Overtime Requirement – Top 10 FAQs

Developed by ComplianceHR

1. Does this new overtime rule change our obligations under state law?

- No. To be classified as exempt, a worksite employee must meet both federal and state requirements. Thus, you must pay exempt worksite employees the federal or state minimum, whichever is higher.
- In 2020, the minimum salary levels in Alaska, California, Maine and New York will be higher than the new federal minimum salary for exemption of $684 per week ($35,568 annualized).

2. Can the new minimum salary level be pro-rated for part-time worksite employees?

No, there is no such thing as a "pro-rated" minimum salary level. A part-time worksite employee cannot be exempt if paid less than $684 weekly.

- Part-time worksite employees shouldn't work more than 40 hours per week (normally, no overtime would be due under the FLSA.)
- If part-time worksite employees work 40+ hours regularly, may be vulnerable for benefit claims and actions for additional workers' compensation premiums.

3. Can worksite employees be exempt without earning the new $684 minimum on a salary basis?

- There are a few categories of worksite employees who can be exempt without being paid on a salary basis -- doctors, lawyers, teachers, and outside sales worksite employees.
- Worksite employees who perform high-level IT work may qualify for the computer exemption if paid the new $684 per week on a salary basis or paid $27.63 per hour.

4. Are religious organizations or non-profits exempt from the requirements of the FLSA?

- No, if the FLSA applies, there are no statutory exceptions for religious organizations or non-profits.
- The FLSA applies to any organization that has $500,000 in gross annual review per year, but also applies to any individual worksite employee who is operating in interstate commerce.

5. If I'm considering converting a salaried worksite employee to hourly, how can I estimate hours?

- This requires some investigation as most exempt worksite employees do not keep time records (not required). Here are some ideas:
    - Start with your organization's standard business or store hours
    - Interview their managers
    - Review the worksite employees' electronic touches in the work place: badge swipes, computer logs, electronic calendars, GPS data
    - Consider sending the worksite employee an hours worked survey

6. If we reclassify, should we change a worksite employee's title?

- While this is not a legal requirement, you might consider whether you have both exempt and non-exempt worksite employees sharing the same job title, which can lead to confusion and sometimes risk.

- Also, if you are reclassifying, differentiating by job title or creating a job ladder (Accountant I, Accountant II), and moving nonexempt job duties to the entry-level position, is a good way to create a defensible distinction between the classifications.

7. We have many exempt worksite employees making over $23,660 but under $35,568. Can we count bonuses and commissions to make it over the new threshold?

- Only up to 10% of the new $35,568 minimum salary level ($3,556.80) can be paid as bonuses, commissions & other non-discretionary incentives paid annually or less frequently.
- *Be cautious:* If your bonus and commissions come up short, you will have just one pay period after the end of your fiscal year for a make-up payment.
- *Remember:* The 10% rule is not available in states that have adopted their own minimum salary levels without adopting the FLSA regulations.

8. We pay annual bonuses in the last week in December but they are forfeited if the worksite employee is not employed during this time period. How does that affect the 10% rule?

- If you've used the 10% rule to pay a salary of $615.60 per week (90% of $684), and because of your bonus rule, the worksite employee forfeits and receives no additional bonus or commission compensation, you haven't complied with the rule and the worksite employee doesn't qualify for exemption.
- *To avoid this:* In the final employment week, you must pay the difference between $615.60 and $684 ($68.40) for every week that worksite employee performed any work before the termination.

9. Does the 10% rule apply to the highly compensated test?

- No. A highly compensated worksite employee must be paid a total annual compensation of $107,432.
  - Must include the guaranteed minimum salary of $684 weekly, without the weekly salary discount allowed under the 10% rule for the standard duties tests.
  - The delta between the $684 per week ($35,568 annual) & $107,432 – that is, $71,846 per year – can be any type of compensation (except the cost of lodging & other facilities, or the cost of employee benefits (health or life insurance premiums, contributions to retirement plans, and similar).

10. If we use Navigator OT and the DOL auditor questions the assessment it provides, will ComplianceHR help clients with their DOL audit?

- Yes. Although ComplianceHR itself does not practice law and cannot represent you before an agency or court, we can provide any information needed to defend the risk assessment produced by Navigator OT, including the underlying algorithms and logic.
- **BONUS:** Navigator OT was designed by Tammy McCutchen, a former DOL Wage and Hour Administrator who wrote the duties tests in the 2004 regulations (and not impacted by the new rule). Tammy actively defends employers across the country.