

**DOL Final Rule 29 CFR 541 - Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees
FLSA Overtime Regulation and its Impact on Mississippi Government**

The Fair Labor Standards Act (FLSA) governs the federal minimum wage, overtime pay standards, child labor standards, and other aspects influencing American employees in the private sector as well as in federal, state, and local governments. The FLSA has been updated several times since it was first created, the most recent was in 2004 when the current salary threshold (\$455 per week) was established. FLSA governs employees in Mississippi, even though it is an at-will employment state. FLSA is to serve as a minimum standard in protecting employees; should any State pass employee protection standards that go above and beyond the measures put forth in the FLSA those are applicable so long as the standards set by FLSA are met.

In May 2016, the United States Department of Labor published a final rule, 29 CFR 541, updating the overtime pay requirements for salaried, white-collar workers; this includes those in bona fide executive, administrative, or professional (EAP) positions. This final rule also updated the salary threshold for Highly Compensated Employee's (HCE). The new rule was established to create a more distinct line between those white collar employees' who are and are not exempt from overtime payments. It will go into effect December 1, 2016, with provisions within the regulation to automatically update the salary thresholds every three years beginning in 2020.

Currently, salaried workers who make \$455 per week/\$23,330 annually or above are exempt from overtime compensation. This means if employee's make above this salary threshold, once they work over 40 hours in a single work week, they are required to be paid overtime. The new rule raises the salary threshold to \$913 per week/\$47, 476 annually making many employees who were not previously eligible for overtime pay, now eligible for overtime pay. The new exempt salary threshold for a HCE is \$134,004 annually. Meaning an employee who receives more than \$134,004 in salary payments, nondiscretionary bonuses, and commission payments are exempt from overtime payments.

The new rule allows nondiscretionary bonuses, incentive payments, and commissions to account for up to 10% of the salary requirement as long as these payments are made at least quarterly. For employers to determine if their employees are exempt from overtime pay the employees must pass 3 tests: 1) the salary basis test, 2) the salary threshold test, 3) the duties test. First, an employee must be paid a regular salary that is not subject to be changed based on the quality or





quantity of their work – this is the “salary basis test”. Second, an employee’s salary must meet the new requirement of \$913 per week/\$47,476 annually for a permanent, full-time job – “salary threshold test”. Finally, an employee’s main job duties must be within the guidelines of duties performed by EAP employee’s; those requirements are as follows and must all be met in order to be exempt:

Professional: The employee’s primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment; The advanced knowledge must be in a field of science or learning; and The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.¹ Common examples of professional jobs are practitioners of law, medicine, theology, accounting, and architecture; however there is also a creative professional exemption which includes many cartoonists, actors, soloists, and others who work in this field. For more detailed information on the professional duties test please refer to DOL Fact Sheet 17D.²

Administrative: The employee’s primary duty must be 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 and the employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.¹ This particular duties test can become very technical. In general, if an employee generally exercises independent judgement and will that can majorly influence your business or office it is best to consider them exempt. For more detailed information on the administrative duties test please refer to the DOL Fact Sheet 17C.³

Executive: The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise; The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.¹ These positions are those that have particular responsibility of managing personnel and operations within an organization. For more detailed information on the administrative duties test please refer to the DOL Fact Sheet 17B.⁴

¹ Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA). https://www.dol.gov/whd/overtime/fs17a_overview.pdf

² Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act (FLSA). https://www.dol.gov/whd/overtime/fs17d_professional.pdf

³ Fact Sheet #17C: Exemption for Administrative Employees Under the Fair Labor Standards Act (FLSA). https://www.dol.gov/whd/overtime/fs17c_administrative.pdf

⁴ Fact Sheet #17B: Exemption for Executive Employees Under the Fair Labor Standards Act (FLSA). https://www.dol.gov/whd/overtime/fs17b_executive.pdf





Computer Employee Exemption: The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below; The employee's primary duty must consist of: 1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; 2) The 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; 3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or 4) A combination of the aforementioned duties, the performance of which requires the same level of skills.¹ For more detailed information on the Computer Employee Exemption please refer to DOL Fact Sheet 17E.⁵

Outside Sales Exemption: The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and the employee must be customarily and regularly engaged away from the employer's place or places of business.¹

Highly Compensated employees (HCE) who receive more than the allowed \$134,004 annually and regularly perform at least one of the duties of the exempt EAP duties are identified and considered exempt from the new overtime regulations as well.

