

## Questions and Answers from the General Information Overtime Webinars

**Q. I want to get clarification on HCE. With the new range being \$134,000.00. Does that mean that anyone we have earning between \$100,000 but less than \$134,000 that they have to be brought up to \$134,000? Or does that mean that anyone earning over \$100,000 but under \$134,000 is no longer considered a HCE. I am just not clear on if they need to be bumped up or can be left alone.**

A. If your employee earns at least \$913 per week and passes the standard duties test, they will not be affected by the increase in the HCE total annual compensation threshold. If they only pass the relaxed HCE duties test, you would need to raise their compensation to the new threshold (\$134,004 per year) to retain their exempt status. Alternatively, you could reclassify the employee as non-exempt, which means that they would be entitled to receive overtime pay for all work hours beyond 40 in a workweek.

**Q. Is the Computer Professional minimum salary/minimum hourly wage requirement increasing as part of the Final Rule?**

A. The hourly salary for the Computer Professional Exemption is still \$27.63. However, the weekly standard salary amount has increased to at least \$913 per week.

**Q. Multiple Incumbent Positions: If I have a job, which meets an exemption test, am I able to reclassify only those who are below the new minimum to non-exempt and allow those that are over to remain exempt? Or, does the entire classification need to be exempt or non-exempt?**

A. The "white collar" exemptions require an employee to be paid on a salary basis, paid above a certain salary level, and meet the respective duties test. If an employee meets the duties test of an executive, administrative, or professional employee, and meets the salary basis requirement, and meets or exceeds the salary level requirement, they would meet the requirements for the exemption. If they fail to meet any part of the criteria, they would not meet the exemption and would therefore be non-exempt. The exemption is applied on an employee by employee basis, not to a particular classification. Keep in mind the salary level and salary basis requirements do not apply to outside sales employees, licensed or certified doctors, lawyers and teachers. Employees in these occupations who meet the duties test are exempt regardless of their salary.

**Q. What is the salary requirement for part time salary workers?**

A. Whether a worker is full-time or part-time, the standard salary level to qualify for exemption will be \$913 per week.

**Q. Are employers in compliance if they follow the annualized amounts? (Or do they have to make sure they are always in compliance each week?)**

A. An employee's exempt status - and, if nonexempt, the employee's right to overtime pay - is determined on a weekly basis. Generally, to retain exempt status, an employee must satisfy the duties test and earn at least \$913 per week.

**Q. Comp Time: Are comp time programs still allowed? Meaning that any hours over 40 hours can be banked to use later to either take time off or maybe get paid at end of year at straight time?**

A. Only employers that are public agencies under the FLSA (e.g. a state government) can provide comp time in lieu of overtime premium payments.

**Q. Please clarify what a highly compensated employee must be paid weekly and annually and how nondiscretionary bonuses and commissions factor in. Thanks!**

A. When the Final Rule takes effect on Dec. 1, 2016, employees who only satisfy the HCE duties test may qualify for exemption if they earn at least \$134,004 per year **and** at least \$913 per week. HCE employees must receive 100% of the \$913 weekly threshold on a salary or fee basis, but non-discretionary bonuses and incentive payments (including commissions) may be used to satisfy the remainder of the \$134,004 total annual compensation requirement.

**Q. Can we classify someone as Salary Non-Exempt and pay them less than the required amount but pay them overtime?**

A. Yes, an employer is permitted to pay a non-exempt employee on salary basis which is less than the required \$913 per week (New Overtime Final Rule) as long as the employee is not paid less than the federal minimum wage rate of for all hours worked and is paid overtime for all hour worked in excess 40 per week. For additional information, please review [Fact Sheet 23: Overtime Pay Requirements of the FLSA](#).

**Q. What is the definition of a highly compensated employee?**

A. The Overtime final rule (effective Dec. 1, 2016) sets the highly compensated employee total annual compensation level to the 90th percentile of earnings of full-time salaried workers nationally (\$134,000) annually). To be exempt as a highly compensated employee, an employee must also receive at least the new standard salary amount of \$913 per week on a salary or fee basis and pass a minimal duties test (i.e., the employee customarily and regularly performs any one of more of the exempt duties or responsibilities of an executive, administrative or professional employee under the regulations).

