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Overtime Provisions in the Fair Labor Standards Act (FLSA): Frequently Asked Questions

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Summary

The Fair Labor Standards Act (FLSA), enacted in 1938, is the main federal legislation that establishes general wage and hour standards for most, but not all, private and public sector employees. Among other protections, the FLSA establishes that covered nonexempt employees must be compensated at one-and-a-half times their regular rate of pay for each hour worked over 40 hours in a workweek.

The FLSA also establishes certain exemptions from its general labor market standards. One of the major exemptions to the overtime provisions in the FLSA is for bona fide "executive, administrative, and professional" employees (the "EAP" or "white collar" exemptions). The FLSA grants authority to the Secretary of Labor to define and delimit the EAP exemption "from time to time." To qualify for this exemption from the FLSA's overtime pay requirement, an employee must be salaried (the "salary basis" test), must perform specified executive, administrative, or professional duties (the "duties" test), and must earn above a salary level threshold (the "salary level" test).

In July 2015, the Secretary of Labor published a Notice of Proposed Rulemaking (NPRM) to make changes to the EAP exemption. After receiving approximately 294,000 comments on the NPRM, the Secretary of Labor published the Final Rule on the EAP exemption on May 23, 2016 (2016 final rule). The 2016 final rule is effective December 1, 2016. The major changes in the 2016 final rule include increasing the salary level threshold from the previous level of $455 per week to $913 per week and providing an automatic update to the salary level every three years. The 2016 final rule does not change the duties and responsibilities that employees must perform to be exempt. Thus, the 2016 final rule will affect EAP employees at salary levels between $455 and $913 per week in 2016. The Department of Labor (DOL) estimates that about 13.1 million workers will be affected in the first year, including about 4.2 million EAP employees who will become newly entitled to overtime pay.

This report answers frequently asked questions about the overtime provisions of the FLSA, the EAP exemptions, and the 2016 final rule that defines and delimits the EAP exemption.

Contents

Frequently Asked Questions 1
The Fair Labor Standards Act (FLSA) 1
What is the FLSA? 1
Who is covered by the FLSA? 1
What are the overtime pay provisions in the FLSA? 2
Are there exemptions to overtime coverage? 2
What are the "EAP" or "White Collar" exemptions in the FLSA? 2
Regulating the EAP Exemptions 3
How are the EAP exemptions determined? 3
What is the "salary basis" test? 3
What is the "duties" test? 4
What is the "salary level" test? 4
The 2016 Final Rule on the EAP Exemptions 6
What are the main changes to the EAP exemption included in the 2016 final rule? 6
How will future adjustments to the salary level occur? 7
Who would be covered by the regulations in the 2016 final rule? 7
Does the 2016 final rule affect independent contractors? 7
Does the 2016 final rule apply to nonprofits? 8
Does the 2016 final rule apply to institutes of higher education? 8
Does the 2016 final rule apply to state and local governments? 8
When does the 2016 final rule become effective? 9
What are the options for congressional action on the 2016 final rule? 9
How might employers comply with the 2016 final rule? 10
How many employees are likely to be affected due to the 2016 final rule? 10
Are congressional employees covered by the FLSA overtime provisions? 11

Tables

Table 1. History of Weekly Standard Salary Thresholds for EAP Exemption 5
Table 2. The Three EAP Exemption Tests Before and After the 2016 Final Rule 6

Contacts

Author Information 11

Frequently Asked Questions

This report addresses frequently asked questions related to the overtime provisions in the Fair Labor Standards Act (FLSA) and the overtime pay exemptions for executive, administrative, and professional employees (the "EAP" or "white collar" exemptions). For a broader overview of the FLSA, please see CRS Report R42713, *The Fair Labor Standards Act (FLSA): An Overview*. For information on the minimum wage provisions of the FLSA, please see CRS Report R43089, *The Federal Minimum Wage: In Brief*.

This report proceeds in three sections. First, there is an overview of the main federal statute on overtime pay—the FLSA. Second, there is a discussion of the regulations implementing the EAP exemptions in the FLSA. Finally, there is information on the most recent update to the EAP exemptions in the 2016 final rule.

