

# The DOL's New Rules for FLSA Classification: What a Nonprofit Needs to Know

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## Agenda

- Overview of new FLSA “salary test” regulations
- The FLSA and common white-collar exemptions
- Independent contractors & misclassification
- Managing nonexempt employees’ entitlement to overtime
- Common wage and hour pitfalls
- Practical implications of the new regulations

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## Prevalence of Wage & Hour Lawsuits

- Number of wage & hour suits has nearly doubled over past 10 years
- Successful suits have resulted in large payouts
  - Class actions
  - Double or treble damages
  - Attorneys' fees
- Media coverage of large settlements
- Jury bias against employers
- Wage & hour compliance is difficult

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## Overview of the FLSA

- Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and child labor standards
  - Federal minimum wage of \$7.25 an hour
  - Non-exempt employees entitled to overtime of 1.5x regular rate for all work over 40 hours in a workweek
  - Certain “white-collar” exemptions
- State laws may require a higher minimum wage (e.g., DC, Maryland) and/or additional overtime protections (e.g., California)
- Employees must generally satisfy a **duties test** *and* a **salary test** to be exempt

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## Salary Test

- Current requirements
  - Paid \$455 per week (\$23,660 per year)
  - Paid on salary basis
  - No reductions due to quantity or quality of work
  - Certain limited salary deductions permissible (e.g., FMLA leave)
  - Ready, willing, and able to work
- “Highly Compensated Employees”
  - Paid \$100,000+ per year
  - Modified duties test

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## Changes to the FLSA Salary Test

- DOL released revised overtime regulations on September 24, 2019
- Effective **January 1, 2020**:
  - Paid \$684 per week (\$35,568 per year)
  - Highly Compensated Employees - \$107,432 per year
  - Nondiscretionary bonuses and incentive payments (including commissions) now count toward annual salary - **up to 10%**
    - Must be made annually or more frequently to qualify

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## Changes to the FLSA Salary Test (cont.)

- Employees who do not meet the new salary test may not be classified as “exempt”
  - DOL estimates approx. 1.3 million “exempt” employees will become “nonexempt” under new rule
- No changes to the duties tests

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## Duties Test

- Job position’s “primary duty”
- Factors considered include
  - Relative importance of exempt duties
  - Amount of time spent on exempt duties
  - Freedom from supervision
  - Wages paid to other employees for nonexempt work

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## Most Common Exemptions

- Executive
- Administrative
- Professional Exemptions
  - Learned
  - Creative
- Computer Employee
- Highly Compensated Employees

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## Executive Exemption

- Paid on **salary basis** - min. \$455/wk (\$684/wk on 1/1/20)
- **Primary duty**
  - Managing the enterprise (or department/subdivision);
  - Regularly directs work of 2 or more employees; and
  - Authority to hire or fire (or recommendations given weight)

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## Administrative Exemption

- Paid on **salary basis** - min. \$455/wk (\$684/wk on 1/1/20)
- **Primary duty**
  - Performance of office or non-manual work directly related to management or general business operations, or employer's customers; and
  - Exercise of discretion and independent judgment with respect to matters of significance

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## Learned Professional Exemption

- Paid on **salary basis** - min. \$455/wk (\$684/wk on 1/1/20)
- **Primary duty**
  - Performance of work requiring advanced knowledge
    - Work that is predominantly intellectual in character and requires consistent exercise of discretion and judgment
  - Advanced knowledge must be in a field of science or learning; and
    - Examples: medicine, accounting, engineering, teaching, law, architecture, etc.
  - Advanced knowledge customarily acquired by prolonged course of specialized intellectual instruction

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## Creative Professional Exemption

- Paid on **salary basis** - min. \$455/wk (\$684/wk on 1/1/20)
- **Primary duty**
  - Performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor
  - Examples: actors, musicians, composers, writers, artists, etc.

