, you could revert to the old with no liability.
- Regardless of what you do in the short term, there is still a risk for employers having to comply with the new rules—or some form of new rules—in the long term.
- **Therefore, you need to be prepared.**



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Strategies for Coping With the New Rules



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Initial observations

- Following analysis depends on whether an appeal is filed and whether the Fifth Circuit overrules the decision of the Texas district court.
- For purposes of explanation, we'll **assume**—
 - Obama administration appeals.
 - Fifth Circuit **does** overrule the injunction.
 - Congress does **not** act before 60-day deadline.
 - Law becomes effective December 1.



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Fundamental observation

- You do **not** have to give currently exempt employees a raise to \$913 a week **unless** you want them to continue to be **exempt**.
- **But** if injunction is overturned, on December 1, 2016, you **must** start paying currently exempt employees overtime if they—
 - Work over 40 hours a week.
 - Are paid less than \$913 a week.



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Strategy 1: Eliminate overtime

- Don't let currently exempt employees work overtime.
- Hire additional (part-time) employees at the lower rate.



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Strategy 2: Reduce overtime

- Suppose restaurant manager currently makes \$455 a week and works an average of 20 hours a week in overtime.
- If current hourly rate is kept, she will have to be paid \$800 a week if she works 20 hours of overtime.
 - $40 \text{ hours} \times \$11.375 = \$455.$
 - $20 \text{ hours} \times \$17.25 = \$345.$
- That's still less than \$913 a week.



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Reduce overtime (continued)

- But suppose same manager is asked to limit overtime to no more than 10 hours a week.
- That works out to be \$627.50 a week.
 - 40 hours \times \$11.375 = \$455.
 - 10 hours \times \$17.25 = \$172.50.



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Strategy 3: Just pay overtime

- Assume we're still talking about manager who currently makes \$455 a week for 40 hours.
- To reach \$913 a week, manager will have to work almost 27 hours of overtime a week.
 - 40 hours \times \$11.375 = \$455.
 - 27 hours \times \$17.25 = \$465.75.
 - Total paycheck = \$920.75.



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Strategy 4: Reduce hourly rate

- Assume we're still talking about same manager who currently makes \$455 a week for 40 hours with 20 hours of overtime.
- $\$455 \div 40 = \11.38 an hour.
- Reduce hourly rate to \$7.25 (minimum wage).
 - 40 hours \times \$7.25 = \$290.
 - 20 hours \times \$10.875 = \$217.50.
 - Total paycheck = \$507.50.



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Strategy 5: Restructure pay

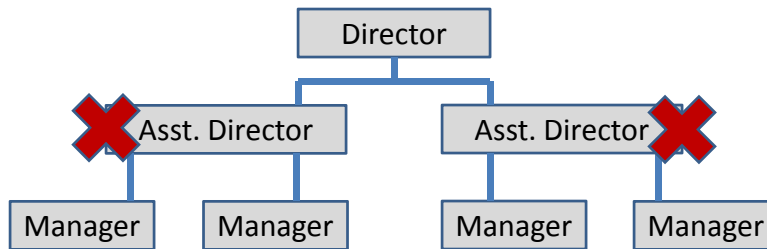
- With supervisors and managers, consider replacing some salary pay with incentive pay.
- Remember that 10% of the threshold amount can be “made up” with incentive pay.
- This means that base pay must be carefully calculated to motivate and allow for potential makeup amounts.
- Change benefits employees are eligible for.



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Strategy 6: Reorganize

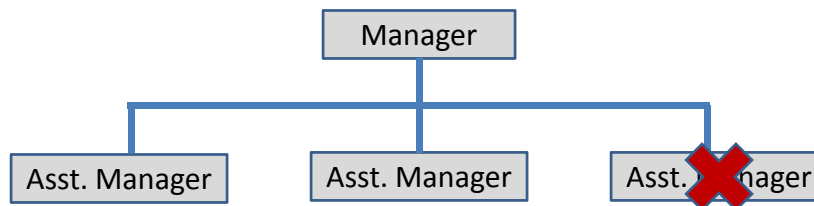
- Consider reducing “levels” of management.
 - If there are three levels of management, reduce to two.



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Strategy 6: Reorganize (continued)

- Consider reducing numbers of management.
 - If business employees one manager and three assistant managers, eliminating one assistant manager may offset increased costs.



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Strategy 7: Variable workweek

- **Warning:** This may be a dangerous approach.
- Can only be used if an employee sometimes works under 40 hours a week and sometimes works more than 40 hours a week.
- Variability must be “consistent.” In other words, can’t be used with employee who works overtime every once in a while.
- Actually makes pay calculations more complex.



