



FLSA Through the Eyes of the Experts



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Introduction

On Wednesday, May 18, 2016, the United States Department of Labor (DOL) published its highly anticipated change to the Fair Labor Standards Act (FLSA) overtime rules, in effect doubling the minimum salary for exemption threshold to \$47,476 for salaried workers. Estimates from the DOL and President Barack Obama predict that the new overtime rules will make **4.2 million currently exempt workers eligible for overtime pay**.

Under the new rules:

- Employees who meet the standard duties test and salary-basis test, and earn more than \$47,476 annually, are exempt from overtime pay (the former threshold was \$23,660).
- Employers are allowed to use non-discretionary bonuses and incentive payments to satisfy up to 10% of the salary in the standard salary test. That is \$91.30 per week or \$4,747.60/year.
- Those that meet the **duties test** for highly compensated employees (HCEs), the new rule's exemption threshold, indexed to the 90th percentile of annual earnings for full-time salaried workers, will rise to \$134,004 (the former threshold was \$100,000).
- The DOL also established automatic increases every three years to the two salary thresholds, beginning January 1, 2020. This means that organizations will have to develop best practices in this area, including tracking these changes and building a process to review which employees will be impacted by the new threshold.

Those are just some of the basic, yet most impactful changes. You can **[read more details](#)** about the new rules by visiting the glossary and resources outlined at the end of this guidebook.

So what can you do to be compliant? How should you manage the change and communicate the impact to your employees? And how do you go about controlling future costs on an ongoing basis, as a result of these changes? To help sort it out, three of ADP's top experts addressed these important questions with the goal to help you plan the best possible strategy as you move towards compliance with the new FLSA overtime rules.

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The new FLSA overtime rules more than doubled the minimum salary for exemption.

Previous:
\$23,660

New:
\$47,476

Compliance and Classification

Q: Compliance to the new FLSA overtime rule is important. What should employers focus on and how can they determine which employees are impacted?

A: Of course this new change is critical, and no doubt scary, for employers and their employees. But rather than see it as a negative, I tell our clients that it's the perfect opportunity to really focus on the situation holistically, including employee classification and independent contractor classification. Yes, there are major changes required, potentially much work to be done. But it's also a great chance to examine role requirements and descriptions by looking at each and every job, to see if they are creating confusing situations with regard to the job duties test. It's an opportunity to determine if people are classified correctly and if not, adjust accordingly. The new FLSA overtime rule change has sparked some basic questions employers should be asking like:

Do I know who really is an employee and who is an independent contractor? Do I have my exempt versus non-exempt employees sorted out according to the tests? If I am not compliant today, why is that the case? And what do I need to do to get it done right?

Q: What other steps do employers need to consider as they answer those questions?

A: Once employers have accurately determined who is doing what and how long they are working, they can start to implement the necessary changes to be compliant based on the new salary threshold. They probably looked at these same issues in 2004, when the last FLSA overtime changes came out. But so much can happen in twelve years. Employers need to find out if the people in certain jobs are doing things outside their job description, and if so, are those duties now exempt duties? And are they professional, executive or administrative?

The final step is plugging in the newly collected job data to see how it all fits together with the much higher threshold. It's really a chance to get your house in order, a prime opportunity. The FLSA Wage and Hour area has the highest amount of litigation across the employment spectrum, so making a mistake here can be very costly. Employers can take this time to look at these issues and during their review, determine where people should be positioned and classified.



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Margaret Phelan Ferrero serves as Vice President, Assistant General Counsel for ADP's Major Accounts division, and leads the company's mid-market and Canada legal and compliance teams. Before bringing her talent to ADP in 2009, Meg practiced law at the largest Hispanic-owned community bank in the U.S., and with law firms in Miami, Florida and San Juan, Puerto Rico. Meg has represented senior management in all areas of employment law, contracts negotiations, real estate matters, and general management. She also brings extensive experience providing compliance guidance, business training and advice on HR, benefits, payroll and Health Care Reform. Meg earned an undergraduate degree from the University of Florida and law and MBA degrees from Stetson University College of Law. She lives in New Jersey and, having three sons, ages 15, 13 and 8, she spends most weekends at sporting events.