It is important to note that an employee's job title does not make him or her exempt or non-exempt. Exemption is based on the three-step test: salary basis, salary threshold, and duties test.

A state-by-state breakdown of the new overtime regulation shows that 39,563 employees in Mississippi who do not currently qualify for overtime, under the new overtime rule will become eligible for overtime pay if their wages, work hours, other duties are not adjusted.⁶ When examining the Stennis Institute's 2015 Municipal Salary and Benefit's Survey⁷, several job positions within local governments seem likely to be affected by this new rule: city manager, personnel manager, parks and recreation director, and county administrator. This is not an all-inclusive list; local governments should review their employee roster and job descriptions with the new EAP exemptions set forth by the Department of Labor. These employees of state and local government are automatically exempt from the final rule: hourly workers; workers with regular workweeks of 40 or less hours; HCE; police and fire employees in small agencies (please see DOL

⁵ Fact Sheet #17E: Exemption for Employees in Computer-Related Occupations Under the Fair Labor Standards Act (FLSA).

https://www.dol.gov/whd/overtime/fs17e_computer.pdf

⁶ STATE-BY-STATE BREAKDOWNS OF WORKERS AFFECTED BY DEPARTMENT OF LABOR'S FINAL OVERTIME REGULATION.

https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/OT_state_by_state_fact_sheet_final_rule_v3b.pdf

⁷ 2015 Municipal Salary and Benefits Survey. http://www.sig.msstate.edu/publications/2015_mml_salary_survey.pdf





Fact Sheet 17J⁸ and DOL Fact Sheet 8⁹) elected officials, their policymaking appointees, their personal staff, and legal advisors who are not subject to civil service laws; and legislative branch employees who are not subject to civil service laws.

State and Local governments have unique provisions built in within the FLSA and new overtime rule that allow them some flexibility when adjusting to the new federal overtime rule. States and Local governments have the option to use compensatory “comp” time. According to the Overtime Final Rule and State and Local Governments¹⁰, state or local government agencies can arrange for their employees to receive comp time instead of paying them one and one half times their normal rate per hour. There are a number of other options for bringing an office into compliance with this new overtime rule. First, raising the salaries of those employees who are close enough to the threshold and pass the duties test, to the new threshold. Second, for employees who seldom work overtime, government entities can choose to either budget the extra pay in the event of incidental overtime or provide comp time. It is not necessary to require these employees to begin punching a time clock, keeping a record of their daily hours worked should be sufficient according to the DOL.¹⁰ Another option is to redistribute the workload of employee’s who are newly eligible for overtime pay. By redesigning the workload, those employees who would usually be required to work overtime to complete their tasks, would be relieved of some of their duties and stay under the 40 hour per week limit. It may also be advantageous for governments to begin cross-training employees in the event an employee has worked their maximum amount of hours and accrued the maximum amount of comp time.

⁸ Fact Sheet #17J: First Responders and the Part 541 Exemptions Under the Fair Labor Standards Act (FLSA)
https://www.dol.gov/whd/overtime/fs17j_first_responders.pdf

⁹ Fact Sheet #8: Law Enforcement and Fire Protection Employees Under the Fair Labor Standards Act (FLSA).
<https://www.dol.gov/whd/regs/compliance/whdfs8.pdf>

¹⁰ Overtime Final Rule and State and Local Governments. <https://www.dol.gov/sites/default/files/overtime-government.pdf>



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