

Check Yourself: A Critical Review of FLSA Salary and Exemption Requirements

- *Marcus Campbell*
- *Sydney Shaw*



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What We'll Cover

- What is the purpose of exemptions? Why do we care about them?
- What are the white collar exemptions?
- What do the new white collar regulations say? What are the most significant changes?
- Are the new regulations going to be thrown out by a court or are they here to stay?
- What are some common FLSA exemption issues in the workplace?



Fair Labor Standards Act (FLSA)

- All employers covered by the FLSA must pay all employees minimum wage and overtime for all hours worked over 40 in a workweek, unless the employee is “exempt” from one or both of these requirements.
- Non-exempt employees must be paid minimum wage and overtime.
 - Current minimum wage = \$10.33/hr.
 - 1/1/25-2/20/25 = \$10.56/hr (for less than 2 months).
 - 2/21/25-2/20/26 = \$12.48/hr.
 - OT = 1.5 x Regular Rate of Pay.

Exempt Employees

- For “exempt” employees, employers do not have to pay min. wage or OT or both.
- Numerous exemptions in sec. 213 of the Act:
 - Recreational and amusement; fish and shellfish harvesting; agricultural; seasonal; transportation (DOT - over 10,000 lbs); even - baseball players under contract!
 - Shohei Ohtani OT = \$27,610/hr.
- The most common exemptions in the workplace are the FLSA’s “White Collar Exemptions.”

FLSA White Collar Exemptions

- The following employees are exempt from both minimum wage and OT requirements of the FLSA:
 - Executive – Managers and supervisors...
 - Administrative – Executive assistants, team leaders, bookkeepers...
 - Professional – Health care, engineers, accountants, teachers...
 - Outside Sales – Not inside sales – away from the place of business...
 - Computer – More advanced computer jobs – not helpdesk...

White Collar Exemptions

- To be “exempt” from min. wage and overtime pay:
 1. The employee must be *paid properly*.
 - On a “salary basis” AND
 - Min. amount required by FLSA regulations AND
 2. The employee’s *primary job duties* must meet the specific requirements of the exemption.
- ***Do not forget the job duties! A salary alone is not enough!***
- The exemptions are narrowly construed.
 - If it is a close call, then the DOL/Judge will rule “Not Exempt.”
- The burden of proving an exemption is on the employer.

Paid Properly – Salary Basis

- Executive, Administrative, and Professional Employees
 - Must be paid:
 - A predetermined salary that constitutes all or part of their pay for the workweek (i.e., same base salary each week); and
 - Generally - Not subject to reduction based on variations in the quality or quantity of work performed that workweek – some limited deductions from pay are acceptable.
 - Absences personal reasons or sickness; major safety/conduct infractions, FMLA leave, etc.
 - Most white collar exempt employee must receive a salary – and cannot be paid hourly.
 - Professional – fee basis is OK.
 - Computer – hourly basis is OK (at least \$27.63 per hour).
 - Outside Sales – no salary or minimum pay requirement.

Paid Properly – Amount of Salary

- Prior to July 1, 2024
 - Amount: \$684 per week or \$35,568 per year.
 - Highly Compensated Employee (HCE) Amount: \$107,432 per year.
 - 1 exempt job duty.
- New FLSA regulations went into effect on July 1, 2024.
- New regulations substantially increased the salary required to qualify for the white collar exemptions, and they also made other significant changes.

Updated FLSA Regulations July 1, 2024

“White Collar” Exemptions Impacted

- Executive
- Professional
- Administrative
- Outside Sales
- Computer

- Main impact of the new regulations – Amount of minimum salary

Minimum Salary Increased

- Effective July 1, 2024
 - The new minimum weekly salary for exempt employees is **\$844 per week (\$43,888 per year)**
- Effective January 1, 2025 (in 2 months)
 - The new minimum weekly salary for exempt employees will be **\$1,128 per week (\$58,656 per year)**
- Effective July 1, 2027
 - Minimum salary amount will be updated every 3 years by the DOL based on up-to-date wage data
- Job duties requirements did not change!

Bonuses – The Basics

- Non-discretionary bonuses, incentive payments, commissions
 - Includes incentive bonuses tied to productivity and profitability
- Can satisfy up to 10% of the minimum salary level
 - Salary can be 90% of the minimum salary
 - 1/1/25: \$52,790 salary + \$5,866 non-discretionary bonus/incentive/commission = Compliance.
 - Can be paid in any increment (monthly, quarterly, annually, etc.)

Bonuses – What is “Non-Discretionary?”