Q: How broad are the changes? And what must companies do regarding classification to comply with the changes?

A: The FLSA rules will impact everyone. Consider the fact that most organizations have an employee who would have been considered exempt in the past, at least one person who would fall into that category. So do they leave those employees classified as exempt and raise their salary? Or, if it makes more sense, do the opposite — make them non-exempt and pay them overtime when they work more than 40 hours per week? In either case, an analysis is required. Most employers will have to do the leg work.

Apart from the obvious hours employees are working at the office, employers need to gauge if they use their laptops or mobile devices away from work. More and more employees are doing it, and it could complicate the overtime compliance. Another compliance-related issue is if employers go the non-exempt route, do they pay overtime or hire another person to control costs? No matter how you see it, compliance requires analysis, whether it's one employee or 1,000. There will be a cost impact either way, but employers have to decide what makes the most sense for their specific situation. There is no silver bullet, and with indexing happening every three years according to the new rule, it will become an ongoing task. So the classification process is here to stay, making it a prime candidate for a best practices approach by HR.

Q: How will these changes impact individual state rules for exemption from overtime?

A: It is a federal rule change but as in the past, employers still need to comply with the law most favorable to the employee. For example, in a state with a higher minimum wage — a trend that is emerging today — if that hourly rate outpaces the federal minimum wage, the state rate will take priority. That also means the threshold will be higher as a percentage of the hourly rate. Right now, FLSA rules take priority. But as we see more states raise the minimum wage, the salary threshold rises too. It's a wait-and-see scenario. Employers must comply with whatever is the highest bar. So if the state threshold is \$55,000 and the new FLSA threshold is \$47,476, employers will have to comply with the state in setting their exempt designation. California is a **good example** of that situation, once their \$15 per hour minimum wage takes effect.

Q: What are the differences between the standard salary-level test, salary-basis test, and duties test in terms of qualifying for exempt employee status?

A: This can get very complicated. The salary-level test means employees who are paid less than \$47,476 per year (or \$913 per week) are non-exempt.

It means that, generally, an employee is paid on a salary basis if they have a "guaranteed minimum" amount of money they can count on receiving for any work week in which they perform "any" work. Of course, the salary basis pay requirement for exempt status does not apply to some jobs — for example, doctors, lawyers and schoolteachers, who are exempt even if paid hourly. Because this is so complicated, employers should seek help from employment counsel or other HR experts.

Finally, as was predicted, the new FLSA overtime rule left the **duties test** basically unchanged. This test outlines specific duties to differentiate exempt from non-exempt workers. If an employee doesn't meet all three tests, then they can't be considered exempt.



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This is your chance, so take the opportunity to evaluate and **make sure you are in the right place** in the way you classify your employees.

Q: Do you expect litigation around compliance to rise due to confusion over the new rules?

A: We probably will see an uptick in lawsuits filed under new FLSA overtime rules. Given the dramatic threshold increase, employers will need time to come into full compliance. The deadline to comply is Dec. 1, 2016, a much longer compliance period than the typical 60 days. So when you consider the already high level of existing FLSA litigation and add in the changes, it seems logical the frequency will go up. For example, between 2000 and 2015 federal court filings increased more than 450 percent; 90 percent of all state and federal class action lawsuits are wage and hour; and since 2008, the DOL has added more than 600 wage and hour investigators.

Employers should be extra careful about taking compliance, and all it entails, seriously around these new changes.

Q: How will new minimum wage laws popping up and independent contractor designations from the DOL impact the overtime compliance issue?

