

Fair Labor Standards Act Overtime Rule: What Employers Need to Know

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*****The below guidance is not meant to serve as legal advice. All IHS members are advised to get an opinion, in writing, from their own attorney.*****

Background

The Fair Labor Standards Act (FLSA) sets forth requirements for employees to be paid at least federal minimum wage and, for employees who work more than 40 hours in a week, overtime premium pay of at least 1.5 times the regular rate of pay. The FLSA rule also provides exemptions from the overtime pay rule for certain employees, including certain employees employed in a bona fide executive, administrative, or professional capacity, or in the capacity of outside salesman. The rule, which was most recently updated in 2019 and went into effect January 1, 2020, updated the salary thresholds for executive, administrative, and professional workers, and simplified the method for identifying overtime-exempt employees.

What Does This Mean for Hearing Aid Practices?

Owners need to evaluate whether their employees are exempt or non-exempt from the overtime rule and ensure compliance. If one or more employees are newly non-exempt, employers need to understand their obligations. Employers may also choose to adopt alternative arrangements to limit the need to pay non-exempt workers overtime wages.

Employers need to remain informed on this rule and subsequent changes. Specifically, the U.S. Department of Labor (DOL), which oversees the application of the FLSA, expressed that it intends to make changes to salary thresholds “regularly,” so employers should review the requirements on a regular basis to determine whether their employees may now fall within a different category and update their compensation arrangements accordingly.

Employers should be aware that some state laws have stricter exemption standards than federal law. The FLSA does not preempt any such stricter state standards. If a State establishes a higher standard than the provisions of the FLSA, the higher standard applies in that State.

The Basics for Determining Whether an Employee is Overtime-Eligible or Exempt

For employees to qualify for exemption, they must meet certain tests regarding their job duties, pass the salary level test, and generally must be paid on a salary basis at least the amount specified in the regulations, which are outlined below.

- Employees that make less than \$684 per week (\$35,568 annually), regardless of their profession, must be paid overtime for hours worked over 40 in a given week.

- Salaried employees making between \$684/week (\$35,568 annually) and \$107,432 annually are overtime-eligible unless they fall within the professional, administrative, or executive exemptions; or fall into the other exemption categories, such as those who perform outside sales. [Click here](#) to view the DOL's Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA) for details.
- Highly compensated employees (HCEs) are exempt from the overtime rule. Employees qualify as HCEs if they receive at least \$107,432 on an annual basis, \$684 of which must be paid weekly on a salary or fee basis, their primary duty is office or non-manual in nature, and he/she customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee.
- Note: For employees earning bonuses or incentive payments, up to 10% of their total bonus/commission can be accounted for in determining whether they meet the standard salary threshold.

Who Qualifies for the Outside Sales Exemption?

To qualify for the outside sales employee exemption, the following tests must be met: a) 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 b) The employee must be "customarily and regularly engaged away from the employer's place or places of business." Tasks or work performed "customarily and regularly" includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.

Do Hearing Aid Specialists Qualify for the Professional Exemption?

To qualify for the learned professional employee exemption, all of the following tests must be met:

- 1) The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$684 per week;
- 2) 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;
- 3) The advanced knowledge must be in a field of science or learning; and
- 4) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

While a specific ruling has not been made by the DOL, it is IHS' interpretation that licensed hearing aid specialists do not qualify for the professional exemption because they do not meet all of the tests necessary to qualify.

Compliance with the Rule

Employers should:

- Get familiar with the rule.

- Revisit job descriptions and remove any ambiguity within those job duties.
- Review the actual duties of employees who were exempt to make sure they are consistent with the latest exemption requirements.
- Examine your process for classifying workers to ensure they align with the FLSA specifications.
- Count the current number of employees who are non-exempt and evaluate the number of overtime hours you are paying, to determine whether you want to make changes to your staffing structure.

Employers found to be in non-compliance with the FLSA may be directed to change employment practices to ensure compliance, pay overtime back-payments owed, and/or may face monetary, civil, and criminal penalties.

The DOL has suggested several options for compliance. They include:

- Raise salaries,
- Pay overtime above a salary,
- Reorganize workloads, adjust schedules, or spread work hours,
- Adjust wages, and/or
- Hire additional staff to offset overtime hours your employees are currently incurring.

Again, IHS advises members to obtain an opinion from their attorney regarding this updated rule and its application on his/her business practices and compliance.

Additional Resources

For more information, check out the following resources:

- [Highlights of the Final Rule on Overtime Eligibility for White Collar Employees | U.S. Department of Labor \(dol.gov\)](#)
- [Handy Reference Guide to the Fair Labor Standards Act | U.S. Department of Labor \(dol.gov\)](#)
- [Final Rule: Overtime Update | U.S. Department of Labor \(dol.gov\)](#)