

Final Overtime Rule: Preparing for Change

*Trick or Treat - The Changes to the “White Collar”
Overtime Regulations are Finally Here*

October 31, 2019



Compliance **HR**

Little®

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Lori Brown

CEO, ComplianceHR

brown@compliancehr.com

 [@labrown1419](https://twitter.com/labrown1419)

- Former Littler Shareholder
- Former General Counsel / HR Chief of Global Security Organization
- Career Compliance Geek

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Answering Your Questions

1. Q & A Box on your screen (questions are confidential – visible to presenters only)
2. E-mail me at brown@compliancehr.com – monitored throughout today's presentation (attendees will not be mentioned by name or company)



What You'll Receive

1. Full slide presentation (pdf format)
2. Link to recorded audio presentation



Agenda

- I. FLSA Overtime Basics
- II. Breaking News: The New Overtime Rules
- III. What the New Overtime Rules mean for employers?
- IV. Practical tips on how employers should prepare for the new rules
- V. How Navigator OT, provided by TriNet, can help you prepare for compliance success
- VI. Questions and Answers

FLSA Basics

- The FLSA requires employers to pay non-exempt employees:
 - ✓ At least the minimum wage for all hours worked
 - ✓ Overtime for all hours worked over 40 in a week at 1.5 times the employee's regular rate of pay
- Employers also must maintain accurate and complete time and payroll records



FLSA: Exempt v. Non-Exempt – THAT is the Question.

- While most employees are eligible for overtime pay, some employees are “exempt” from the FLSA overtime requirements
- The most common exemptions are for “white collar” workers – executive, administrative, professional, outside sales, and computer employees

To be considered exempt, employees must generally satisfy three tests:

1 Salary-level test

Currently, employers must pay employees at least \$455 per week (the minimum salary requirement) to qualify for the executive, administrative, and professional employee exemptions.

2 Salary-basis Test

With very limited exceptions, the employer must pay employees their full salary in any week they perform work, regardless of the quality or quantity of the work.

3 Duties Test

To qualify for an executive, administrative or professional exemption an employee must meet specific duties tests.

FLSA Basics



- The FLSA is highly technical – this stuff is complicated!
- DOL estimates that 70% of employers are not in full compliance
- To comply, you need to understand:
 - ✓ Who is exempt and non exempt?
 - ✓ When are employees working?
 - ✓ How to calculate overtime pay rate?



BREAKING NEWS

**DOL's New Overtime Rules will
Take Effect JANUARY 1, 2020**

BREAKING NEWS: *The New DOL Rules on Overtime Are Finally Here*

Poll Question

With the new overtime laws taking affect, does your organization plan to conduct an overtime compliance audit?



Tammy McCutchen

VP Strategy, ComplianceHR

tammy@compliancehr.com

 [@tdmccutchen](https://twitter.com/tdmccutchen)

- Littler Principal
- Former Administrator, US-DOL Wage & Hour Division and author of 2004 revisions to the overtime regulations
- Leading authority on federal and state wage and hour laws