**Q. If there is an employee that is currently making \$120,000, does the employer have to increase his salary to the required annual salary for the highly compensated employee?**

A. To continue to claim the exemption under the highly compensated employee test, the employer would have to increase the compensation to at least the new total annual compensation amount. To the extent the employee meets the standard duties test under the executive, administrative, or professional exemption (EAP exemption), the employer can claim the standard EAP exemption for the employee if he or she earns not less than the new minimum standard salary amount of \$913 per week.

**Q. If the employee is being paid hourly but all the duties are applicable should he be paid salary instead? If this employee wants to stay being paid hourly should it be documented and signed by the employee?**

A. Employees paid on an hourly basis are generally entitled to overtime pay, even if they satisfy the duties requirements for exemption. Employers are not required to pay employees who satisfy the duties test on a salary basis unless the employer intends to assert the exemption and not pay overtime.

**Q. I know it is not changing but can you provide a simple definition as to what the duties test is? Is the duties test what defines whether an employee is exempt under executive/admin/professional?**

A. WHD Fact Sheet #17A provides a concise overview of the applicable duties tests for all of the Section 13(a)(1) exemptions. That fact sheet is available at:  
[https://www.dol.gov/whd/overtime/fs17a\\_overview.pdf](https://www.dol.gov/whd/overtime/fs17a_overview.pdf).

**Q. Does a "secretary" who makes \$48000 fit into an exempt category?**

A. Workers who do not pass the standard duties test, including most secretarial staff, do not qualify for exemption and will be entitled to overtime pay. There is a relaxed duties test for "highly compensated employees" earning over \$134,004 per year, but even under that HCE test the employee must still perform exempt duties on a customary and regular basis.

**Q. Can an employee make for example \$60,000 annually and still be a non-exempt employee? Or once an employee reaches the new salary level of \$47,476 they are automatically a salaried exempt employee?**

A. To qualify for exemption, employees generally must pass tests regarding their earnings and job duties. So, yes, an employee who does not satisfy the applicable duties requirements will not qualify for exemption regardless of how much they earn.

**Q. Any changes in the salary requirements for non-exempt workers?**

A. Under the Fair Labor Standards Act, employees who are not exempt from its wage provisions must be paid not less than the federal minimum and overtime pay at not less than time and one half of the employee's regular rate of pay for hours worked over 40 in a workweek. For example, non-exempt employees may be paid on an hourly or salary basis.

**Q. If our management team meets the test for the executive duties, does this exempt them from the overtime pay if they make under the newly required \$913/per week rate?**

A. An exempt executive, administrative, and professional employee must meet the duties test in addition to being paid on a salary basis and at the required salary level. Therefore, if an employee only meets the duties test and not the required salary level, they would not meet the criteria necessary to be considered exempt, and would be entitled to overtime in any week they work more than 40 hours.

**Q. Is it permissible for newly non-exempt employees to be classified as salary non-exempt? All other non-exempt employees are hourly; salary non-exempt would be a new classification for us. It would be far less insulting for my accountants and those in similar positions be paid this way (even if we have to count hours) than to have to punch a clock.**

A. Yes. Salaried status and exempt status are separate concepts, so employees entitled to overtime pay may still be paid on a salary basis (as long as they receive overtime pay for their work hours beyond 40 in a workweek). See Fact Sheet 23 for guidance on how to comply with the overtime requirement for salaried nonexempt employees:  
<https://www.dol.gov/whd/regs/compliance/whdfs23.pdf>.

**Q. I have an employee that works 50 hours a week on exempt status. He will be moved back to hourly, and will get a pay reduction. This will help us to maintain his current weekly wage. Is this something that we can do and be in compliance with FLSA.**

A. Employers have a range of options for responding to the updated standard salary level. For each affected employee newly entitled to overtime pay, employers may:

- increase the salary of an employee who meets the duties test to at least the new salary level to retain his or her exempt status;

- pay an overtime premium of one and a half times the employee's regular rate of pay for any overtime hours worked;

- reduce or eliminate overtime hours;

- reduce the amount of pay allocated to base salary (provided that the employee still earns at least the applicable hourly minimum wage) and add pay to account for overtime for hours worked over 40 in the workweek, to hold total weekly pay constant; or

- use some combination of these responses.

