

# **Fair Labor Standards Act Part 541 "Overtime" Final Rule**

## **State and Local Government Presentation *June 8, 2016***

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*This presentation is for general information and is not to be considered in the same light as official statements of position contained in the Department's regulations.*



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# Outline: Webinar Topics

- FLSA Coverage
- Minimum Wage and Overtime Basics
  - Minimum Wage
  - Overtime Pay
  - Exemptions
- 541 Updates (Overtime Rule)
- Special Rules
- Recordkeeping and Posting
- Q's & A's Segment



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# FLSA Coverage Public Agencies

Covered public agencies include:

- Federal government agencies and political subdivisions
- State government agencies and political subdivisions
  - County
  - City
  - School District
- Interstate government agencies



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# Minimum Wage and Overtime Basics



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# Minimum Wage: Basics

- Covered, non-exempt employees must be paid not less than the federal minimum wage for all hours worked
- The minimum wage is \$7.25 per hour
- Cash or equivalent – free and clear



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# Overtime Pay: Basics

Covered, non-exempt employees must receive one and one-half times the regular rate of pay for all hours worked over forty in a workweek



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# Workweek

- Compliance is determined by workweek, and each workweek stands by itself
- Workweek is 7 consecutive 24 hour periods (168 hours)



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# “Work Periods” (Fire Protection and Law Enforcement)

*FLSA Section 7(k):*

Employees engaged in fire protection or law enforcement may be paid overtime on a “*work period*” basis.

- A “work period” is from 7 to 28 consecutive days.
- Overtime pay is required when the hours worked in “work period” exceed the maximum hours standards outlined in 29 CFR § 553.230 .



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# “Work Periods”

## (Fire Protection and Law Enforcement)

### 29 CFR 553.230

Work period (days)	Maximum hours standards	
	Fire protection	Law enforcement
28 .....	212	171
27 .....	204	165
26 .....	197	159
25 .....	189	153
24 .....	182	147
23 .....	174	141
22 .....	167	134
21 .....	159	128
20 .....	151	122
19 .....	144	116
18 .....	136	110
17 .....	129	104
16 .....	121	98
15 .....	114	92
14 .....	106	86
13 .....	98	79
12 .....	91	73
11 .....	83	67
10 .....	76	61
9 .....	68	55
8 .....	61	49
7 .....	53	43



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# Regular Rate

- Is determined by dividing total earnings in the workweek by the total number of hours worked in the workweek
- May not be less than the applicable federal minimum wage



# Compensatory Time Off

- FLSA Sec. 7(o): State and local governments employees may receive compensatory time off (comp time) in lieu of cash payment for overtime hours.
- Comp time must be in the amount of ONE AND ONE HALF paid hours off for each overtime hour worked



# Compensatory Time Off, cont.

- Compensatory time is permissible under the following conditions:
  - Agreement or understanding with employee before start of work
  - Most public employees may not accrue more than 240 hours (160 of actual hours worked)
  - Law enforcement, fire protection, and emergency response personnel and employees engaged in seasonal activities may not accrue more than 480 hours (320 of actual hours worked)



# Compensatory Time Off, cont.

- An employee must be permitted to use compensatory time on the date requested unless doing so would “unduly disrupt” the operations of the agency.



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# Exemptions and Exceptions

- There are numerous exemptions and exceptions from the minimum wage and/or overtime standards of the FLSA



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# Fire and Police Small Agency (Overtime Exemption)

*FLSA Section 13(b)(20):*

- Law enforcement and fire protection employees are overtime-exempt in any work week when their police or fire department employs less than five employees in law enforcement or fire protection activities.