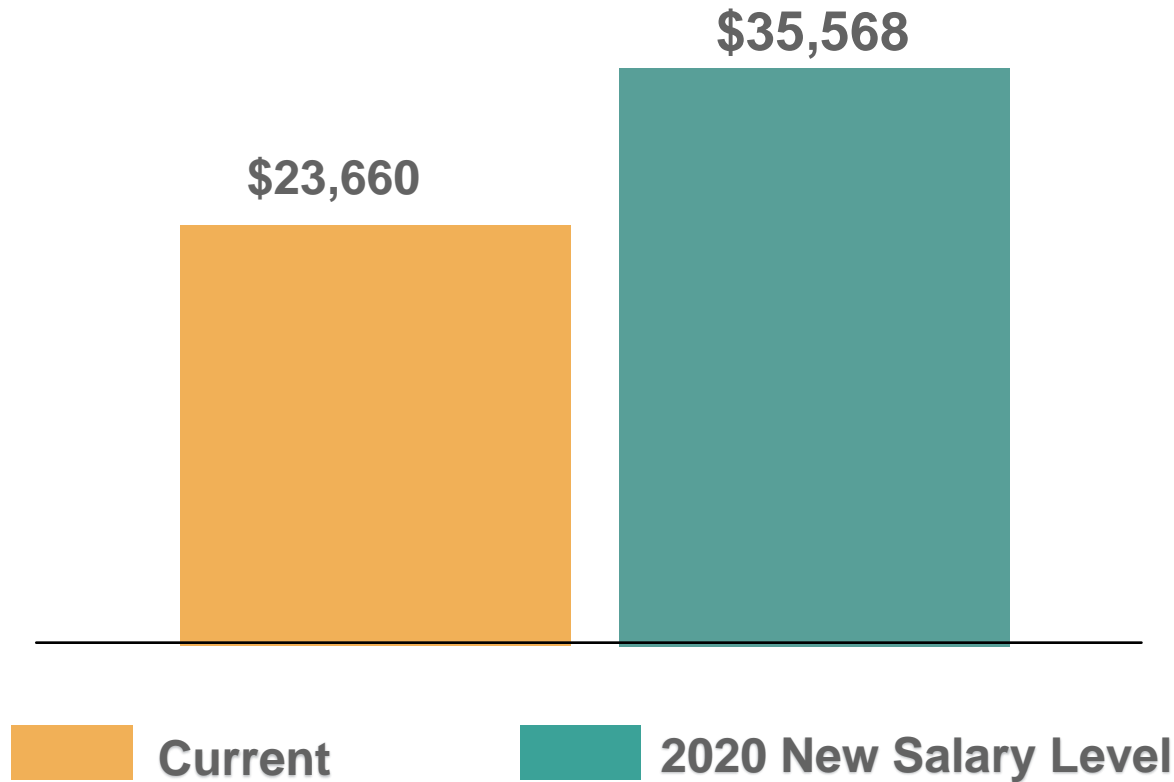
CHANGE #

1

Minimum Salary Level

(but don't forget salary basis & duties test!)

New Minimum Salary Level as of JAN. 1



Final Rule

- \$ 684 per week
- \$ 35,568 annualized

CHANGE #

The 10% Rule

15

BREAKING NEWS: *The New DOL Rules on Overtime Are Finally Here*

Up to 10% of the Minimum Salary May Be Commissions and Incentive Pay

Counted towards the 10% - non-discretionary payments

- All commissions
- Bonuses based on individual performance, productivity or hours worked
- Bonuses based on company performance
- Safety bonuses

Not counted towards the 10% - discretionary pay

- Service awards
- Employee-of-the month awards
- Spot bonuses / prizes
- Holiday bonuses

The 10% Rule – Let's Do the Math

- \$684 weekly minimum minus 10% = \$615.60 weekly guaranteed salary
- \$35,568 annual salary times 10% = \$3,556.80 in commission or bonuses annually

What happens if the incentive pay falls short?

- Only one pay period for a make-up payment
- Employees paid even \$1 less than required are owed overtime for the entire prior year

