

2020 OVERTIME OVERVIEW --

WHAT EMPLOYERS AND EMPLOYEES NEED TO KNOW ABOUT OVERTIME REGULATIONS

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I. Introduction

On January 1, 2020, the FLSA salary threshold increased for the first time in 16 years and was raised from \$23,660 per year to \$35,568. It is expected that an additional 1.3 million workers will now be entitled to overtime.

Sixteen years earlier, on August 23, 2004, the first major overhaul of Federal Labor Standards Act (FLSA) overtime rules in 50 years went into effect. It was estimated at the time that 6.7 million salaried workers would receive as much as \$375 million in additional earnings every year because of it.

This article discusses the changes that occurred in 2020 and looks back at the overtime overhaul that occurred in 2004 as well. It then addresses how these changes impact employees and employers and provides a list of things every employer (and employee) review to make sure employees are properly classified.

II. The Three Tests – Salary Basis, Salary Level and Duties

A worker is exempt from the overtime provisions if three tests are satisfied. The *salary basis test* requires that a predetermined salary be paid, rather than hourly wage, and that the amount paid is not adjusted based on whether the person worked a certain number of hours each week. The *duties test* requires that the person's job duties must primarily involve "executive, administrative, or professional" duties as set forth in the Department of Labor's regulations. The *salary level test* requires that an employee be paid \$35,568 per year, up from \$23,660 for the last 16 years.

The *salary basis test* and the *salary level test* are straightforward. If an employee is not paid a predetermined amount regardless of the number or hours worked or not worked, or the employee makes less than \$35,568 a year, overtime is almost always payable. The *duties test* is full of problems, however. The next section discusses the major exemptions that make up the *duties test*.

III. The Big Three Exemptions

If the *salary basis* and *salary level tests* are satisfied, employees are still typically eligible for overtime *unless* they hold positions falling within one of three so-called "white collar" exemptions:

1. Executive;
2. Administrative; or
3. Professional.

Even if a “salaried” employee is labeled an “executive,” described as an “administrative” employee, or considered a “professional,” however, the employee may still be entitled to overtime. In other words, you cannot simply give someone the title of Vice President of Desk No. 43 and put that individual into an exempt category. Those tests will be addressed next.

1. “Executive”

An "**executive**" employee must have as his or her "primary duty" the management of an enterprise, or a customarily recognized department or subdivision. The "primary duty" test, however, was made significantly more flexible in 2004, both for "executive" positions and for "administrative" and "professional" employees. First, while duties that involve more than half an employee's time are still generally considered "primary," the new regulations provide greater leeway for a finding of exempt status even where less than 50% of the employee's time is taken up with exempt functions. In addition, under the new regulations, non-exempt tasks that are "directly and closely related" to an employee's exempt responsibilities may now be counted as exempt work, in determining the employee's "primary duties." The standard for what constitutes "management" duties has also been expanded, as has the definition of a customarily recognized "department or subdivision" of an enterprise.

2. “Administrative”

"**Administrative**" employees must have as their primary duty 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 those primary duties must include the exercise of discretion and independent judgment with respect to matters of significance (because of the "discretion and independent judgment" requirement, there are many "administrative" employees in every organization, including most "administrative assistants," who are *not* covered by the "administrative" exemption, and who *must* be paid overtime premium pay). While this duties test is largely unchanged under the new 2004 regulations, the number of positions likely to meet the test has increased.

3. "Professional"

"**Professional**" employees must have as their primary duties work requiring knowledge of an advanced type, work in a field of science or learning, or work customarily acquired by a prolonged course of specialized intellectual instruction. In addition to loosening the "primary duty" test, the new regulations in 2004 made it clear

that occupations whose educational prerequisites involve three years of non-specialized college instruction and a fourth year in an accredited specialized program will generally be exempt. As the next section illustrates though, it gets complicated.

IV. Illustration – Junior Accountants

To illustrate how these exemptions work, consider so-called junior accountants (i.e., they have not yet passed the CPA exam but are working for accounting firms) and whether the long hours they often put in entitles them to overtime. In *Campbell v Pricewaterhousecoopers*, the Ninth Circuit Court of Appeals addressed whether PwC's unlicensed junior accountants¹ should receive overtime pay California law or were exempt from mandatory overtime under its "professional" or "administrative" exemptions that are patterned after the FLSA (all other states' wage and hour laws largely mimic the FLSA). The District Court granted partial summary judgment to the junior accountants, finding that PwC was not exempt from paying overtime for its employees working over 40 hours per week.

On appeal, the Ninth Circuit overruled the District Court, focusing on whether unlicensed accountants are "categorically ineligible, as a matter of law, to fall under two state regulatory exemptions from mandatory overtime: the professional exemption and the administrative exemption." It held that they are not, finding that the District Court erroneously rejected PwC's triable defenses under both exemptions, and sent the case back for further proceedings. In other words, "genuine issues of material fact" precluded the trial court judge from deciding the case and required that a jury assess the evidence and reach a verdict.