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# **“White Collar” Exemptions**



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# “White Collar” Exemptions

The most common FLSA minimum wage and overtime exemption -- often called the “EAP” or “white collar” exemption -- applies to certain:

- Executive Employees
- Administrative Employees
- Professional Employees



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# Three Tests for Exemption

**Salary Basis**

**Salary Level**

**Job Duties**



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# Salary Basis Test

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- Need not be paid for any workweek when no work is performed



# Deductions From Salary

- An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the business
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available



# Deductions From Salary (Public Agencies)

- **29 CFR 541.710(a):** A public agency employer may deduct pay for absences for personal reasons or because of illness or injury of less than one work-day, even when accrued leave is not used by an employee, per a pay system that:
  - Is established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability; and
  - Requires the public agency employee's pay to be reduced because:
    - Permission for using accrued leave has not been sought or has been sought and denied;
    - Accrued leave has been exhausted; or
    - The employee chooses to use leave without pay.



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# No Salary Requirements

- The salary level and salary basis tests do not apply to:
  - Outside Sales Employees
  - Doctors
  - Lawyers
  - Teachers
  - Employees in certain computer-related occupations paid at least \$27.63 per hour



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# Executive Duties

- Primary duty is management of the enterprise or of a customarily recognized department or subdivision
- Customarily and regularly directs the work of two or more other employees
- Authority to hire or fire other employees or recommendations as to the hiring, firing, advancement, promotion or other change of status of other employees given particular weight





# Administrative Duties

- Primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance



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# Professional Duties

- Primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction OR
- Primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor



# Computer Related Occupations

**An employee in a computer related occupation can qualify for exemption if the employee receives either:**

- A guaranteed salary or fee of **\$913** per week or more, or
- An hourly rate of not less than \$27.63 per hour

*And the employee:*

- Is employed as an analyst, computer programmer, software engineer or other similarly skilled occupation, and
- The primary duty must be in design, development, creations, systems analysis etc. (as defined in the regulations).



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# New Overtime Rule Overview



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# New Overtime Rule Overview

- March 2014 - Presidential Memorandum
- July 2015 – Notice of Proposed Rulemaking
- May 23, 2016 – Final Rule Published
- December 1, 2016 – Final Rule Effective Date



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# New Overtime Rule Changes

- **Salary Level Increases**
- **Nondiscretionary Bonuses**
- **Automatic Updates**



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# New Overtime Rule Standard Salary Level and Highly Compensated Employees

- **Standard salary level - pursuant to 29 CFR 541.600**

Current  
\$455

**Effective 12/1/2016**  
\$913 per week

- **Highly Compensated Employee (HCE) - pursuant to 29 CFR 541.601**

Current  
\$100,000

**Effective 12/1/2016**  
\$134,004 per annum



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# New Overtime Rule

## Nondiscretionary Bonuses

- Nondiscretionary bonuses and incentive payments (including commissions) are forms of compensation promised in advance to employees (e.g., bonuses for meeting set production goals, retention bonuses, and commission payments based on a fixed formula).
- May be used to satisfy up to 10% of the standard salary level.
  - Minimum of 90% (approx. \$822) of standard salary level must be paid as a weekly salary.
- Payments must be paid on a quarterly or more frequent basis.



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# New Overtime Rule

## Catch-up Payments

- If an employee does not earn enough from the nondiscretionary bonus, commission, or incentive payments in a given quarter to meet the standard salary level – an employer may make a “catch-up” payment within one pay period of the end of the quarter.
- Any such “catch-up” payment will count only toward the prior quarter’s salary amount and not toward the salary amount in the quarter in which it is paid.



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# New Overtime Rule

## Highly Compensated Employees (HCE)

- HCEs must continue to receive at least the full standard salary level amount each pay period on a salary or fee basis without regard to the payment of nondiscretionary bonuses and incentive payments. *(No Change to this principle)*
- Nondiscretionary bonuses and incentive payments (including commissions) may be counted towards the highly compensated employees' total annual compensation requirement. *(No Change to this principle)*
- The HCE test does not allow employers to credit nondiscretionary bonuses or incentive payments (including commissions) towards the standard salary level weekly requirement.



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# New Overtime Rule Automatic Updates

- Every three years beginning January 1, 2020, the standard salary and annual compensation levels will be automatically updated.
- At least 150 days before the effective date, the Secretary will publish a notice in the Federal Register of the updated salary and total annual compensation amounts that will be required.