CHANGE #

3

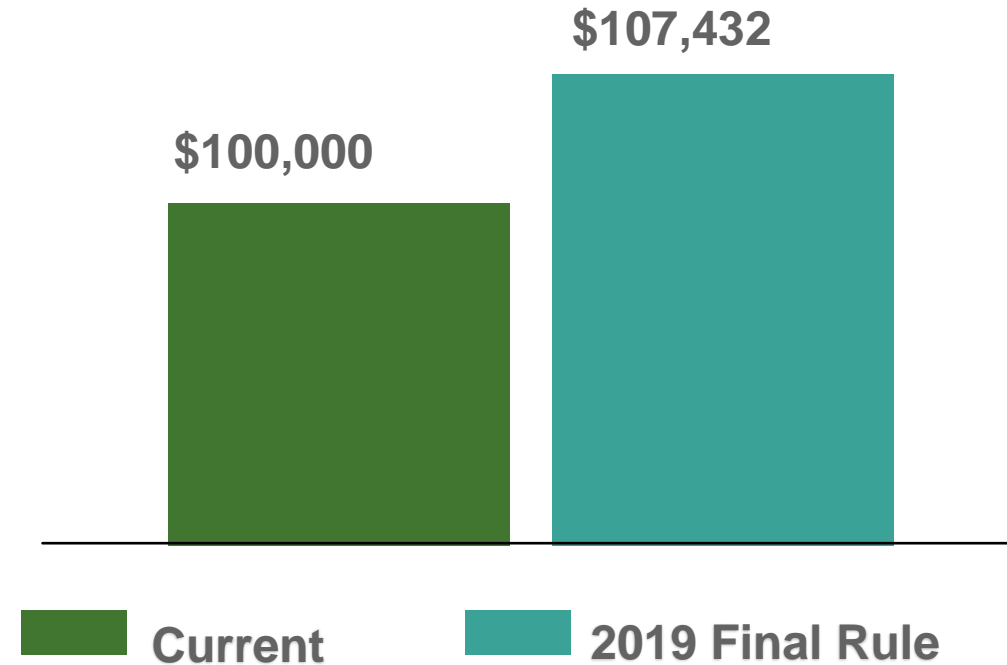
Highly Compensated Level

18

BREAKING NEWS: *The New DOL Rules on Overtime Are Finally Here*

Highly Compensated Level

- Total annual compensation of \$107,432
- Must include the minimum guaranteed weekly salary of \$684 (\$35,568 annualized)



Breaking News: 62 Days Until New Rules Become Effective!

CHANGE #

Automatic Increases

20

BREAKING NEWS: *The New DOL Rules on Overtime Are Finally Here*

No Automatic Increases

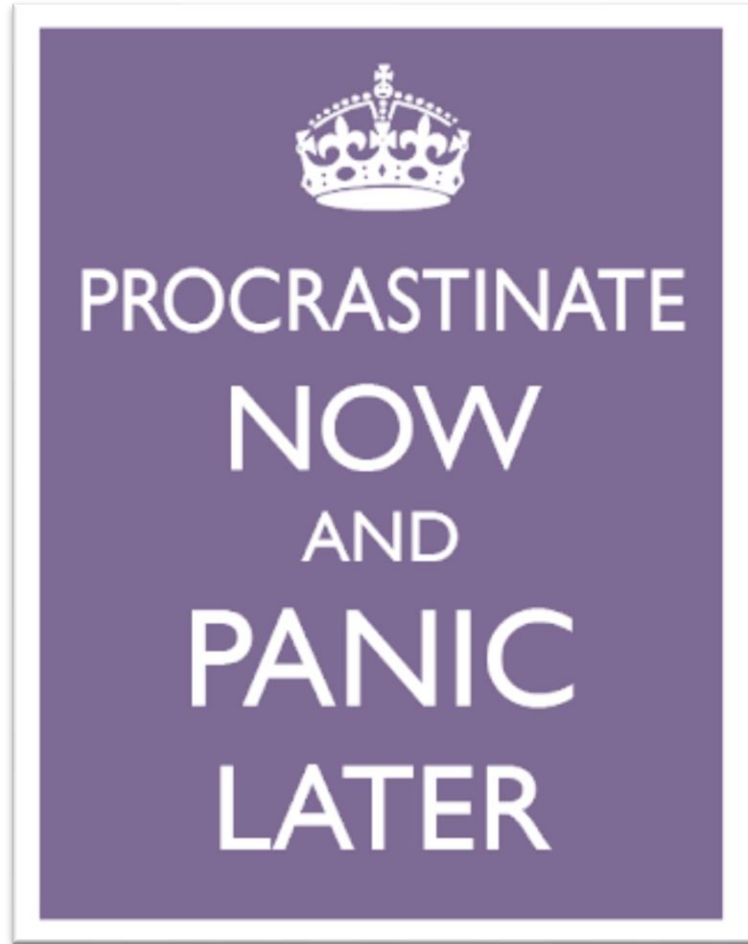
- DOL will not increase salary levels without notice and comment rulemaking



Poll Question

When do you plan to review your exemption classifications to comply with the new regulations?

