

**2016 Final Regulations Defining and Delimiting the Exemptions for Executive,
Administrative, Professional, Outside Sales and Computer Employees**

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OVERVIEW OF CHANGES TO EAP EXEMPTION	
OLD REGULATIONS	NEW REGULATIONS (EFF. 12/1/16)
1. STANDARD SALARY \$455 week/\$23,660 year (subject to duties test)	1. STANDARD SALARY \$913 week/\$47,476 year (still subject to duties test)
2. HIGHLY COMPENSATED \$100,000 (subject to minimal duties test)	2. HIGHLY COMPENSATED \$134,004 (still subject to minimal duties test)
3. AUTOMATIC UPDATES TO COMPENSATION REQUIREMENTS None	3. AUTOMATIC UPDATES TO COMPENSATION LEVELS Every 3 years
4. INCLUSION OF NONDISCRETIONARY BONUSES AND INCENTIVE PAYMENTS TO REACH STANDARD SALARY Inapplicable	4. INCLUSION OF NONDISCRETIONARY BONUSES AND INCENTIVE PAYMENTS TO REACH STANDARD SALARY Permitted for up to 10% of standard salary level—must be paid at least quarterly

Summary of Purpose

The U.S. Department of Labor’s Final Rule updates the regulations for determining whether white collar salaried employees are exempt from the Fair Labor Standards Act’s minimum wage and overtime pay protections. They are exempt if they are employed in a bona fide executive, administrative, or professional capacity, referred to as the “white collar” or “EAP” exemption.

Who is Covered by the FLSA? Employees of enterprises that have an annual gross volume of sales made or business done of at least \$500,000 (non-profits are no exception), plus hospitals, businesses providing medical or nursing care for residents, schools (whether operated for profit or not for profit), and public agencies. Employees may be individually covered if their work regularly involves them in interstate commerce also.

Basic Requirements of EAP Exemption (Effective 12/1/16)			
Exemption	Salary Level Test	Salary Basis Test	Duties Test
Executive	<ul style="list-style-type: none"> At least \$913/wk (\$47,476/year) 	<ul style="list-style-type: none"> At least 90% of salary level (\$822/wk) paid on a “salary” basis Up to 10% (\$91/wk) may be satisfied with nondiscretionary bonuses or incentive payments 	<ul style="list-style-type: none"> Primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise; Customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and Authority to hire or fire, or their suggestions and recommendations regarding hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight. <p>(WHD Fact Sheet 17B)</p>
Administrative	<ul style="list-style-type: none"> At least \$913/wk (\$47,476/year) “Academic administrative personnel” may qualify with a salary at least equal to the entry salary for teachers at their educational establishment. 	<ul style="list-style-type: none"> At least 90% of salary level (\$822/wk) paid on a “salary” or “fee” basis Up to 10% of the salary level (\$91/wk) may be satisfied with nondiscretionary bonuses or incentive payments 	<ul style="list-style-type: none"> Primary duty must be 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 Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. <p>(WHD Fact Sheet 17C)</p>
Professional	<ul style="list-style-type: none"> At least \$913/wk (\$47,476/year) <p><i>Salary level test does not apply to doctors, lawyers, or teachers</i></p>	<ul style="list-style-type: none"> At least 90% of salary level (\$822/week) paid on a “salary” or “fee” basis Up to 10% of salary level (\$91/wk) may be satisfied with nondiscretionary bonuses or incentive payments <p><i>These requirements do not apply to doctors, lawyers, or teachers</i></p>	<p>Learned Professional</p> <ul style="list-style-type: none"> Primary duty must be 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. <p>Creative Professional</p> <ul style="list-style-type: none"> Primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. <p>Other</p> <ul style="list-style-type: none"> Note exemption for teachers, doctors, and attorneys. <p>(WHD Fact Sheet 17D)</p>