- In accordance with preannounced standards.
- Examples:
 - Production goals
 - Retention bonuses
 - Commissions
- Discretionary Bonuses – examples
 - Unannounced, no promise to pay bonus
 - Spontaneous reward for a specific act



Catch-Up Payments

- If the commissions, bonuses, incentive payments we take credit for (up to 10%) fall short, the employer can make a “catch-up” payment **no later than the next pay period after the end of the year**
- The catch-up payment will count toward the prior quarter’s salary amount, not the quarter in which it was paid

HCE Salary Increased

- Effective July 1, 2024
 - The salary requirement for HCEs will be \$132,964 annually
- Effective January 1, 2025 (in 2 months)
 - The salary requirement for HCEs will be \$151,164 annually
- Effective July 1, 2027
 - Minimum annual HCE salary amount will be updated every 3 years by the DOL based on up-to-date wage data
- Job duties requirements did not change!

Bonuses For HCEs

- Bonuses can count toward total annual compensation amount
 - Not limited to 10%
 - Must receive at least the standard salary level per week on a salary or fee basis (\$844/week now; \$1,128/week on 1/1/25)
 - (Not a change from the current regulations)
- Catch-Up Payments
 - If bonuses fall short of total amount, the employer may make a catch-up payment **during the last pay period or within one month after the end of the 52-week period** (counts toward prior year and not the year in which it was paid)

Exception for Administrative Employees in Educational Institutions

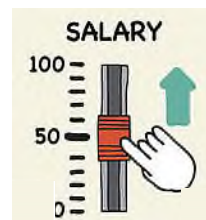
- Administrative employees (e.g., counselors, advisors) may have a lower minimum salary threshold apply
- Administrative employees are exempt from minimum wage and overtime requirements if they are paid at least (1) the minimum salary in the regulations, or (2) the entrance salary for teachers at the school.
- This does not apply to individuals with jobs that are not directly related to academic instruction (e.g., business officers)

Revision of the White Collar Salary Level

- Challenges
 - Part-time
 - Seasonal employees who want to be paid on a 52-week basis
 - Inside sales employees
- Are there exempt employees who still do not have to be paid the minimum salary? Yes.
 - Outside Sales
 - Doctors and lawyers
 - Teachers and some Academic Administrative Employees
 - Agriculture
 - More

Impact Of The Revisions

- Minimum salary will adjust every three years based on the labor market (35th percentile of the labor market)
- So ... if an employee is given a raise to meet the new minimum salary, those individuals may need to be given another raise in 2027, 2030 ...
 - Employers will need to review this issue every three years



Impact Of The Revisions

Your exempt employees who lose their exempt status will feel _____

- A. Thrilled about the transfer of income
- B. Grateful to join the hourly ranks
- C. Excited to punch a clock
- D. Enthusiastic about pre-approval requirements for overtime

*Unanticipated employee relations issues



Litigation Update

Is a Judge just going to throw these out?
(again)

2016 FLSA Regulations Litigation

- DOL increased salaries in 2016
- Challenged in Texas federal court
 - *State of Nevada & Plano Chamber of Commerce*
- Many attorneys (i.e., Me)
 - “Nothing will come of this legal challenge”
 - “This happens all the time”
 - “Prepare to comply”
- What happened in 2016?
 - Nationwide injunction issued
 - Regulations were scrapped by the new, incoming administration
 - Started over



2024 FLSA Regulations Litigation

- Three cases are currently pending in Texas.
 - *Plano Chamber of Commerce*
 - *State of Texas*
 - *Flint Avenue, LLC*
- All three seek to invalidate the rules and allege that the DOL exceeded its statutory authority because the new rules' focus on minimum salary levels improperly focuses on salary, rather than an employee's duties
- The lawsuits are similar to the 2016 case that struck down the 2016 salary changes

Pending Texas Cases

- *Plano Chamber of Commerce and State of Texas* cases.
 - June 28, 2024
 - Limited injunction issued for employees of the State of Texas only.
 - No injunction issued for private employers.
- *Flint Avenue, LLC* case
 - July 1, 2024
 - Court refused to issue an injunction.
- Both federal courts refused to issue the same type nationwide injunction that was issued in the 2016 cases.

The *Mayfield* Case and Appeal

- 2019 Trump Administration DOL raised minimum salary from \$455 per week to \$684 per week (effective 1/1/20)
 - Challenged in Texas federal court (*Mayfield* case)
 - Federal district court ruled in favor of the DOL
 - Appeal has been pending for years
- 5th Circuit Court of Appeals - September 11, 2024 Decision
 - DOL had authority to issue the 2019 regulations increasing the salaries for the white collar exemptions
- What does this decision mean?
 - Campbell was right back in 2016!

Are the 2024 Regulations Going to Survive?

- My opinion – Yes.
- All employers should comply with the new requirements now and in the future.
- Decisions expected in both Texas District Court cases before 1/1/25 (i.e., before the increase to \$1,128 per week).
- But ... I could be wrong (again).
 - Automatic update every 3 years – might not survive.

How to Prepare

What You Need To Do

1. Talk to the appropriate business leaders about the upcoming changes and your plan for managing the changes.
2. *Audit your exempt personnel* and determine which exempt employees earn less than \$844 per week now, and \$1,128 per week as of 1/1/25.
3. For each such employee, determine if the employee will be given a raise to meet the new minimum salary or if the employee will be re-classified as non-exempt.