62 days Until January 1!!!!



- Compliance will take more time than you anticipate
- 62 days left to comply
- There is no more time to procrastinate – it's time to panic

Preparing for Change:

Here we go again!

Why Do We Care?



The Cost of Non-Compliance

- ☐ April 8, 2019
Thermo Fisher's \$4.7M Wage Deal Gets Green Light
...s \$4.7 million class action settlement with workers to resolve wage, meal and rest break claims...
- ☐ April 4, 2019
PetSmart To Pay \$2.4M To End Dog Groomers' Wage Suit
...A California federal judge has given the initial OK to a \$2.42 million deal to settle claims in two...
- ☐ April 2, 2019
\$3.56M Settlement Ends Cabot Misclassification Suit
...A Pennsylvania federal judge on Tuesday gave the final okay to a \$3.56 million deal to settle a...
- ☐ April 1, 2019
\$7.5M Comcast Wage Deal Falls Short, Judge Says
... struck the settlement in March. Under the deal, the workers would receive about \$4.65 million...
- ☐ March 28, 2019
Nurse Staffing Co. Inks \$2.75M Deal To End OT Row
... million — constituting approximately 50 percent of the maximum unpaid overtime that could be...
- ☐ March 28, 2019
\$2.35M Wage Deal Unravels After Truckers Lose Class Cert.
...A Utah federal judge on Wednesday nixed a \$2.35 million settlement after denying class...

The Key Decision



Increase Salary versus
Reclassify?

New Rule as Opportunity



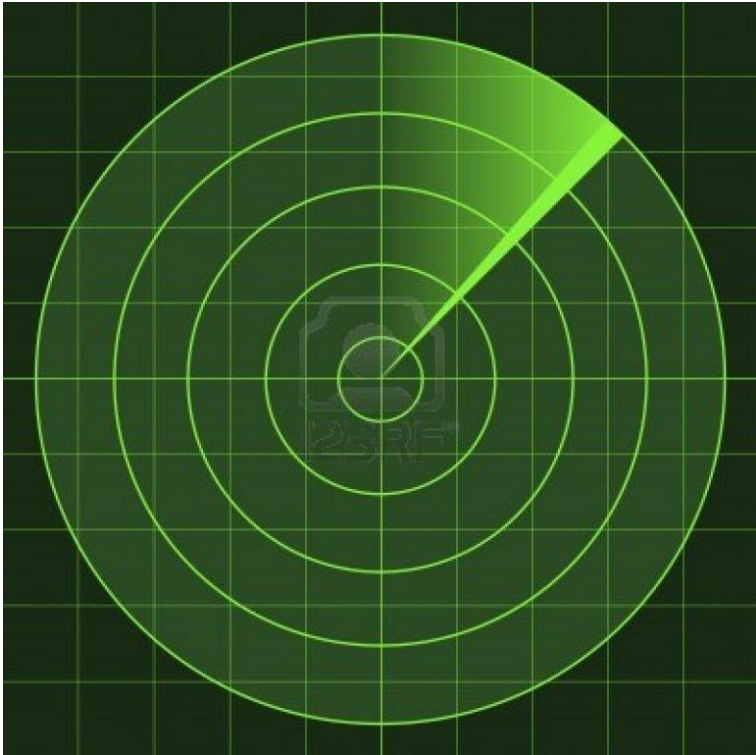
- The new rules are an opportunity for employers to correct exempt classification errors
- Do the job duties performed by all of your employees meet the requirements for exemption?