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# New Overtime Rule

## Updating the Standard Salary Level

Standard salary level – updated to equal the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region.



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# New Overtime Rule

## Updating HCE Compensation Level

Highly compensated employees – updated to equal the 90th percentile of annualized earnings of full-time salaried workers nationally.



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# State and Local Government

## Special Rules



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# Public Agencies

- Under the FLSA, individuals may not volunteer services to for-profit private sector employers.
- On the other hand, individuals may generally volunteer services to public sector agencies and their community.
  - The FLSA states that public sector employees may not volunteer to do the same work for which they are employed.
  - However, the FLSA imposes no limitations or restrictions on the types of services which private individuals may volunteer to perform for public agencies.

**Note:** 29 U.S.C. 203(e)(4)(A)-(B); 29 C.F.R. §553.100-106



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FLSA Sec. 7(p)(2): Occasional or Sporadic Employment:

- An employee may work in a different capacity for the same public agency without the hours being combined with their regular hours for the purposes of computing overtime, provided the following conditions are met:
  - Work is on a part-time basis
  - Work is on an infrequent, irregular, or sporadic (occurring in scattered instances) basis
  - Work is done solely at employee's option
  - Work must not fall within the same general capacity as employee's regular work



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# State and Local Government

## *FLSA Sec. 7(p)(3): Substitution:*

- Two employees may agree (at their own volition) to substitute scheduled hours or work for one another.
- If the two employees make the substitution, the employer may exclude the substituted hours worked from overtime calculations.

Note: any such agreement must be approved prior to the performance of work.



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# State and Local Government

## *(Hours Worked for Fire Protection and Law Enforcement)*

### Sleep Time

#### ***Law Enforcement and/or Fire Protection***

##### Permissible deductions:

- Tour of duty more than 24 hours;

##### **Only if –**

- Express or implied agreement exists;
- Adequate sleeping facilities are furnished;
- “Usually uninterrupted” sleep (five (5) consecutive hours)

##### Impermissible deductions:

- Tour of duty less than 24 hours;
- Tour of duty exactly 24 hours;



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# State and Local Government

## *(Hours Worked for Fire Protection and Law Enforcement)*

<b>Meal Time <i>Law Enforcement</i></b>	<b>Meal Time <i>Fire Protection</i></b>
<p>Permissible deductions:</p> <ul style="list-style-type: none"><li>• Tour of duty 24 hours or less;<ul style="list-style-type: none"><li>- Completely relieved of duties</li></ul></li></ul>	<p>Permissible deductions:</p> <ul style="list-style-type: none"><li>• Tour of duty more than 24 hours.<ul style="list-style-type: none"><li>- Completely relieved of duties</li><li>- Expressed or implied agreement exists</li></ul></li></ul>
<p>Impermissible deductions:</p> <ul style="list-style-type: none"><li>• Required to remain on call, or</li><li>• Engaged in extended surveillance activities</li></ul>	<p>Impermissible deductions:</p> <ul style="list-style-type: none"><li>• Tour of duty less than 24 hours;</li><li>• Tour of duty exactly 24 hours;</li></ul>



# Recordkeeping and Posting



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# Recordkeeping

- The FLSA requires that all employers subject to any provision of the Act make, keep, and preserve certain records.
- Time clocks are not required and records need not be kept in any particular form.
- Nonetheless, every covered employer must keep certain records for each non-exempt worker



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# Required Posting

- Covered employers must post a notice explaining the FLSA, as prescribed by the Wage and Hour Division, in a conspicuous place such as a lunch room or employee lounge area.
- Posting: Available electronically for downloading and printing at - [www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm](http://www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm)



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# Additional Information

## ***Other resources include:***

- New Overtime Rule
- Guidance Documents
- Fact Sheets
- Frequently Asked Questions
- Call or visit the nearest WHD Office
  - Visit the WHD homepage at:  
<http://www.dol.gov/whd/overtime/final2016>
  - Call the WHD toll-free information and helpline at: 1-866-4US-WAGE (1-866-487-9243)



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