The Fair Labor Standards Act (FLSA)

What is the FLSA?

The FLSA, enacted in 1938, is the main federal legislation that establishes general labor standards for most, but not all, private and public sector employees. The three main protections provided in the FLSA relate to a minimum wage, maximum hours (overtime), and child labor.

Who is covered by the FLSA?

The FLSA extends labor standards to individuals under two types of coverage—"enterprise coverage" and "individual coverage." An enterprise is covered if it has annual sales or business done of at least $500,000. In addition, the FLSA applies to certain other enterprises—such as hospitals and federal, state, and local governments—regardless of the dollar volume of business. Even if individuals are not employed by a covered enterprise, they may be covered if they engage individually in interstate commerce.[1] Thus, employees are covered if they meet the FLSA criteria for either category.[2]

In addition, the FLSA exempts certain employers and employees from the labor standards in the act, such as state and local elected officials and bona fide executive, administrative, and professional employees. An individual or enterprise is "covered" or "nonexempt" if FLSA protections apply and is "exempt" if FLSA protections do not apply. Finally, coverage in the FLSA is defined in terms of "employer" and "employee." The latter is defined as "any individual employed by an employer." Independent contractors, which by definition are self-employed, and thus not employees, would not be covered by the FLSA provisions.[3]

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[1] As DOL notes, the concept of individual coverage is broad in that interstate commerce means "any work involving or related to the movement of persons or things across state lines or from foreign countries." See http://www.dol.gov/elaws/esa/flsa/scope/ee2.asp for guidance. Being engaged in interstate commerce includes not only performing work in the production of goods but also activities in support of such commerce, such as making interstate calls, processing credit cards, and receiving packages. See Department of Labor, Wage and Hour Division, *Fact Sheet #9: Manufacturing Establishments Under the Fair Labor Standards Act (FLSA)*, Washington, DC, July 2008, http://www.dol.gov/whd/regs/compliance/whdfs9.htm.

[2] See Department of Labor, Wage and Hour Division, *Coverage Under the Fair Labor Standards Act (FLSA)*, Fact Sheet #14, Washington, DC, July 2009, http://www.dol.gov/whd/regs/compliance/whdfs14.pdf.

[3] Employee classification is beyond the scope of this report. For additional information, see David Weil, The

DOL estimates that approximately 132.8 million, or 83%, of the 159.9 million wage and salary workers are covered by the FLSA and subject to DOL's overtime regulations.[4]

What are the overtime pay provisions in the FLSA?

Section 7(a) of the FLSA specifies the requirements for maximum hours of work and overtime pay requirements. In general, unless an employee is specifically exempted in the FLSA, he or she is considered to be a covered "nonexempt" employee and must receive pay at the rate of one-and-a-half times ("time and a half") the regular rate for any hours worked in excess of 40 hours in a workweek. Employers may choose to pay more than time-and-a-half for overtime or to pay overtime to employees who are exempt from overtime pay requirements under the FLSA.

The FLSA overtime provisions are applied on a workweek basis, which means that an employee's workweek is a fixed and regularly recurring period of 168 hours (i.e., 7 consecutive 24-hour periods). Under the FLSA provisions, overtime pay applies to hours worked in excess of 40 in a workweek. Thus, the law allows some flexibility in daily work hours. For example, an employer could schedule 4 10-hour workdays in a workweek without being required to pay overtime. Similarly, an employee who works a five-day workweek could work four hours one day and nine hours the other four days and not work overtime. On the other hand, averaging of hours over multiple weeks is not permitted in calculating maximum hours and overtime.

Are there exemptions to overtime coverage?

The FLSA statutorily exempts various groups of individuals from FLSA overtime coverage. Some of the exemptions are for a class of workers (e.g., executive, administrative, and professional employees), while others are more narrowly targeted to workers performing specific tasks (e.g., workers employed on a casual basis to provide babysitting services).