The Reclassification Decision: Salary

- Pull salary and incentive pay data for all employees earning below the minimum
- Calculate the cost of increasing salary to the minimum
- Calculate the cost of overtime:
 - $(\text{Weekly salary} / 40) * 1.5 * \text{expected overtime hours}$



The Reclassification Decision: Duties



- Do all your exempt employees meet the duties tests for exemption?
- Rare opportunity to correct classification issues
- Reduced risk of triggering litigation
- Reclassified based on job duties should fly under the radar

Job Duty Review Process: The Manual Option

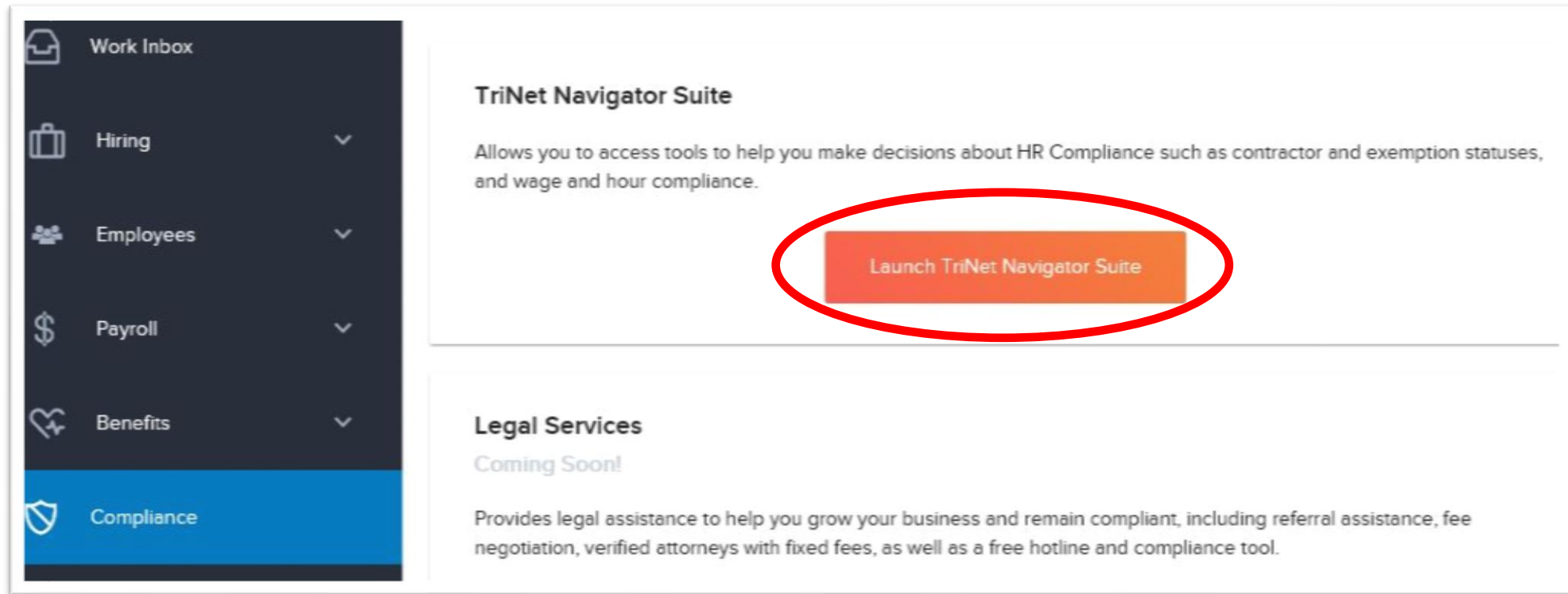
- Review HRIS data
- Review documents
- Conduct interviews
- Research and apply the law



The ComplianceHR Solution

Accessing Navigator Suite

Under the Admin View, the TriNet Navigator Suite can be found under the “Compliance” link on the TriNet platform (login.trinet.com)



Accessing Navigator Suite

Navigator IC



Independent Contractor Assessment

Delivers an actionable risk assessment, a report on how to lower the risk of misclassification, and a summary of applicable laws

[+ Create New Evaluation](#)

[Q View Evaluations](#)

[▶ IC Agreement](#)

Navigator OT



Exempt Status Assessment

Provides a risk assessment of each applicable exemption, suggestions on how to lower the risk of misclassification, and a summary of the federal and state exemption standards

[+ Create New Review](#)

[Q View Reviews](#)

[Q View Evaluations](#)

Navigator Pay Practices



Wage and Hour Compliance

Delivers comprehensive reports on a federal and state-by-state basis for the most common wage and hour issues

[▶ Find Minimum Wage](#)

[▶ Use Rapid Reference](#)

Navigator Onboarding



Onboarding Document Production


Produces state and federal compliant employment applications, offer letters, and employee non-disclosure documents

[+ Create New Document](#)

Giving you the tools you need!

