



# COMPLIANCE BULLETIN

## FAQs on the New White Collar Overtime Exemption Rule

### HIGHLIGHTS

- The final rule increases the standard salary level for the EAP exemptions to \$684 per week (\$35,568 per year).
- The final rule increases the HCE salary level to \$107,432 per year.
- The final rule permits using nondiscretionary bonuses to satisfy up to 10 percent of an employee's salary level.

### IMPORTANT DATES

#### September 24, 2019

Final 2019 overtime rule is announced.

#### January 1, 2020

Final overtime rule becomes effective.

### OVERVIEW

On Sept. 24, 2019, the U.S. Department of Labor (DOL) [announced](#) a new [final rule](#) that updates the salary thresholds that some individuals must meet in order to qualify for a minimum wage and overtime exemption under the federal Fair Labor Standards Act (FLSA). The final rule becomes effective on **Jan. 1, 2020**.

The final rule affects the exemptions for executive, administrative and professional (EAP) employees, highly compensated employees (HCEs), employees in the motion picture industry and individuals who work in various U.S. territories.

### ADDITIONAL INFORMATION

The DOL has issued Frequently Asked Questions (FAQs) to provide additional information for employers and employees on the final rule.

The DOL's FAQs are included in this Compliance Bulletin. They can also be accessed on the DOL's [website](#). Employers should become familiar with the rule and accompanying information as they prepare to comply with the adjusted salary levels.

### Provided By:

Connor & Gallagher OneSource



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## General Questions about the New Overtime Rule

### ***Q. How many workers will become overtime-eligible as a result of this Final Rule?***

An estimated 1.3 million workers will become newly entitled to overtime protection because of the increase in the salary level.

### ***Q. What will the “Overtime” Final Rule do?***

The final rule updates the earnings thresholds necessary to exempt executive, administrative, or professional employees from the FLSA’s minimum wage and overtime pay requirements. They are exempt if they are employed in a bona fide [executive, administrative, or professional](#) (EAP) capacity, as those terms are defined in the Department of Labor’s regulations at [29 CFR part 541](#).

### ***Q. What is “overtime”?***

Unless specifically exempted, employees covered by the FLSA must receive pay for hours worked in excess of 40 in a workweek at a rate not less than one and one-half their regular rate of pay. This rate is referred to as “overtime” pay.

### ***Q. What determines if an employee falls within one of the exemptions?***

To qualify for an exemption in this rule an employee generally must:

1. Be salaried, meaning that they are paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the “salary basis test”);
2. Be paid at least a specified weekly salary level, which is \$684 per week (the equivalent of \$35,568 annually for a full-year worker) under this final rule (the “salary level test”); and
3. Primarily perform executive, administrative, or professional duties, as defined in the Department’s regulations (the “duties test”).

Certain employees are not subject to either the salary basis or salary level tests (for example, doctors and lawyers). The Department’s regulations also provide an exemption for certain highly compensated employees (HCEs) who earn above a higher total annual compensation level (\$107,432 under this final rule) and satisfy a minimal duties test.

### ***Q. Why is the Department revising its overtime regulations?***

For the first time in 15 years, America’s workers will have an update to overtime regulations that will put overtime pay into the pockets of more than a million working Americans. This rule brings a common sense approach that offers consistency and certainty for employers as well as clarity and prosperity for American workers.

The Department is currently enforcing the earnings thresholds set in 2004: \$455 per week standard salary level and \$100,000 total annual compensation threshold for HCEs. The increases to the salary thresholds are

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long overdue in light of wage and salary growth since 2004. Nearly every person who commented on the Department's 2017 Request for Information, participated at listening sessions in 2018 regarding the regulations, or commented on the Notice of Proposed Rulemaking agreed that the thresholds needed to be updated for this reason. While the Department increased the salary and HCE levels in a final rule in 2016, that rule was declared invalid by the United States District Court for the Eastern District of Texas, and an appeal of that decision to the United States Court of Appeals for the Fifth Circuit was held in abeyance pending the completion of the Department's rulemaking. The Department has been enforcing the part 541 regulations in effect on November 30, 2016, including the \$455 per week standard salary level set in the 2004 final rule.

## ***Q. What are the significant changes?***

In the final rule, the Department:

- ✓ Raises the "standard salary level" from the currently enforced level of \$455 to \$684 per week (equivalent to \$35,568 per year for a full-year worker);
- ✓ Raises the total annual compensation level for "highly compensated employees (HCEs)" from the currently-enforced level of \$100,000 to \$107,432 per year;
- ✓ Allows employers to use nondiscretionary bonuses and incentive payments (including commissions) that are paid at least annually to satisfy up to 10 percent of the standard salary level, in recognition of evolving pay practices; and
- ✓ Revises the special salary levels for workers in U.S. territories and in the motion picture industry.