Some of the more common exemptions in the FLSA include executive, administrative, and professional employees (the "EAP" or "white collar" exemptions; see next section); commissioned sales employees; farmworkers; motion picture theater employees; motor carrier drivers; and amusement park employees. Many of the broad exemptions from overtime coverage listed here include additional requirements (e.g., salary thresholds) in order for employees to qualify as exempt.[5]

What are the "EAP" or "White Collar" exemptions in the FLSA?

When the FLSA was enacted in 1938, Section 13(a)(1) provided an exemption, from both the minimum wage (Section 6) and overtime (Section 7) provisions of the act, for bona fide executive, administrative, and professional employees (the "EAP" or "white collar" exemptions). Rather than define the terms executive, administrative, or professional employee, *the FLSA*

Application of the Fair Labor Standard Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors, U.S. Department of Labor, Wage and Hour Division, Administrator's Interpretation No. 2015-1, Washington, DC, July 15, 2015, http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm.

[4] Wage and Hour Division, Department of Labor, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 81 *Federal Register* 32456, May 23, 2016. The 27.2 million individuals (159.9 million minus 132.8 million) not covered by the FLSA or subject to DOL's overtime regulations include self-employed or unpaid workers, religious workers, and certain federal workers.

[5] For more details on exemptions in the FLSA, including exemptions from overtime provisions specifically, see http://www.dol.gov/elaws/esa/flsa/screen75.asp.

authorizes the Secretary of Labor to define and delimit these terms "from time to time" by regulations.[6]

The general rationale for including the EAP exemption in the FLSA at the time of enactment was twofold. One, the nature of the work performed by EAP employees seemed to make standardization difficult and thus output of EAP employees was not as clearly associated with hours of work per day as it was for typical nonexempt work. Two, bona fide EAP employees were considered to have other forms of compensation (e.g., above-average benefits, greater opportunities for advancement) not available to nonexempt workers.[7]

Regulating the EAP Exemptions

How are the EAP exemptions determined?

As mentioned, the Secretary of Labor is authorized to define and delimit the EAP exemptions. Although the determinations have changed over time, to currently qualify for an exemption under Section 13(a)(1) of the FLSA (i.e., not to be entitled to overtime pay), an employee generally has to meet three criteria:

1. The "salary basis" test: employee must be paid a predetermined and fixed salary.
2. The "duties" test: employee must perform executive, administrative, or professional duties.
3. The "salary level" test: employee must be paid above the threshold established in the rulemaking process, typically expressed as a per week rate.[8]

In addition, as part of the process of defining and delimiting the EAP exemption, in 2004 DOL also created a "highly compensated employee" (HCE) exemption in which employees earning an amount above the standard EAP salary threshold annually are exempt from overtime requirements if they perform at least one of the duties of an EAP employee.[9]

What is the "salary basis" test?

To qualify for the EAP exemption, an employee must be paid on a "salary basis," rather than on a per hour basis. That is, an EAP employee must receive a predetermined and fixed payment that is not subject to reduction due to variations in the quantity or quality of work.[10] The salary must be paid on a weekly or less frequent basis.

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[6] Originally, the FLSA stated that regulations implementing the EAP exemption would be issued by the administrator of the newly created Wage and Hour Division (WHD) of DOL. The Fair Labor Standards Amendments of 1961 (P.L. 87-30) changed the authority to issue regulations from the administrator of the WHD to the Secretary of Labor.

[7] Conrad F. Fritsch and Kathy Vandell, *Exemptions From The Fair Labor Standards Act: Outside Salesworkers and Executive, Administrative, and Professional Employees*, Minimum Wage Study Commission, Volume IV, Washington, DC, June 1981, p. 240.

[8] Although the EAP salary threshold is typically stated in weekly rates, 29 C.F.R. §541.600(b) indicates that the "required amount of compensation per week may be translated into equivalent amounts for periods longer than one week."

[9] 29 C.F.R. §541.601. See Wage and Hour Division, Department of Labor, *Highly-Compensated Workers and the Part 541-Exemptions Under the Fair Labor Standards Act (FLSA)*, Fact Sheet #17H, Washington, DC, July 1, 2008, http://www.dol.gov/whd/overtime/fs17h_highly_comp.htm. The salary level for the HCE exemption established in 2004 was $100,000.