- Online exemption analysis solution
- Expert level guidance on exemption decisions
- Assessment in as little as 15 minutes
- Tool applies federal and state exemptions tests, and over 2400 reported court decisions and DOL opinion letters
- Provides suggestions to lower risk of misclassification

Navigator OT



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[+ Create New Review](#)[View Reviews](#)[View Evaluations](#)

Review Set Up

Navigator OT

Review Details

Please enter the following information. An * indicates a required field. All other fields are optional.

Brief name to describe and identify this [review](#).*

Which [regulations](#) do you want to use?

Note: these will be applied to all evaluations inside your review.

How would you like to enter the evaluation data?*

Would you like to evaluate employees or positions?*

Who will complete the evaluation(s)?*

Employee First Name*	Employee Last Name*	Employee Email	Work State*	Employee ID	Employee Dept
Mark	McHenry	MMcHenry@abccompany.com	Illinois	12345	Retail Operations

Navigator OT Questionnaire

Navigator OT

Abc Inc.: Mark McHenry

Work State

Where does Mark McHenry [work](#) ⓘ?

Illinois ▼

Compensation Details

How is Mark McHenry paid?
Select all that apply

☒ On a [salary](#) ⓘ


☐ On a [fee basis](#) ⓘ

☐ By the [hour](#) ⓘ

☐ Commissions

☐ A [nondiscretionary](#) ⓘ bonus

☐ None of the Above

 What is Mark McHenry's annual salary?

\$ 70000.00

Has Mark McHenry's salary ever been reduced for reasons other than standard payroll deductions for taxes, liens, and employee benefits?
[More information](#) ⓘ

☐ Yes ☒ No

[< Back](#) [Next >](#)

Navigator OT Questionnaire

How many **employees** ⓘ does Mark McHenry supervise?

If no employees, enter 0

3

Does Mark McHenry perform work in a computer, software or information technology field?

☐ Yes ☒ No

Does Mark McHenry **sell** ⓘ Abc Inc.'s products or services?

☒ Yes ☐ No

Exemption Analysis

What is the highest level of education Mark McHenry has achieved?

Associates Degree ▼

Does Mark McHenry perform work in any of the following artistic or creative fields?

Check all that apply.

- ☐ Acting
- ☐ Design (including web design)
- ☐ Drawing, Sketching or Cartooning
- ☐ Film/Video
- ☐ Graphic Arts
- ☐ Journalism
- ☐ Music
- ☐ Painting
- ☐ Performance Art
- ☐ Photography
- ☐ Writing
- ☐ Other Artistic Media
- ☒ None of the Above

Navigator OT Questionnaire

Business Operations

- ☐ Conducting business or sales research
- ☒ Creating, modifying, interpreting or approving departures from company policies, procedures or operating practices
- ☐ Managing projects or major assignments related to the operations of the business (e.g., projects in areas such as tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations, legal and regulatory compliance, and similar areas impacting how the business is operated)
- ☐ Performing work that strictly follows established manuals, guidelines, policies or procedures
- ☐ Determining techniques and processes used to perform work or to carry out business programs or initiatives
- ☐ Determining type of materials, supplies, machinery, equipment or tools to be used to perform the work
- ☐ Conducting ordinary inspections, examinations or grading within closely prescribed limits to determine adherence to established standards described in manuals, check lists or similar sources (NOT including supervisors reviewing work of employees or ensuring adherence to company policies)
- ☒ Planning or controlling a budget
- ☐ Planning short-term or long-term business objectives
- ☐ Providing expert advice to the company or the company's customers in areas such as accounting, finance, tax, actuarial computation, benefits, insurance, law, legal compliance, engineering, architecture, the sciences (physical, chemical, biological), health and safety, public relations, media relations or government relations
- ☐ Providing for the safety and security of employees or property
- ☐ Purchasing, buying, procuring or managing inventory, materials or supplies
- ☐ None of the Above

Navigator OT Questionnaire

Selected Job Duties

Below is a list of all the duties you selected. If this list is complete, please answer the following questions about each duty. If you need to remove a job duty, you can select "None" from first drop down.