A: There is a connection, especially in places like California or other states that are raising their minimum wage, meaning state law may represent a higher threshold someday. Employers will have to continue to pay attention to requirements state by state. Almost as important, employers must understand that the new regulations have an indexing component, which means the threshold could increase every three years. It will not be dependent on Congress.

Q: What's your single, biggest takeaway for employers on the FLSA compliance front?

A: The first thing is to act now. If you have been waiting to see what's coming, it's happened. Take the information you know and run your financial analysis. Then, start thinking about the human impact and how to manage that change to make sure employees know they are valued. After that, move forward with a strategy that makes sense to every stakeholder. This is your chance, so take the opportunity to evaluate and make sure you are in the right place in the way you classify your employees. ■



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Communication and Change

Q: What's the most critical concern for businesses regarding these changes as they affect the workforce?

A: There isn't a single main concern; there are a few critical ones. For starters, it's key that all people within the workforce understand the new change and how it will affect them. Employers must level with employees about what's happening with complete transparency. Also, some employers already have a strong idea of what it all means but, unfortunately, many do not. So with the latter, you have the potential for employees to be blindsided because their employers may not be plugged into these new overtime regulations. That's my most pressing concern.

Larger companies, which may have more informed employees because they already offer robust communication channels, will have an advantage. When you get into the small business sector, workers may not be as informed. Size notwithstanding, every employer has to discuss what these changes are and what they will mean for employees, even if the actual impact on any given employee has yet to be determined.

Especially for associates who do not understand what's happening, there is the likelihood that there will be an emotional piece to this process too. Depending on how an employer decides to go, people may be reclassified from salaried to hourly, and affected workers could respond emotionally. For example, they may believe the change indicates they are not as important as they were before the new changes. Of course, that's untrue. Or they may have less flexibility in their role, or even lose conveniences like working from home. The reality is employers who understand the FLSA changes should be sensitive to those types of reactions, and be ready to reassure their employees. They can't take any of those folks for granted, especially if they haven't done any communications around it until now.

Q: What's the message to employees?

A: It's a major change. And it's going to be personal to employees. One minute they are salaried and have certain flexibilities and the next they may have to clock in and out. I imagine that would be a shock if you didn't understand that it's not about you, it's about a change in the law – one ostensibly designed to help people be paid more fairly.

For example, employees on the brink of becoming entry-level managers (and in turn exempt) may see this as a change in their career path. Think about restaurant and retail employees who work their way through the ranks for their entire career.



Tara Wolckenhauer Vice President, Global HR Strategy and Planning

With more than 20 years' experience as a proven HR leader, **Tara Wolckenhauer** serves as Vice President of Global HR Strategy and Planning and brings a pragmatic, business strategy approach to ADP clients. Prior to her work at ADP, Tara served as HR leader at Express Scripts, and before that at Medco Health. A frequent speaker and commentator, Tara has been featured in The Wall Street Journal, Business Day Live and Forbes, and has spoken at the Association of Women's Business Centers and Elevate2015. She is married with three kids and lives in New Jersey.

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Q: What strategies can employers use to communicate these changes to employees?

A: When it comes to education, using a full-circle communications strategy is fundamental. For employers, the objective should be to communicate with your employee population via strategies that makes sense for each situation. That could be using email, written communications, print or online, or face-to-face meetings, even streaming video. My recommendation is to use all types of channels, so you can reach out to everyone in your workforce.

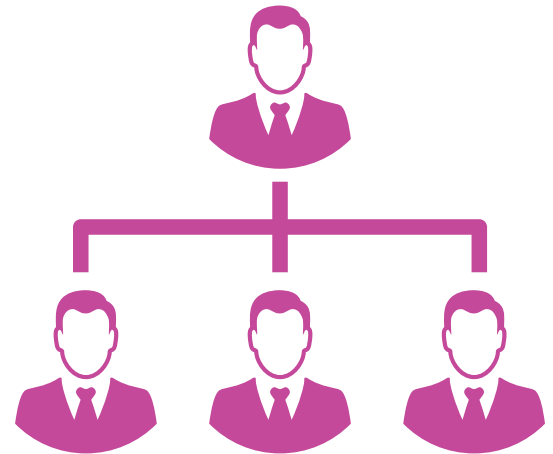
It also helps to do the analytics and understand the impact, which is where time and attendance technology tools can make a difference, by helping track people's time and relaying that information to affected employees. Employers can use special calculators, for example, to gauge how the new law will affect their employees, both overall and individually. Then, they must relay that information in any and every way possible that makes sense.