## ***Q. What numbers do I need to know from this Final Rule?***

The Final Rule by the Numbers:

- ✓ **\$684 per week** – salary requirement – up from the currently enforced level of \$455/week (level is equivalent to \$35,568 per year)
- ✓ **\$107,432** – total HCE compensation threshold – up from the currently enforced level of \$100,000 annually
- ✓ **10%** – amount of the standard salary level the final rule allows employers to cover with nondiscretionary bonuses and incentive payments that are paid annually or more frequently
- ✓ **1.3 million** – estimated number of currently exempt workers who the Department estimates will, without intervening action by their employers, become eligible for overtime
- ✓ **\$298.8 million** – estimated amount of extra pay workers will receive each year
- ✓ **\$455/week** – special salary level for workers in Puerto Rico, U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands
- ✓ **\$380/week** – special salary level for workers in American Samoa
- ✓ **\$1,043/week** – "base rate" threshold for employees in the motion picture industry

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## ***Q. How does the Final Rule differ from the NPRM?***

In the NPRM, the Department proposed to inflate the salary level to reflect anticipated wage growth to January 2020, the final rule's estimated effective date. In the final rule, instead of projecting the salary level to January 2020, the Department has set the salary level using pooled CPS data through June 2019—the most recent data available at the time the Department drafted the final rule. Relying on recent actual wage data is consistent with the Department's approach in prior rulemakings, and results in a standard salary level of \$684 per week (\$35,568 for a full-year worker).

In addition, the Department is setting the HCE total annual compensation threshold equal to the 80th percentile of weekly earnings of full-time salaried workers nationally (as opposed to the 90th percentile as set forth in the NPRM). Additionally, to be consistent with the methodology for setting the standard salary level, the Department is using three years of pooled data to estimate the HCE compensation level (whereas in the proposal it used one year of data), and (like the standard salary level) the Department is no longer inflating the threshold to January 2020. This results in an HCE total compensation threshold level of \$107,432, which the Department believes is sufficiently high to provide a meaningful and appropriate complement to the more lenient HCE duties test.

Finally, the Department has reaffirmed its intent to update the Part 541 regulations more regularly, but is declining to finalize its proposal to propose updates to the Part 541 regulations quadrennially. The Department believes such a commitment could deprive the Department of flexibility to adapt to unanticipated circumstances, and believes that prevailing economic conditions, rather than fixed timelines, should drive future updates.

## ***Q. When will these changes take effect?***

The effective date of this final rule is January 1, 2020.

## ***Q. Is the Department making any adjustments to the standard or HCE duties tests?***

The Department is not making any changes to the standard or HCE duties test.

## **Other Related Questions**

### ***Q. Who is covered by the FLSA?***

The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards covering employees in the private sector and in Federal, State, and local governments. Covered nonexempt workers are currently entitled to a federal minimum wage of not less than \$7.25 per hour. Overtime pay at a rate not less than one and one-half times the regular rate of pay is required after 40 hours of work in a workweek.

For more information on enterprise and individual coverage under the FLSA, see [Fact Sheet 14](#).

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***Q. Will employers have to stop employees from working from home or having flexible schedules?***

No. Nothing in the final rule changes the FLSA's hours worked principles. See [Fact Sheet 22: Hours Worked Under the FLSA](#).

***Q. What if a State has its own overtime laws?***

The FLSA provides minimum wage and hour standards, and does not prevent a state from establishing its own protective standards. If a State establishes a more protective standard than the provisions of the FLSA, the higher standard applies in that State.

***Q. Where can I review comments submitted in response to the Department's Notice of Proposed Rulemaking (NPRM)?***

Those comments are viewable at [www.regulations.gov](http://www.regulations.gov) under docket ID WHD-2019-0001.

## Salary Level

***Q. What are the new salary and compensation levels under this Final Rule?***

When this final rule takes effect on January 1, 2020, the "standard" salary level will be \$684 per week (equivalent to \$35,568 annually for a full-year worker). The total annual compensation requirement for highly compensated employees will be \$107,432 per year.

***Q. How did the Department determine the new standard salary level?***

The final rule is the thoughtful product informed by public comment, listening sessions, and long-standing calculations. The Department is updating the standard salary level by applying the 2004 methodology to current CPS data. Using pooled 2018/2019 CPS MORG data to represent the July 2018 through June 2019 period, a salary level of \$684 corresponds to the 20th percentile of earnings for full-time salaried workers in the South Census Region and/or in the retail industry.