Following remand to the lower court for trial, the case settled for \$5 million after four more years of litigation. The District Court's approved settlement included \$2.9 million in attorney fees and expenses. PwC did not admit liability to pay junior accountants' overtime and specifically did not agree to reclassify its junior accountants or to start paying them overtime in the future.

Meanwhile, a different federal circuit reached the opposite conclusion than the PwC case after reviewing nearly the same facts, albeit under federal law, and dismissed pendant state law claims without prejudice. In *Pippins v. KPMG*, 759 F.3d 235 (2nd Cir. 2014), the Second Circuit held that junior accountants, or what this court consistently called "Audit Associates," working for KPMG were "professionals" exempt from overtime pay requirements **as a matter of law** and affirmed summary judgment in favor of the accounting firm.

After noting that whether an exemption applies under overtime statutes and regulations is a "mixed question of law and fact," it characterized "how employees spent their working time as a fact question," but "whether particular activities excluded them from overtime benefits as a question of law." Some critics see this as a distinction without a discernable difference, but that is the law in the states that the Second Circuit

¹While some cases call them "audit associates," we refer to them as junior accountants.

covers, until a U.S. Supreme Court ruling—which may not be anytime soon—or Congress amends the FLSA.

As these disparate results suggest, the application of these exemptions is often more difficult than it appears. What employers can do, and employees should do, however, is discussed next.

V. What Every Employer Should Do

In light of the new regulations and thresholds, each employer should take the following steps:

- **Review your classification of all exempt and non-exempt employees in light of the new thresholds** -- if every employee in your organization is treated as exempt, or if most of them are, this may be a problem.
- **Awarded nondiscretionary bonuses** and incentive payments can be used to pay up to 10% of current year's newly exempt salary threshold, so if employers can make these changes can correct the problem before the year-end.
- **Revise or adjust formal job designations as appropriate** – old job descriptions (e.g., more than 10 years) that include as a duty “making photocopies” probably need to be revised.
- **Adjust compensation of lower-paid employees** -- bring them in line with the new 2020 threshold if you can justify a raise.
- **Adjust compensation of higher-paid employees** – take advantage of the new exemption for highly paid employees (the threshold for “highly compensated” workers was raised in 2020 from \$100,000 to \$107,432).
- **Adopt a policy concerning improper deductions** – for exempt employees.
- **Talk to your lawyer.**
- **Review the FLSA "traps for the unwary"** -- the new 2004 regulations have left unchanged many of the traps employers often fall into and create some new pitfalls. The most common of these are as follows:
 - Failing to pay for covered travel time;
 - Providing "compensatory time off" instead of required overtime premium pay;
 - Failing to aggregate hours worked for two or more related employers;

- Counting only base pay in calculating the "time and one-half" overtime premium;
- Paying non-exempt employees with a flat rate or lump sum payment instead of the "time and one-half" rate;
- Ignoring "small amounts" of overtime and other time-card inaccuracies; and
- Failing to pay for time worked by employees who start early, stay late or work through lunch.

As you can see, the regulations continue to pose significant risks to employers and should not be taken lightly.²

VI. Impact

Non-compliance is very expensive.³ In 2019, the top 10 wage and hour class action totaled \$449 million according to an annual survey by a Chicago law firm. Three of the cases settled for almost \$300 million:

- \$100 million: *In Re Wackenhut Wage and Hour Cases* involved security officers who alleged a failure to provide meal and rest breaks under California law.
- \$100 million: *Van Dusen v. Swift Transportation* involved drivers who asserted they were misclassified as independent contractors and deprived of proper wages and reimbursement of expenses in Arizona.
- \$98.8 million: *Roberts v. C.R. England Inc.*, involved drivers who alleged the defendants misrepresented the income that was available to them after they finished the company's training programs.¹

Conclusion

The new overtime law changes took effect on August 23, 2004 and there is still a lot of confusion about how to apply them to a given individual or job classification. You should take the necessary steps mentioned above to ensure compliance with the amended regulations with all deliberate speed.

² The official Department of Labor site is designed to help employers and employees understand the Department's new rules. Here is the Internet link: <http://www.dol.gov/whd/index.html>

³ The penalties involved with FLSA violations can be enormous. Employers who violate the FLSA (or their state counterparts) are liable for the unpaid overtime for two years preceding the complaint, and, if it is determined that the employer willfully failed to comply, the employer is liable for overtime payments for three years preceding the complaint. The employer may also be liable for an additional amount known as "liquidated damages" for non-compliance, effectively doubling the amount of the employer's liability. Those numbers are then multiplied by the number of workers involved.

ⁱ Seyfarth Shaw's 16th Annual Workplace Class Action Report: Plaintiffs' Win Percentage for Certification Conversion Climbs to Historic New Level in 2019 (Jan. 7, 2020).