The total time spent should not exceed 100%, even if multiple duties are handled [concurrently](#) ⓘ. The total time spent **can** be less than 100%.

You are currently allocating: 95%

Selected Job Duty	Approx Time Spent ⓘ	Importance ⓘ	Authority ⓘ
Planning or controlling a budget	15% ▼	Important ▼	Sometimes Followed ▼
Managing performance of employees, including but not limited to coaching and conducting performance reviews, ensuring compliance with company policies and procedures, and evaluating the work of employees	10% ▼	Important ▼	Almost Always Followed ▼
Planning or directing the work of employees	35% ▼	Critical ▼	Always Followed ▼
Making Sales	35% ▼	Very Important ▼	Always Followed ▼

Navigator OT Questionnaire

Exemption Analysis

What percentage of time during a typical week does Mark McHenry spend on exempt work?

31-40% ▼

What percentage of time during a typical week does Mark McHenry spend on exempt work?

11-20% ▼

Does Mark McHenry perform sales or sales-related work at any of the following locations?

Check all that apply

- ☒ Abc Inc. office(s)
- ☐ Personal home
- ☐ Customer place of business
- ☐ Customer home
- ☐ Other locations away from a fixed home or Abc Inc. office

Exemption Analysis

Is Mark McHenry currently in training for this position (e.g., manager-in-training, trainee engineer or an apprentice)?

☐ Yes ☒ No

Select the statement that best describes how closely Mark McHenry is supervised:

Mark McHenry is not closely supervised (e.g., Mark McHenry provides updates to manager on a regular basis, but manager does not often direct or review work) ▼

Does Mark McHenry use any manuals, guidelines, or other established standard procedures (SOPs) in the performance of this job? [More information](#) ⓘ

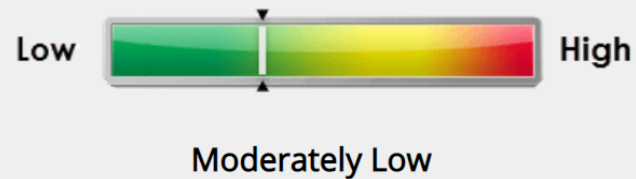
☐ Yes ☒ No

To what degree does Mark McHenry use any templates, checklists, computer assisted design or other computer applications in the performance of job duties?

Mark McHenry does not use any tools ▼

Navigator OT Results & On Screen Summary

What is the risk of classifying Mark McHenry as an exempt employee?



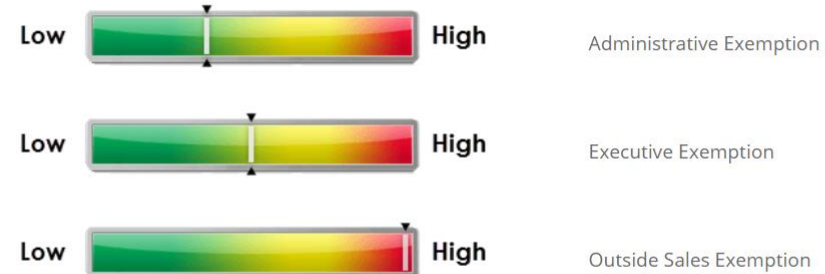
Mark McHenry is likely to meet the requirements for the following exemption: Administrative.

Mark McHenry does not clearly meet the requirements for the following exemption: Executive. However, in the "Understanding Your Risk" section below, there is more information about how to reduce the risk of classifying the employee based on this exemption.

Mark McHenry is extremely unlikely to meet the requirements for the following exemption: Outside Sales.

Mark McHenry does not qualify for the following exemptions: Computer, Creative Professional and Learned Professional.