***Q. Why is the Department setting the standard salary level at this level?***

The final rule is the thoughtful product informed by public comment, listening sessions, and long-standing calculations.

The Department believes that this method will set an appropriate dividing line between nonexempt and potentially exempt employees by screening out from exemption only those employees who, based on their compensation, are unlikely to be bona fide executive, administrative, or professional employees. In addition, the use of earnings data from the South and the retail industry will ensure that the salary level is suitable for employees in low-wage regions and industries. This approach will also maintain the prominence of the duties test by ensuring that the salary level alone does not disqualify from exemption a substantial number of employees who meet the duties test.

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## ***Q. What are Census Regions?***

Census Regions are groupings of states plus the District of Columbia that subdivide the United States for the presentation of data by the United States Census Bureau. The current Census Regions are: the Northeast, the Midwest, the South, and the West.

## ***Q. How did the Department determine the new total annual compensation requirement for highly compensated employees (HCEs)?***

To update the HCE total annual compensation requirement, the Department used the pooled 2018/19 CPS MORG data to ascertain that the 80th percentile of all full-time salaried workers in 2018 is equal to \$107,432.

## **Nondiscretionary Bonuses and Incentive Payments**

### ***Q. May employers use bonuses to satisfy part of the new standard salary level test?***

Yes. In recognition of evolving pay practices, the Department is permitting employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary test requirement. Such bonuses include, for example, nondiscretionary incentive bonuses tied to productivity or profitability (e.g., a bonus based on the specified percentage of the profits generated by a business in the prior year). The Department recognizes that some businesses pay significantly larger bonuses; where larger bonuses are paid, however, the amount attributable toward the EAP standard salary level is capped at 10 percent of the required salary amount.

For employers to credit nondiscretionary bonuses and incentive payments (including commissions) toward a portion of the standard salary level test, such payments must be paid on an annual or more frequent basis.

### ***Q. May employers make a catch-up payment in the event that an employee doesn't receive enough in nondiscretionary bonuses and incentive payments (including commissions) in a given year to remain exempt?***

Yes, if an employee does not earn enough in nondiscretionary bonuses and incentive payments (including commissions) in a given 52-week period to retain his or her exempt status, the Department permits a "catch-up" payment at the end of the 52-week period. The employer has one pay period to make up for the shortfall (up to 10 percent of the standard salary level for the preceding 52-week period). Any such catch-up payment will count only toward the prior 52-week period's salary amount and not toward the salary amount in the 52-week period in which it was paid. If the employer chooses not to make the catch-up payment, the employee would be entitled to overtime pay for any overtime hours worked during the previous 52-week period.

### ***Q. Does the Final Rule change how employers may use bonuses to satisfy the salary level for highly compensated employees (HCEs)?***

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No, the Department has not made changes to how employers may use bonuses to meet the salary level component of the HCE test. To claim the HCE exemption under the final rule, employers must pay workers at least the standard weekly salary level of \$684 per week on a salary or fee basis, while the remainder of the total annual compensation may include commissions, nondiscretionary bonuses, and other nondiscretionary compensation. Because employers may fulfill a majority of the HCE total annual compensation requirement with commissions, nondiscretionary bonuses, and other forms of nondiscretionary deferred compensation, the Department determined that it would not be appropriate to permit employers to also use nondiscretionary bonuses and incentive payments to satisfy the weekly standard salary amount.

## Economics

### ***Q. What are the costs of the Final Rule?***

The Department's analysis quantifies three direct costs to employers: (1) regulatory familiarization costs; (2) adjustment costs; and (3) managerial costs. The costs are the combined costs for both the change in the standard salary level test and the HCE total annual compensation level. Total annualized direct employer costs over the first 10 years were estimated to be \$173.3 million, assuming a 7 percent discount rate.

### ***Q. How many employees does the Department estimate will be impacted by the salary level increases?***

The Department estimates that 1.3 million workers who would otherwise be exempt under the currently-enforced standard salary level of \$455 per week will either become eligible for overtime or have their salary increased to at least \$684 per week, and that 4.1 million employees paid between \$455 and \$684 per week who fail the standard duties test (i.e., that are and will remain nonexempt) will have their overtime eligibility made clearer because their salary will fall below the specified threshold. Additionally, an estimated 101,800 workers will be affected by the increase in the HCE compensation test from \$100,000 per year to \$107,432 per year.

### ***Q. What are the estimated transfers from the "Overtime" Final Rule?***

This rule will transfer income from employers to employees in the form of wages. The Department estimated annualized transfers will be \$298.8 million. The majority of these transfers will be attributable to the FLSA's overtime provision; a smaller share will be attributable to the FLSA's minimum wage requirement.

*Source: U.S. Department of Labor*