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## Computer Employee Exemption

- Can be paid on salary basis or hourly
  - Min. \$455/wk (\$684/wk on 1/1/20) or
  - \$27.63/hour (currently and after 1/1/20)
- **Primary duty**
  - Application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
  - 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
  - Design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
  - Some combination of the above

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## Highly Compensated Employees

- Paid at least \$100,000 per year (\$107,432/yr on 1/1/20)
  - At least \$455 (\$684 on 1/1/20) per week
- **Primary duty**
  - Office or non-manual work; and
  - Customarily and regularly perform **at least one** of the duties of an exempt executive, administrative, or professional employee
- Example: Executive making \$150,000/yr who regularly directs 2 employees meets the Highly Compensated Employee test—even if does not meet the other Executive Exemption requirements

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## Exemptions Do NOT Apply to:

- “Blue collar” workers who perform work involving repetitive operations with their hands, physical skill, and energy
- Non-management employees in production, maintenance, construction, and similar occupations (carpenters, electricians, mechanics, etc.)
- Police officers, firefighters, paramedics, correctional officers, rescue workers, and other similar employees
- Exemption does not apply based upon job title alone, but requires a case-by-case assessment of employee’s job duties

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## Issues Presented by New Regulations

- New rules disproportionately affect smaller businesses and nonprofits
- Employees currently classified as exempt will become nonexempt
  - Part-time employees who pass duties test but not new salary test
  - Eligibility for overtime
  - Need to track hours
- Changes in classification might affect employee benefits

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## Steps to Prepare for the New Regulations

- Evaluate current employee classifications and job descriptions to identify employee affected classifications
- Consider raising salaries to maintain “exempt” classifications
- Re-classify employees as nonexempt (overtime eligible)
- If re-classifying as nonexempt, determine how best to balance compliance, financial consequences, and employee relations issues
  - Hourly rate + overtime
  - Fixed salary + overtime

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## Steps to Prepare for the New Regulations (cont.)

- Manage employee overtime
  - Require prior authorization
  - Impose uniform timekeeping policy
  - Clock in/out
  - Lunch and breaks
- Train management
  - No “off the clock” work – EVER
  - Review of timesheets
- Uniform discipline for overtime violations (but must still be paid)
- Impose a non-retaliation policy for reporting violations

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## Steps to Prepare for the New Regulations (cont.)

- Adjust “workweek”
- Restructure duties/assignments
- Review policies relevant to nonexempt employees
  - Overtime, tracking & recording time, telework, paid leave
- Consider changes to job descriptions and staffing
  - Use of interns, volunteers, and contractors
- Communicate any changes to employees in writing
  - New compensation structure
  - New classifications
  - New job descriptions

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## Avoiding Common Wage and Hour Pitfalls

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## Avoiding Common Misconceptions

- Not all salaried employees are exempt
- Some exempt employees can be paid hourly
- Do not assume “supervisors” are exempt
- Most “administrative” positions do not meet the “independent judgment” requirement
  - Merely following procedures is insufficient
  - Major decisions must be free from immediate direction/supervision
- Not all employees who work with computers qualify for the computer employee exemption (e.g., help desk)
- Employers must pay an employee for overtime, even if unauthorized

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## Reclassifying Employees as Independent Contractors

- Beware of misclassification
- Most workers are properly classified as employees, not contractors
- Various tests for classifying “employees” – some common factors:
  - Control and supervision over how work is accomplished
  - Permanency of working relationship
  - Ability of contractor to work for other companies
  - Work is not an integral part of organization’s business
  - Ability of contractor to realize a profit/incur a loss
- Desire or intention of parties is often irrelevant to classification

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## Consequences of Misclassification

- Tax liability for money that should have been withheld
- Employer contributions to social security and unemployment taxes
- Overtime and other wage claim liability
- State unemployment insurance payments
- Workers’ compensation insurance premiums (and liability)
- Employee entitlement to employee benefits
- Liability under other employment-related laws (discrimination, harassment, leave laws, tort claims, etc.)

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## Volunteers

- May volunteer for religious, charitable, civic, humanitarian, or similar nonprofit organizations as a public service
  - Bona fide volunteers not considered employees under FLSA
  - Typically cannot perform commercial activities run by a nonprofit
- Employee may not “volunteer” for the same organization, performing the same work

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## Importance of Job Descriptions

- Maintain written job descriptions to document exempt duties
- Ensure job descriptions are accurate
  - Classification is based on actual duties performed, not titles or descriptions
  - Primary and essential duties are identified
- Conduct regular audits of job descriptions

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## “Comp Time”

- **Government employers** may compensate employees for overtime work with paid time off (comp time) in lieu of monetary payment if certain conditions are met
- No equivalent “comp time” law for employees in private sector
  - Private employers may give nonexempt employees time off from work to avoid exceeding 40 hours in a single workweek
- Rewarding exempt employees with additional leave may be acceptable in certain circumstances but must be done with care, to avoid destroying employee’s “exempt” status

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**Q & A**

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**Thank You!**

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