Naturally, people reclassified will need training on the policies, a time and attendance system, and even their pay stub. A human capital management (HCM) suite can be used as a way to communicate with people — by offering an article, a training video, or other resources via an employee self-service portal.

Q: Speaking of strategies, what's the best way to communicate the impact to employees?

A: In situations like this, the best is to have a human being talk to another human being. This is not the first time the FLSA has made a change. A decade ago, there was a change about classifying exempt versus non-exempt employees, and I remember having to sit with associates and talk to them, tell them what it meant. They were very appreciative to get the information that way.

When education is this important, employers need to use every tool and communication channel they have to deliver open, honest information. Plus, there will be new policies formed around this issue, and that will mean new training and learning for workers, along with their managers. You have to do all of that. In fact, managers must be involved, though you have to ensure they are surrounded by the tools and people they need to support the conversation when they meet with their workers.



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Q: Will this require added resources for communicating the changes? If so, should employers already be adding staff/using outsourcing firms who understand the issues?

A: That's an interesting question, and one for each company to decide depending on their own internal resources. Larger companies and those in higher-end markets probably have very robust resources available. But as you go down market, things can begin to get much more difficult for employers tasked with this type of communications challenge.

With smaller employers, the onus might fall on an accountant and/or an attorney to help the business owner figure it all out. Partnering with a company that you can count on as both a trusted resource as well as a solution provider may be pivotal and important. As people try to interpret a law like the new overtime rules, employers may possibly need to consult a professional in order to make sure not only that they are compliant, but also that their employees are getting the best, most accurate information. And that includes both the overall impact as well as the impact on their personal situations. ■



Controlling Costs

Q: When deciding whether to classify employees as exempt or non-exempt, how do you determine if it would cost more to pay someone overtime or raise their salary to the new threshold?

A: That's a tough question. There are a few options. Of course, you can raise a person's pay to maintain the exemption. If they are making forty-five thousand per year, and you know they are working 55-60 hours a week, it makes sense to raise their pay as long as they pass the duties test. Or, if their salaries are much lower, you can pay them overtime and have them clock in and out like other non-exempt employees.

Note that while the DOL says there is no need to have new non-exempt workers use a time management system, employers must keep records for each non-exempt worker. Choosing a manual solution could be error prone, which is risky because DOL audit requirements remain.

It's really based on what hours they are working now, how much they earn, and what the difference would be if you had to pay overtime – the challenge is that you often don't know, because time had not been tracked for these workers.

Another option is to reclassify workers as non-exempt and adjust their pay. Then, work on reducing overtime and if they have to work excessive hours, you may have to hire additional help at lower hourly rates than time-and-a-half.

A third option, which may not work for all employers, is to reduce or eliminate overtime hours.

The fourth option offered by the DOL is to reduce the amount of allocated base salary, provided the employee still receives the hourly minimum wage. And remember, you have to be compliant with both federal and state laws.

It's worth mentioning, employers are also allowed to use non-discretionary bonuses and incentive payments to satisfy up to ten percent of the salary in the standard salary test.

All these options will cost money, of course, so employers need to figure out the best strategy for their particular organization. That is, after they make a strong business case with the C-Suite, get legal approval, and finally, make sure they are compliant.