Outside Sales	Inapplicable	Inapplicable	<ul style="list-style-type: none"> Primary duty must be making sales 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 must be customarily and regularly engaged away from the employer's place or places of business. <p>(WHD Fact Sheet 17F)</p>
Computer	<ul style="list-style-type: none"> At least \$913/wk (\$47,476/year), or at least \$27.63/ hr 	<ul style="list-style-type: none"> At least 90% of salary level (\$822/wk) paid on a "salary" or "fee" basis unless employee paid on hourly basis and receives at least \$27.63/hr Up to 10% of salary level (\$91/wk) may be satisfied with nondiscretionary bonuses or incentive payments 	<ul style="list-style-type: none"> Employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field with primary duty of: <ol style="list-style-type: none"> The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; 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; The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or A combination of the aforementioned duties, the performance of which requires the same level of skills. <p>(WHD Fact Sheet 17E)</p>
<p>Highly Compensated Exemption (HCE) (WHD Fact Sheet 17H)</p> <ul style="list-style-type: none"> Paid total annual compensation of \$134,004 or more (must include at least \$913/wk paid on a salary or fee basis) <ul style="list-style-type: none"> 10% catch-up payments not permitted, must be paid at least \$913/wk Additional payments permitted in addition to the \$913/wk salary to meet \$134,004 total annual compensation Perform office or non-manual work; and Customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption. 			

PRACTICE TIPS

- Salary Alone is Not Enough.** Employee's job duties and salary must meet the EAP requirements.
- Catch-Up Payments to Meet Standard Salary Level.**
 - If an employee does not earn enough in non-discretionary bonuses or incentive payments (including commissions) in a quarter to retain the salary level for exempt status, an employer may provide a "catch-up" payment at the end of the quarter. The employer has one pay period to make up the shortfall (up to 10% of the salary) or the employee becomes eligible for overtime pay that quarter.

- b. To claim the HCE, employers must pay workers at least the standard weekly salary level of \$913 per week on a salary or fee basis. No catch-up payments are permitted to meet salary basis test under the HCE. However, employers who pay workers at least the standard weekly salary level of \$913 are permitted to fulfill the HCE total annual compensation requirement (\$134,004) with commissions, nondiscretionary bonuses, and other forms of non-discretionary deferred compensation.
 - c. Nondiscretionary bonuses and incentive payments (including commissions) described above, are compensation promised to induce employees to work more efficiently or to remain with the company (e.g., bonuses for meeting production goals, retention bonuses, and commission payments based on a fixed formula). By contrast, discretionary bonuses are those at the employer's discretion and not in accordance with preannounced standards (e.g., unannounced bonus, or spontaneous award).
3. **Off-the-Clock Work.** Beware of off-the-clock work (including out of office and smart phone use) for employees reclassified to hourly non-exempt or salary non-exempt. In addition, labor budgets as a factor influencing bonuses may incentivize or reward off-the-clock work at the risk of litigation.
4. **Fluctuating Work Week (FWW) Method of Overtime Compensation.** Use of the FWW to pay salaried non-exempt workers overtime at .5 rather than 1.5 times their regular rate of pay is a minefield for litigation. The regular rate of pay cannot fall below the minimum wage, payment of bonuses may invalidate the FWW method of compensation, and the overtime rate of pay for the calculation varies based on number of hours the salary intends to cover. Further, certain state laws do not permit use of the fluctuating workweek method.
5. **Updates.** Employers must keep their pay systems in line with the updates to the salary levels that occur every three years.
6. **Higher Education.** Teachers and coaches are generally exempt, but preschool teachers may not be. Graduate and undergraduate students engaged in research may not be entitled to overtime. Administrative personnel for higher education institutions are subject to a special salary threshold that does not apply to white-collar employees outside of higher education. Public universities or colleges that qualify as a public agency may use comp time in lieu of cash overtime payments.
7. **Audit.** Employers may consider an attorney audit of its classification decisions. This can decrease potential exposure from a 3-year to a 2-year statute of limitations under the FLSA, and avoid an award of double damages.
8. **DOL Implementation Suggestions.**
 - a. Increase the salary of an employee who meets the duties test to at least the new salary level to retain exempt status;
 - b. Pay an overtime premium of 1.5 times the employee's regular rate of pay for overtime hours worked;
 - c. Reduce or eliminate overtime hours;
 - d. Reduce the amount of pay allocated to base salary (provided that the employee still earns at least the applicable hourly minimum wage—currently \$7.25/hour) and add pay to account for overtime hours worked over 40 in the workweek, to hold weekly pay constant; or
 - e. Use some combination of the above.