The circumstances of each affected employee will likely impact how employers respond to this Final Rule.

**Q. Are blue collar workers (i.e. mechanics) able to be classified as salaried exempt or must they be hourly?**

A. Blue collar workers like mechanics will not qualify for exempt status because they do not pass the duties requirements for exemption, so they are entitled to overtime pay unless another exemption applies. However, nonexempt employees do not have to be paid on an hourly basis.

**Q. Can you please confirm that if an employee is paid \$134,004 as of 12/1/2016 they should be classified as Exempt regardless of the duties test?**

A. That is incorrect. Employees who earn at least \$134,004 per year (and at least \$913 per week) must still satisfy the HCE duties test to qualify for exemption. Although the HCE duties test is less rigorous than the standard duties test, the employee must still perform exempt duties on a customary and regular basis. See Fact Sheet #17H for a description of the HCE duties test: [https://www.dol.gov/whd/overtime/fs17h\\_highly\\_comp.pdf](https://www.dol.gov/whd/overtime/fs17h_highly_comp.pdf).

**Q. I was trying to take notes and didn't get all the details on the administrative duties exemption.**

A. See WHD Fact Sheet # 17C for an overview of the administrative employee exemption: [https://www.dol.gov/whd/overtime/fs17c\\_administrative.pdf](https://www.dol.gov/whd/overtime/fs17c_administrative.pdf).

**Q. If someone is paid a salary to work Monday through Friday and only works 4 days instead of 5, is the new rule stating we have to still pay the full salary for the week?**

A. Yes, employees who perform any work in a workweek must satisfy the full standard salary level test to retain their exempt status. This is not a change from the current regulations. For information on permissible deductions, see 29 CFR 541.602.

**Q. We have salaried professionals whom are not scheduled at any time to work more than 40 hours per week. Do we have to track hours each week to verify that or if the schedule doesn't allow for more hours can we document their schedules and not have them do a time card? We have several of the Officers that are very upset in having to go back to turning in time cards each week.**

A. If the salaried professionals are bona fide exempt employees as defined in 29 CFR Part 541.300, there is not a recordkeeping requirement. However, if the salaried professionals do not meet all the requirements for the exemption, including the salary level, there are recordkeeping requirements that can be found in 29 CFR Part 516, which would be applicable to them.

Furthermore, overtime-eligible workers are not required to punch a time clock. Employers have options for accounting for workers' hours - some of which are very low cost and burden. There is no particular form or order of records required and employers may choose how to record hours worked for overtime-eligible employees. For example, where an employee works a fixed schedule that rarely varies, the employer may simply keep a record of the schedule and then indicate the changes to the schedule that the worker actually worked when the worker's hours vary from the schedule ("exceptions reporting"). See [Fact Sheet 21: Recordkeeping Requirements under the Fair Labor Standards Act \(FLSA\)](#).

For employees with a flexible schedule, an employer does not need to require an employee to sign in each time she starts and stops work. The employer must keep an accurate record of the number of daily hours worked by the employee, not the specific start and end times. So an employer could allow an employee to just provide the total number of hours she worked each day, including the number of overtime hours, by the end of each pay period. The Department has material available to help employers figure out what method of recording hours works best for their workforce.

**Q. As a local government, we have identified the employees that are currently classified as exempt, but are compensated below the new salary threshold of \$47,476. Do we have the option of allowing these employees to accrue compensatory time at the rate of time and one-half in lieu of raising their salaries to the new threshold?**

**If so, we currently have employees within the same job title that are compensated both above and below the salary threshold. Is it permissible to offer compensatory time (at time and one-half) only to those in the same job title that are compensated below the salary threshold without offering the same comp time to those compensated above?**

A. State and local government employers may provide comp time in lieu of overtime pay, provided that there is a prior agreement. See <https://www.dol.gov/sites/default/files/overtime-government.pdf>. Since job titles do not determine exempt status, employers may treat exempt and nonexempt staff differently even though they may have the same job title.