[10] The salary basis is specified in 29 C.F.R. §541.602. Wage and Hour Division, Department of Labor, "Defining and

What is the "duties" test?

Job titles alone do not determine exemption status for an employee. Rather, the Secretary of Labor, through issuance of regulations, specifies the duties that EAP employees must perform to be exempt from overtime pay requirements of the FLSA.[11]

To qualify for the exemption for *executive employees*, all of the following job duties tests must be met:

- the employee's primary duty "is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof";
- the employee "customarily and regularly directs the work of two or more other employees"; and
- the employee "has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight."

To qualify for the exemption for *administrative employees*, both of the following job duties tests must be met:

- the employee's primary duty "is 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
- the employee's primary duty "includes the exercise of discretion and independent judgment with respect to matters of significance."

To qualify for the exemption for *professional employees*, the following job duties test must be met:

- The employee's primary duty is the performance of work "requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction"; or work "requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor."

What is the "salary level" test?

In addition to the duties test, an employee must earn above a certain salary in order to qualify for the EAP exemption. The 2016 final rule establishes that, effective December 1, 2016, the minimum weekly standard salary threshold for the EAP exemption is "a rate per week of not less than the 40th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census region," which is currently the South region and is equal to $913 ($47,476 annually).[12]

Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 81 *Federal Register* 32394, May 23, 2016.

[11] See 29 C.F.R. §541. Prior to the 2004 regulations, the duties test consisted of a "short" and "long" version depending on the salary threshold. The 2004 regulations created a "standard" test for each of the EAP categories.

[12] The salary threshold level is specified in 29 C.F.R. §541.600. See Wage and Hour Division, Department of Labor, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 81 *Federal Register* 32550, May 23, 2016.

That is, a bona fide executive, administrative, or professional employee must also earn at least $913 per week, which is $47,476 for a full-year (52 weeks) worker, to be exempt from overtime pay. Otherwise, even if an employee qualifies as a bona fide executive, administrative, or professional employee, that employee would not be exempt from overtime pay (i.e., they would be entitled to overtime pay) if the employee does not earn at least $913 per week.

Since the FLSA was enacted in 1938, the salary level threshold has been raised eight times, including the 2016 increase. Prior to 2004, the salary level for exemption varied by the type of employee and the type of duty test. **Table 1** includes the salary levels for the EAP exemptions from 1938 through 2016.

Table 1. History of Weekly Standard Salary Thresholds for EAP Exemption

Enactment	Executive	Administrative	Professional	Short Test (All)[a]
1938	$30	$30	—	—
1940	$30	$50	$50	—
1949	$55	$75	$75	$100
1958	$80	$95	$95	$125
1963	$100	$100	$115	$150
1970	$125	$125	$140	$200
1975	$155	$155	$170	$250
		Standard Test for EAP		
2004		$455		
2016		$913		

Source: Wage and Hour Division, Department of Labor, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 81 *Federal Register* 32401, May 23, 2016.

a. For the period 1949–2004, DOL used a second, less-stringent duties test (the "short test") for employees paid at a salary above the thresholds for the three individual exemption categories—executive, administrative, and professional. The more thorough duties test for the exemption categories became known as the "long test" and applied to employees who did not meet the short test's higher salary threshold. In addition to the salary differential for the two tests, the other main difference was the long test's limit on the percentage of work time an exempt employee could spend on nonexempt work. The 2004 final rule combined the tests into a single standard test and one salary threshold.

As noted previously, the 2004 final rule established the HCE exemption in addition to the EAP exemption. The 2016 final rule establishes the HCE salary threshold at $134,004, which is the 90th percentile of full-time salaried workers nationally.[13]

In addition to the standard salary level and HCE tests, the 2016 final rule adjusts the two existing "special salary tests" in the EAP exemptions. First, the 2016 final rule maintains the "longstanding practice" of setting the salary for American Samoan employees at 84% of the standard salary level, thus making the new level in American Samoa $767 per week.[14] Second, the 2016 final rule continues a special salary test created in 1953 for the motion picture producing industry that provides an exception to the "salary basis" test. Specifically, employees in the

[13] The HCE is established in 29 C.F.R. §541.601.