What You Need To Do

4. For each employee who will receive a raise or who is already above the minimum salary amount, determine if they meet the job duties test.
5. For each employee who will be re-classified as non-exempt, determine if they will be paid an hourly wage or a salary.
 - Determine how OT will be calculated and paid.
6. For each employee who will be re-classified as non-exempt, determine how you will track their work hours.

What You Need To Do

7. For each employee who will be re-classified as non-exempt, prepare a communication to the employee explaining how they will be paid.
8. Determine the effect on PTO plans, benefit plans, etc. that categorize employees by hourly / salary.
9. Adopt a policy regarding recording work hours and working “off the clock”.

What You Need To Do

10. Work with managers to determine if job duties or expectations of when employees will work need to be adjusted and communicated. Supervisors must decide whether employees will be expected to answer emails or phone calls outside of their regular shifts.
11. Train managers who are not familiar with supervising non-exempt employees regarding basic wage and hour issues.

If You Want to Keep An Employee Exempt

To Raise Or Not To Raise

- **Nothing in the new regulations requires raises for anyone!**
- Raise – Must bring employee to \$1,128 per week(\$58,656 per year) (1/1/25)
 - You need to know how many hours the employee works to make an informed decision – track hours now!
- What about pay ranges within the same job classification. Does everyone get a raise?
 - Production Supervisors – Pay range \$55,000-\$62,000/year
 - Now you can have exempt and non-exempt Production Supervisors?

If You Want to Reclassify An Employee to Non-Exempt

If You Want to Reclassify Employee As Non-Exempt – Two Big Questions

1. How will you pay the reclassified employee?
 - Hourly?
 - Salaried non-exempt with fixed or fluctuating workweeks?
 - Miller Johnson can help you figure this out.
2. How will you track and record the reclassified employee's hours?
 - Time clock, apps, time sheets, standard schedules?

Common FLSA Exemption Problems

Do Not Forget the Job Duties!

- Salary is only step 1.
- Step 2 – The employee’s job duties must also satisfy the job duties in the Executive, Administrative, and Professional regulations.
- “He’s salaried – so I do not have to pay him overtime”
- **Ex:** \$85,000 per year Production/Field Support Engineer
 - Does not regularly supervise 2 or more people (Executive - out)
 - Does some non-manual/office work – but regularly goes on the plant floor or out in the field to help others with manual work (Administrative – out)
 - No bachelor’s degree is required for the job (Professional – may be out too)

Working Supervisors/Assistant Managers

- Executive exemption
 - Regularly supervise 2 or more employees
 - Primary duty must be managing the company or a recognized subdivision of the company
 - The more that supervisors and managers work alongside your salaried non-exempt employees – the more likely it is the DOL will find that their primary duty is not management – and they will be found to be non-exempt
 - Greater than 50% non-exempt work – the DOL will likely find your working supervisors/assistant managers are non-exempt
 - *Bob Evans – 16.5 million*
 - *Duane Reade – 13.5 million*

Non-Discretionary Bonuses Impact OT

- Not exemption related – but Plaintiff’s attorneys are filing more lawsuits relating to non-discretionary bonuses to hourly workers
- OT = 1.5 x “Regular Rate of Pay”
- Regular Rate of Pay – includes non-discretionary bonuses
 - Production bonuses; Attendance bonuses; Productivity bonuses; Retention bonuses
 - Ex: September monthly productivity bonus is paid out in October
 - If the employee worked OT in September, then he/she should get an additional “true up” payment in October because the bonus increased his/her regular rate for September, and the overtime payment we made was too low

Non-Discretionary Bonuses - Example

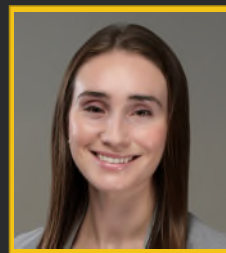
- \$25/hr; worked 50 hours the week of Sept. 8-14; \$300 prod. bonus paid in mid-Oct.
- \$300/30 days = \$10/day or \$70/week
- We paid 10 hours of OT in Sept. using a regular rate of \$25/hr in Sept.
- Additional \$70 applied that week increases the employee's regular rate to \$26.40/hr
- We owe employee an additional \$7 for the week of Sept. 8-14.
 - Non-discretionary bonus payments could mean that additional OT pay is owing to the employee for an earlier time period



Marcus Campbell

616.831.1791

campbellm@millerjohnson.com



Sydney Shaw

616.831.1835

shaws@millerjohnson.com

DETROIT

500 Woodward Ave
Suite 2800
Detroit, MI 48226

GRAND RAPIDS

45 Ottawa Ave SW
Suite 1100
Grand Rapids, MI 49503

KALAMAZOO

100 W Michigan Ave
Suite 200
Kalamazoo, MI 49007