For example, an employee might be working at \$16 per hour and work five hours of overtime on average, about \$5,800 annually, which is a lot of money. The same employer, with the proper technology and tools in place to manage it — such as employee scheduling or overtime analytics — might be able to limit overtime to two hours per week — a 60 percent savings.

Finally, the new rule doesn't mandate changing from salary to hourly; an employer may choose to keep employees salaried and pay them overtime.



Sushma Tripathi
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Sushma Tripathi serves as Vice President, Workforce Planning and Benefits Consulting for the ADP Strategic Advisory Services group and has more than 25 years of experience in progressive leadership, operations and product management roles, primarily in health and productivity management, employee benefits administration and wellness outsourcing. She actively works with clients to help them execute their human capital management (HCM) strategies with a focus on health and productivity management as well as workforce planning. Sushma has an MBA from Drexel University with dual majors in Finance and Human Resources Management. Sushma is the parent of two millennials and a big fan of long hikes on weekends.

It's well-known that the biggest cost factor for employers is labor. And that's where having control over your workforce planning by using today's technology can help make a huge difference.

Q: What can employers do to control these additional costs?

A: It's well-known that the biggest cost factor for employers is labor. And that's where having control over your workforce planning by using today's technology can help make a huge difference. That's especially true with these new FLSA regulations.

Good examples include: scheduling solutions to avoid overtime; overtime reporting to see when someone is approaching their full work week; analytics to spot trends that can be improved, even absence management practices and data, specifically tracking unscheduled and intermittent time off, since absence is such a big driver of overtime. It all adds up to having a better understanding of what's going on in your business and arming managers with the tools to proactively control costs.

Q: How will the new FLSA rule cost considerations affect productivity?

A: From an employer perspective, the key to productivity is accountability. Employer accountability could be around time discipline, the right staffing levels to meet demand, and, in general, overall workforce policy compliance and insights.

Employees are more focused on their pay, their benefits, and if they have the right tools and environment to do great work and be happy in their jobs. They need the option to schedule time off for personal reasons. Do they have that flexibility baked into their jobs? Life happens, and can my employer accommodate all of that? If the employees believe the employer can make all of those accommodations because there is a system in place to manage it right, that's when they feel more engaged, more productive. They feel like they are working for the right employer. And by getting ahead of the FLSA rule, while delivering that workplace flexibility, employers can use the opportunity to boost productivity. When I talk to employers, I always ask if they have a workforce management system in place that can actually optimize both accountability and flexibility, while keeping overtime classifications compliant.

The new rules also will shine a light on places where long hours may be being worked, and when people are working too many hours, which can lead to fatigue and lower productivity. So that drives the need to schedule and comply with rest rules.

Q: What are the penalties for misclassifying employees as exempt or non-exempt and paying them erroneously based on that misclassification?

A: The penalties vary, depending on factors such as egregiousness of the offense, back wages denied, DOL fines, etc. Much of the financial pain for employers for not being compliant would come from litigation arising from a misclassification issue. In fiscal year 2015, for example, for minimum wage violations there were 10,642 claims, with \$37.8 million paid out in back wages. For overtime violations, which also fall under the FLSA, there were 10,496 claims and back wages of \$137.7 million. Also, ninety-two percent of class action litigation involve wage and hour claims. So it's pretty clear, noncompliance is costly, as well as a potential public relations issue, and brings challenges with employee engagement, satisfaction, and attrition.



As of May 18, the DOL doubled the threshold and it may change every three years. That means employers must look for ways to control overtime and related costs.

Q: Will unexpected spikes in cost from these FLSA changes result in more resources (software, staff, etc.) for the industries most affected?

A: To try and offset unexpected costs, employers should take a hard look at their current time and labor system.

Is it proactive? Does it help them plan? Does it match labor supply with the forecasts for demand? Does it offer visibility into workforce shortages and overages? Does it offer that important flexibility we discussed, so employees can apply for leave or swap shifts without a hassle? Will it notify HR of a person's absence?