[14] See Wage and Hour Division, Department of Labor, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 81 *Federal Register* 32422, May 23, 2016. The salary threshold level for American Samoa is specified in 29 C.F.R. §541.600(a).

motion picture producing industry may be classified as exempt if they meet the duties tests for EAP exemption and are paid a "base rate" (rather than on a "salary basis") of $1,397 per week.[15]

The 2016 Final Rule on the EAP Exemptions

What are the main changes to the EAP exemption included in the 2016 final rule?

On July 6, 2015, a Notice of Proposed Rulemaking (NPRM) was published in the *Federal Register* to define and delimit EAP exemptions.[16] During the comment period from July 6, 2015, through September 4, 2016, DOL received nearly 294,000 comments on the proposed rule.[17] The final rule was published in the *Federal Register* on May 23, 2016.

The primary changes to the EAP exemption in the 2016 final rule include

- an increase in the salary level test from the current $455 per week ($23,660 annually) to $913 per week ($47,476 annually);
- an increase in the annual salary threshold for the HCE exemption from $100,000 to $134,004;[18]
- indexation of the salary level to the 40th percentile of weekly earnings so that it would automatically be updated every three years; and
- an allowance that up to 10% of the standard salary level may be comprised of nondiscretionary bonuses, incentive payments, and commissions.

As summarized in **Table 2**, the 2016 final rule changes the salary level test but does not change the current standard duties test or the salary basis test for the EAP overtime exemption.

Table 2. The Three EAP Exemption Tests Before and After the 2016 Final Rule

Test	Prior to 2016 Rule	After the 2016 Rule
Salary Basis	Payment at a predetermined and fixed amount per week or less frequently	No change
Duties Test	Specific duties, not job titles alone, required to qualify as bona fide EAP employees	No change
Salary Level	$455 per week ($23,660 annually)	$913 per week ($47,476 annually)

[15] See Wage and Hour Division, Department of Labor, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 81 *Federal Register* 32422, May 23, 2016. The salary basis exception for the motion picture producing industry is specified in 29 C.F.R. §541.709.

[16] Department of Labor, Wage and Hour Division, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 80 *Federal Register* 38516-38612, July 6, 2015.

[17] See https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-0001.

[18] The HCE exemption applies to employees who are paid on a salary basis, are paid total annual compensation above the level set in the rule, and who perform at least one of the EAP duties and responsibilities.

Source: CRS analysis of Wage and Hour Division, Department of Labor, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 81 *Federal Register*, May 23, 2016.

How will future adjustments to the salary level occur?

Since the FLSA was enacted in 1938, the salary level threshold has been raised eight times, including the 2016 increase (see **Table 1**). Each of the previous increases have occurred through intermittent rulemaking by the Secretary of Labor, with periods between adjustments ranging from 2 years (1938–1940) to 29 years (1975–2004). The 2016 final rule implements a mechanism to automatically update the EAP salary level thresholds.[19] Updates begin on January 1, 2020, and continue thereafter every three years.

- *Standard salary level*. Effective December 1, 2016, the standard salary level for the EAP exemption is $913 per week. Starting January 1, 2020, and every three years thereafter, the standard salary level threshold will equal the 40th percentile of weekly earnings of full-time nonhourly workers in the lowest wage Census region.
- *Highly compensated employee*. Effective December 1, 2016, the HCE salary level for the EAP exemption is $134,004 per year. Starting January 1, 2020, and every three years thereafter, the HCE salary level threshold will equal the 90th percentile of annual earnings of full-time nonhourly workers nationally.
- *American Samoa*. Effective December 1, 2016, the American Samoa salary level for the EAP exemption is $767 per week (84% of standard salary level). Starting January 1, 2020, and every three years thereafter, the American Samoa salary level will equal 84% of the standard salary level.[20]
- *Motion picture producing industry*. Effective December 1, 2016, the motion picture producing employee salary level for the EAP exemption is $1,397 per week. Starting January 1, 2020, and every three years thereafter, the motion picture producing industry salary level will be adjusted (from its most recently applicable base rate) by the same percentage as the standard salary level.