Individual Exemption Risks



Note: Mark McHenry does not qualify for the Computer, Creative Professional and Learned Professional exemptions.

FOR MORE INFORMATION ABOUT YOUR RESULTS PLEASE SEE THE RESOURCES BELOW:

- ▶ Understanding Your Risk
- ▶ Summary of Law
- ▶ Profession-Specific Exemptions
- ▶ Transcript of Your Questions and Answers
- ▶ Disclaimer

PRINT THIS REPORT: Printable Report

Additional Report Resources

Riskiest Factors

Mark McHenry's risk may be lowered as follows:

Exemptions	Risk Factor	Steps to Lower Risk
Executive	Employees Supervised	<p>To qualify for the executive exemption, an employee must supervise the work of two or more full-time employees, or their equivalent on a regular basis. Under the FLSA and state wage-hour laws, full-time generally means 40 hours of compensable work. Thus, this requirement limits the exemption to employees who supervise at least 80 hours of work each week by other employees. This could be 2 employees working 40 hours per week, or 4 employees each working 20 hours each week. Also, the employee must supervise others on a regular basis, which means more than occasionally. For example, a relief supervisor is likely not an exempt employee if he only occasionally has some responsibility for directing the work of other employees.</p> <p>Even though Mark McHenry supervises 3.00 employees, Abc Inc. may be able to lower its risk by ensuring that Mark McHenry supervises well above 80 hours of work each week and by ensuring that Mark McHenry supervises those employees on more than one occasional basis.</p>

Failure to Qualify

Mark McHenry has failed to meet the most basic qualifications required in order to be classified as exempt under the Computer, Creative Professional and Learned Professional exemptions.

Exemptions	Reason Not Qualified
Learned Professional	<p>The Learned Professional exemption requires that the employee have advanced knowledge "customarily acquired by a prolonged course of specialized intellectual instruction." This requirement restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence that an employee meets this requirement is possession of the appropriate four-year advanced academic degree. However, the word "customarily" means that the exemption is also available to employees who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. For example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry.</p> <p>Mark McHenry doesn't clearly qualify for the Learned Professional exemption because Mark McHenry does not have at least a Bachelor's Degree. However, if you feel that Mark McHenry may nonetheless qualify for the learned professional exemption because they have substantially the same knowledge level and performs substantially the same work as the degreed employees also in the same job, it may still be possible for Mark McHenry to still qualify under this exemption. However, based solely on the information provided, Mark McHenry is not clearly qualified for this exemption.</p>

Transcript of Questions & Answers

Engagement Details

Employee First Name	Mark
Employee Last Name	McHenry
Job Title	Assistant Manager
Job Code	Assistant Manager
Department	Retail Operations
Work Jurisdiction	Illinois
Manager First Name	Robert
Manager Last Name	Smith
Manager Department	HR

Compensation

How Mark McHenry paid?	On a salary
What is Mark McHenry's annual salary?	\$70,000.00
Has the salary ever been reduced for reasons other than standard payroll deductions for taxes, liens, and employee benefits?	No

Applicable Exemptions

Does Mark McHenry perform work in a computer, software or information technology field?	No
Does Mark McHenry perform work in any of the following artistic or creative fields?	Not Applicable
How many employees does Mark McHenry supervise?	3.00
What is the highest level of education achieved by Mark McHenry?	Associates Degree
Does Mark McHenry sell Abc Inc.'s products or services?	Yes

Duty Tests

Job Duty	Time Spent	Importance	Authority
Creating, modifying, interpreting or approving departures from company policies, procedures or operating practices	5%	Important	Almost Always Followed
Planning or controlling a budget	10%	Important	Sometimes Followed

The Secret Word is:



Why Should I Use Navigator OT?

- The new law is coming and also brings a unique opportunity to get your house in order
- Through traditional methods, exempt audits are costly & time consuming – can take up to 6 months
- Diagnose your vulnerabilities now in minutes not weeks or months, for free

Questions?

Thank you!



Compliance **HR**

Littler®