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Requirements of variable workweek

- Employee must be paid a salary.
- Full weekly salary must be paid even when employee works significantly less than 40 hours a week.
- Salary must be based on the greatest number of hours worked in week.
- Employee must be paid “half time” for any work over 40 hours.



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Steps to take before new rules take effect

1. Identify currently exempt employees below threshold of \$913 a week (\$47,476 a year).
2. Determine patterns of overtime for these employees.
 - May involve informal estimates by employees.



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Steps to take (continued)

3. Make sure that these employees meet duties tests.
 - Watch out for borderline cases.
 - May be a good opportunity to redraft job descriptions.
4. For each employee or class of employees, run the numbers and consider a strategy.



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Example 1

- Restaurant manager currently makes \$800 a week and works an average of 20 hours a week in overtime.
- Typical new weekly paycheck will be \$1,400.
 - 40 hours × \$20 an hour = \$800
 - 20 hours overtime × \$30 an hour = \$600.
- Makes sense to give pay raise to \$913 a week so that manager remains exempt.



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Example 2

- If same manager averages less than 3.7 hours of overtime a week, then it would make sense to keep current salary.
 - 40 hours × \$20 an hour = \$800
 - 3.7 hours × \$30 an hour = \$111.
 - Total weekly pay = \$911.



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Steps to take (continued)

5. Before implementing changes, consider effect on morale and productivity.
 - Careful, sensitive communication of changes is important.
 - Remember employees can still be paid a salary, but classified as non-exempt. (Overtime still has to be paid, though.)



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Steps to take (continued)

6. Consider other things that may have to be done.
 - May require **new rules** or personnel procedures for some employees.
 - May require **training** of employees switching from exempt to non-exempt.



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If You Change Employees From Exempt to Non-Exempt



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Formerly exempt employees must keep time

- Time clock, computer-based system, or even paper system will suffice.
- Formerly exempt employees may have difficulty adapting to signing in and out when they—
 - Go to lunch.
 - Take some time off to get a haircut.



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Overtime **must** be paid

- Even when boss tells employees not to work overtime, but they work overtime anyway.
- **Employer can't have a rule like this:** "If you work overtime without approval, you don't get paid."
- But unapproved overtime can be a basis for disciplinary action.



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Employees can't be told to work "off the clock"

- Violates FLSA.
- Complaining employee will get paid overtime.
- Government will get paid a fine.



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No such thing as comp time

- Suppose hourly employee works on big project for 60 hours for 1 week during January.
- Employee must be paid for that 20 hours of overtime for that week during January.
- Employee can't just take off 20 hours the next week following the 60-hour workweek.
- Employee can't be given an extra 20 hours of vacation to be used at a later date.



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Workweek is based on 7-day period

- Employer can choose the continuous 168-hour period:
 - Monday through Sunday.
 - Sunday through Saturday.
 - 9/80 schedule (workweek ends mid-day Friday)
- If employee works late during that week, hours can be moved to other days **in that week**.
 - Employee who works 13 hours on Monday can take off 5 hours early on Friday.



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Hourly approach opens Pandora's box

- **Pressuring employees** to volunteer for community projects: This “volunteered” time may actually be found to be overtime.
- **Off-hours work**—as when employees answer questions by telephone or email when they are otherwise “off duty.”
- **Travel time**—to and from out-of-town training seminars, for example.
- **Break periods.**
- **Donning and doffing** of special clothing.



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Summary

- The new rules are currently enjoined and will **not** go into effect on December 1, 2016.
- Injunction can be lifted at anytime and whether new rules apply will be depend on court's decision.
- Meanwhile, have currently exempt employees making less than \$913 a week to keep up with their time just in case.
- Otherwise, be prepared to implement rules.
- Some form of the rule will probably eventually go into effect.
- Use time to re-evaluate currently exempt employees.



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If rules go into effect—

- The EAP trigger amount for exempting employees will increase from \$455 a week to \$913 a week (from \$23,600 to \$47,476 annually).
- Up to 10% of the EAP trigger amount can be calculated by including nondiscretionary bonuses, incentive payments, and commissions.
- The trigger amount for qualifying for the highly compensated employee (HCE) exemption will increase from \$100,000 to \$134,000 annually.



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Summary (continued)

- The EAP trigger amount and the HCE trigger amount will be adjusted every 3 years. The first adjustment will be on January 1, 2020.
- No changes were made to the duties tests for the EAP exemptions.
- No changes were made to the federal minimum wage law nor the 40-hour trigger for overtime payments.



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**Download a side-by-side
version of old and new rules:**

<http://www.thirdshiftblog.com/entry/dept-of-labor-issues-new-overtime-regulations>



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Questions?

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