Who would be covered by the regulations in the 2016 final rule?

The 2016 final rule expands overtime coverage to EAP employees through a higher salary level threshold rather than through additional classes of employees. As such, EAP employees making between $455 per week (the effective rate until December 1, 2016) and the new rate of $913 per week in 2016 should become nonexempt (i.e., covered) by the overtime provisions and entitled to overtime pay for hours worked in excess of 40 per workweek.

Does the 2016 final rule affect independent contractors?

No. Because the FLSA applies to "employees," individuals who are classified as independent contractors are not covered by the FLSA provisions.

[19] These mechanisms are specified in 29 C.F.R. §541.607. See Wage and Hour Division, Department of Labor, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 81 *Federal Register* 32551, May 23, 2016.

[20] When the highest industry minimum wage in American Samoa reaches the federal minimum wage, the American Samoa salary level becomes equal to the standard salary level. See 29 C.F.R. §541.607(b).

Does the 2016 final rule apply to nonprofits?

Yes. There is no general exemption for nonprofits in the FLSA or the overtime rule. Coverage for workers in nonprofits, like other entities, is determined by the enterprise and individual coverage tests (See "Who is covered by the FLSA?"). It is important to note, however, that charitable activities often associated with nonprofits do not count as ordinary commercial activities and thus do not count toward the $500,000 threshold for enterprise coverage under the FLSA. Only the commercial activities of nonprofits (e.g., gift shops, fee for service activities) count toward the threshold. On the other hand, even if a nonprofit does not meet the enterprise test for coverage, individual employees in an otherwise exempt nonprofit may be covered by the FLSA and the overtime rules if they engage in interstate commerce (e.g., regularly making out of state phone calls, processing credit card transactions.).[21]

Does the 2016 final rule apply to institutes of higher education?

Yes. Both the FLSA and the 2016 final rule apply to institutes of higher education (IHEs). Due to other provisions of the FLSA, however, many personnel at IHEs are not eligible for overtime and thus are unaffected by the 2016 final rule.[22] For example, in general, bona fide teachers, coaches (if their primary duty is teaching), and graduate and undergraduate students are exempt and thus are not eligible for overtime. Similarly, academic administrative personnel are exempt from overtime pay if they are paid at least the EAP salary level threshold or are paid at least equal to the entrance salary for teachers at the same institution.[23] On the other hand, some IHE workers are subject to the overtime rules of the FLSA and will be affected by the 2016 final rule. Affected workers include postdoctoral researchers who are employees, nonacademic administrative employees, and other salaried workers who are not covered by another exemption. Finally, like some public sector employees, but unlike private sectors employers, public IHEs may have the option of using compensatory time (i.e., a rate of 1.5 hours for each hour of overtime), rather than cash payment, to meet the obligation of providing overtime compensation.

Does the 2016 final rule apply to state and local governments?

Yes. There is no blanket exemption from FLSA and overtime rule coverage for state and local governments. In general, employees of state and local governments are covered by the overtime provisions of the FLSA and thus are affected by the 2016 final rule updating the salary level threshold for the EAP exemptions. That said, other FLSA provisions apply to state and local governments that affect the applicability of overtime rules on these public sector employees.[24]

One way in which FLSA overtime rules apply differently in the public sector relates to the mode of compensation. State and local governments may have the option of using compensatory time, at a rate of 1.5 hours for each hour of overtime, rather than cash payment to meet the obligation

[21] For detailed guidance on nonprofits and the overtime rules, see Wage and Hour Division, United States Department of Labor, *Guidance for Non-Profit Organizations on Paying Overtime under the Fair Labor Standards Act*, Washington, DC, May 18, 2016, https://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf.

[22] For detailed guidance on overtime and institutes of higher education, see Wage and Hour Division, United States Department of Labor, *Guidance for Higher Education Institutions on Paying Overtime under the Fair Labor Standards Act*, Washington, DC, May 18, 2016, https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf.

[23] That is, academic administrative employees could be exempt if they earned less than $913 per week as long as their earnings were equal to or greater than the starting teacher salary at the same school. Ibid, p. 7.