With those questions and others answered, employers can avoid costly overtime by making scheduling changes. This is especially helpful in areas such as retail and hospitality, which are often singled out as the two industries hit hardest by the FLSA overtime changes. Also, any good time and labor system has to be auditable and drive compliance. When the Department of Labor writes to you, you are guilty until you prove otherwise, so being prepared is key. If audited, employers will want to make sure their situation and system meets certain criteria:

Is it fair and transparent? Do you have sensible practices in place? Do you have controls to handle all of these changes? Can it diagnose a breakdown and minimize errors? Is it defensible?

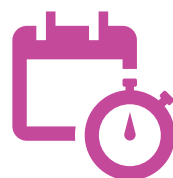
Last but not least, does your time and labor system offer insight, actionable information to optimize your productivity? As Meg Ferrero noted earlier, employers have until Dec. 1, 2016, to comply with these new regulations, so they have a great window to review policies, practices, tools and, if they need to upgrade to a new technology platform.

It's a jolt. As of May 18, the DOL doubled the threshold and it may change every three years. That means employers must look for ways to control overtime and related costs.

Q: What's your biggest takeaway for business leaders regarding these FLSA changes?

A: It all comes down to what you did to prepare for the deadline. What needs to be done in terms of controlling costs and ensuring compliance is doing a workforce analysis, gathering data, modeling alternatives, making a business case, getting approval, communicating and educating employees, managing change, and then measuring, rethinking, and adjusting, if needed. ■

Employers have until Dec. 1, 2016, to comply with these new regulations.





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ADP Compliance Resources

To help clients navigate the often very complex waters of FLSA overtime rules, ADP's dedicated professionals carefully monitor federal and state legislative and regulatory measures affecting employment-related human resource, payroll, tax and benefits administration. Also, as is the case with the new FLSA overtime changes (which will be indexed and adjusted annually), ADP systems are updated as relevant laws evolve.

With these impending changes and any others that occur, our goal is to help minimize our clients' administrative burden across the entire spectrum of employment-related payroll, tax, HR and benefits, so that you can focus on running your business. The information in this guide is provided as a courtesy to assist in your understanding of the impact of the new FLSA overtime rules, and should not be construed as tax or legal advice. Such information is by nature subject to revision and may not be the most current information available. ADP encourages readers to consult with appropriate legal and/or tax advisors. For more information, visit www.adp.com/flsa.

For additional FLSA regulatory insights, please visit [Eye on Washington: Legislative Updates](#) and subscribe to receive email alerts on the topic as they become available.

To find articles on FLSA and other hot topics, visit www.adp.com/spark for HR leaders and www.adp.com/thrive for small to midsized business owners.

Glossary

Employee: A worker who is economically dependent on the business they work for, according to the DOL. (As opposed to a contract worker, whose income is not dependent on a single employer.)

Non-Exempt: An employee who is entitled to at least minimum wage for each hour worked and overtime when working more than 40 hours in a work week. (Currently, must be paid on an hourly basis and make less than \$913/week.)

Exempt: A salaried employee who isn't entitled to overtime and must satisfy certain salary level, salary basis and duties tests

Highly-compensated employee: An individual who:

- Owned more than five percent of the interest in the business at any time during the year or the preceding year, regardless of how much compensation that person earned or received, or
- For the preceding year, received compensation from the business of more than \$115,000 (if the preceding year is 2014; \$120,000 if the preceding year is 2015 or 2016), and, if the employer so chooses, was in the top twenty percent of employees when ranked by compensation. (IRS.gov)

Executive Exemption: An employee's primary duty must be managing an enterprise or subdivision thereof. The employee must customarily and regularly direct the work of at least two or more other full-time employees; and have the authority to hire or fire other employees.

Administrative Exemption: An employee's primary duty must be office of non-manual work related to the business. The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Professional Exemption: An employee's primary duty must be the performance of work requiring advanced knowledge in science or learning, or invention, imagination, originality or talent.