[24] For guidance on the applicability of the FLSA and the 2016 final rule on employees of state and local governments, see United States Department of Labor, *Overtime Final Rule and State and Local Governments*, Washington, DC, May 18, 2016, https://www.dol.gov/sites/default/files/overtime-government.pdf.

of providing overtime compensation. This option provides an alternative not available to private sector employers to meet the overtime pay requirements.

Additionally, some public sector employees are not covered by the FLSA. For instance, certain state and local employees—elected officials, their appointees and staff who are not subject to civil service laws, and legislative branch employees not subject to civil service laws—are not covered by the FLSA and will not be affected by the 2016 final rule.

The FLSA provides partial exemptions from the overtime requirements for fire protection and law enforcement employees. Specifically, fire protection and law enforcement employees are exempt from overtime pay requirements if they are employed by an agency with fewer than five fire protection or law enforcement employees. In addition, the FLSA allows overtime for all fire protection and law enforcement employees (not just those in small agencies) to be calculated on a "work period" (i.e., 7 to 28 consecutive days) rather than the standard "workweek" period (i.e., 7 consecutive 24-hour periods).

When does the 2016 final rule become effective?

The 2016 final rule becomes effective on December 1, 2016, which is just over six months from the publication of the final rule in the *Federal Register* on May 23, 2016.[25] Beginning on January 1, 2020, and every three years thereafter, the salary level thresholds for the EAP exemptions are automatically updated according to the mechanisms specified in the 2016 final rule.

While the 2016 final rule becomes effective on December 1, 2016, DOL issued a "time-limited non-enforcement" policy for one group of employers. Specifically, DOL will not enforce the provisions of the 2016 final rule until March 17, 2019, for "providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds."[26]

What are the options for congressional action on the 2016 final rule?

Congress can pass legislation to repeal rules or compel new rules. For example, prior to the publication of the 2016 final rule, legislation was introduced that would prohibit the Secretary of Labor from enforcing the final rule and would require additional analysis from the Secretary before the issuance of any substantially similar rule in the future.[27]

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[25] By comparison, the last time DOL issued a new rule on the EAP overtime exemption, in 2004, the effective date was four months after the publication of the final rule. See Wage and Hour Division, United States Department of Labor, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 69 *Federal Register*, April 23, 2004.

[26] Wage and Hour Division, Department of Labor, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Announcement of Time-Limited Non-Enforcement Policy for Providers of Medicaid-Funded Services for Individuals With Intellectual or Development Disabilities in Residential Homes and Facilities With 15 or Fewer Beds," 81 *Federal Register* 32390, May 23, 2016. For additional information on the nonenforcement policy, see https://www.dol.gov/whd/overtime/final2016/nonenforcement-faq.htm.

[27] Two identical bills, both titled "Protecting Workplace Advancement and Opportunity Act," were introduced in the Senate (S. 2707) and the House (H.R. 4773) on March 17, 2016. The bills would prohibit the Secretary of Labor from enforcing the proposed rule if it is a final rule at the time of enactment of the bill, require the Secretary of Labor to conduct a new economic and cost-benefit analysis of any proposed "substantially similar" rules, prohibit the inclusion of automatic updates to the salary threshold in any new rule, require a minimum 120-day comment period on any substantially similar rule, require a minimum of one year between the publication of a "substantially similar" final rule and the effective date of such rule, and prohibit the Secretary of Labor from promulgating in a final rule any of the

How might employers comply with the 2016 final rule?

Because the 2016 final rule increases the salary level threshold for the EAP exemption, a greater number of employees will become eligible for overtime pay. To comply with the proposed regulations, employers have several options:[28]

- pay overtime to newly covered EAP employees, if they work more than 40 hours in a workweek;
- increase the weekly pay for workers near the salary threshold ($913 per week) to a level above that so that the EAP employees would become exempt and thus not eligible for overtime pay;
- reduce work hours of nonexempt (covered) employees to 40 or fewer so that overtime pay would not be triggered;
- hire additional workers to offset the reduction in hours from nonexempt employees;
- reduce base pay of nonexempt workers and maintain overtime hours so that base pay plus overtime pay would not exceed, or would remain close to, previous employer costs of base pay plus overtime.

This list is not intended to be exhaustive. Rather it provides some possible channels of adjustment to a higher salary threshold for overtime pay.

How many employees are likely to be affected due to the 2016 final rule?

It is difficult to project the number of employees currently exempt under the EAP exemptions who would no longer be exempt under the 2016 final rule. This is due in part to uncertainty about employer responses, such as increasing salaries above the new threshold to maintain exemption for EAP employees. With caveats, DOL estimates that approximately 13.1 million workers would be affected by the proposed rule. In particular, DOL identifies two groups that would be affected—newly covered workers and workers with strengthened protections.[29]

Specifically, DOL estimates the following:

- In the first year under the provisions of the 2016 final rule, about 4.2 million EAP employees would become newly entitled to overtime pay due to the increase in the salary threshold.[30] That is, employees in this group meet the duties test for the EAP exemption but earn between the current ($455 per week) and new ($913 per week) salary thresholds.
- An additional 8.9 million workers would receive "strengthened" overtime protections, including the following:[31]

duties tests for the EAP unless those changes were included in the proposed rule.

[28] This list of possible responses is neither exhaustive nor mutually exclusive. In addition, the list is not meant to imply equal likelihood of responses.

[29] See Wage and Hour Division, Department of Labor, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 81 *Federal Register* 32405, May 23, 2016.

[30] This total includes 4,163,000 for the EAP standard salary threshold and 65,000 for the HCE threshold. See Wage and Hour Division, Department of Labor, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 81 *Federal Register* 32470, May 23, 2016.

[31] See Wage and Hour Division, Department of Labor, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 81 *Federal Register* 32500, May 23, 2016.

- An additional 5.7 million white collar workers who are paid on a salary basis and who earn between the current threshold of $455 per week and the new salary threshold of $913 per week but do not meet the EAP duties test (i.e., they perform nonexempt work but might be misclassified) would also gain overtime protections since their exemption status would not depend on the duties test. In other words, this group of workers would gain overtime coverage because the higher salary threshold would create a brighter line exemption test and reduce misclassification for exemption purposes.
- About 3.2 million salaried workers in blue collar occupations whose overtime coverage would be clearer with the higher salary threshold. As DOL notes, this group of workers should be currently covered by overtime provisions but may not be due to worker classification.

Are congressional employees covered by the FLSA overtime provisions?

The application of the provisions of the FLSA is determined by the Congressional Accountability Act (CAA, P.L. 104-1), which was enacted in 1995 and extends some FLSA provisions, including overtime provisions, and other labor and workplace laws to congressional employees. In addition, the CAA created the Office of Compliance, which is headed by a five-member Board of Directors (Board), to enforce the CAA.

The 2016 final rule will apply to congressional staff if the Board adopts them and Congress approves the Board's regulations, pursuant to the process established in the CAA.[32] In other words, regulations adopted by the Board do not have legal effect until they are approved by Congress.

When the Secretary of Labor issued new regulations to update the EAP exemptions in 2004, the Board adopted them; but thus far Congress has not apparently approved the 2004 overtime regulations.[33] Thus, overtime regulations that were adopted by the Board and approved by Congress in 1996, based on DOL regulations originally promulgated in 1975, currently apply to congressional staff.[34] Therefore, in the absence of action by the Board and by Congress, the provisions in the 2016 final rule will not change the status quo.

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[32] Specifically, Section 203(c) of the CAA requires the Board to issue regulations that "shall be the same as substantive regulations promulgated by the Secretary of Labor to implement" the FLSA provisions that apply under the act to congressional employees. The Board may "for good cause" modify the regulations if such a modification would be more effective for the implementation of the protections in the FLSA.

[33] The regulations were submitted to Congress for its approval. The regulations continue to be listed as "Pending Regulations" on the Board's website. Office of Compliance, "Pending Regulations," http://www.compliance.gov/directives/regulations/.

[34] The regulations became effective on April 16, 1996. A copy of these regulations is available on the Office of Compliance website, http://www.compliance.gov/directives/final-regulations.

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