**Q. Learned professional exemption follow-up: During the webinar, it was mentioned that a job requiring a degree in any subject area would not fall under the learned professional exemption. Would this be different if required qualifications included a degree in one of several different qualifying areas?**

A. For information on the Learned Professional Exemption, please see Fact Sheet 17d which can be found here: [https://www.dol.gov/whd/overtime/fs17d\\_professional.pdf](https://www.dol.gov/whd/overtime/fs17d_professional.pdf).

**Q. Will the final rule have an impact on either the salary basis or hourly rate for computer professionals?**

A. The Final Rule did not change the hourly salary for the Computer Professional Exemption which is \$27.63. However, the weekly standard salary amount has increased to at least \$913 per week.

**Q. The standard salary level is based on full time exempt employment. How do you prorate this if the exempt position is not full time? Example - a store has two managers- one works 3 days a week and the other 4 days a week?**

A. An employee's exemption status is always determined on a workweek basis. Unless the employee falls under one of the EAP occupations that is not subject to the salary level requirement (e.g., doctors, lawyers, teachers, outside sales), the employee must satisfy the **full** standard salary level

test (\$913 per week, beginning on Dec. 1, 2016) if they work any amount of time in the workweek. The salary level is not prorated for part-time employees.

**Q. If an employee meets the duties test and not the salary test, they are non-exempt, and qualify for overtime? They do not have to be raised to the new salary level?**

A. You are correct. For employees who are subject to the salary level requirement, an employer may raise their salaries to the new level (\$913 per week, beginning on Dec. 1, 2016) to retain their exempt status, but the employer is not required to do so. Alternatively, the employer may classify the employee as non-exempt and ensure that they receive overtime pay whenever they work more than 40 hours in a workweek. Some EAP occupations are not subject to a salary level requirement (e.g., doctors, lawyers, teachers, and outside sales employees), so if the employee passes the duties test they qualify for exemption regardless of how much they earn.

**Q. Will OT be calculated on over 40 a week or 8 a day? Thank you.**

A. Under federal law, an employer's obligation to pay overtime pay is always calculated on a workweek basis, not a daily basis. For employees entitled to overtime pay, employers are obligated to pay an overtime premium for any work hours performed beyond 40 in a workweek.

**Q. What happens if an employee quits before payment of the non-discretionary bonus is due? Does the employer have to bonus out the employee for that quarter so that the employee earned at least \$913/week for the time they were actually employed?**

A. When the Final Rule takes effect on December 1, 2016, employers will newly be allowed to satisfy up to 10 percent of the standard salary level with nondiscretionary bonuses and incentive payments (including commissions). Nondiscretionary bonuses and incentive payments are forms of compensation promised to employees, for example, to induce them to work more efficiently or to remain with the company. By contrast, discretionary bonuses are those for which the decision to award the bonus and the payment amount is at the employer's sole discretion and not in accordance with any preannounced standards.

For an employee who qualifies for the "white collar" exemption, the employee must be paid \$913 per week. An employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment. As stated in the regulations at 29 CFR 541.602(b)(6).

**Q. How are part time professional employees handled?**

A. Whether a worker is full-time or part-time, the standard salary level to qualify for exemption will be \$913 per week. Keep in mind the salary level and salary basis requirements do not apply to licensed or certified doctors, lawyers and teachers. Employees in these occupations who meet the duties tests are exempt regardless of their salary. For information on the Learned Professional Exemption, please see Fact Sheet 17d which provides a concise overview of the applicable duties

tests for the professional exemption which can be found here:  
[https://www.dol.gov/whd/overtime/fs17d\\_professional.pdf](https://www.dol.gov/whd/overtime/fs17d_professional.pdf).

**Q. Is the amount/week calculated before or after taxes?**

A. Thanks for your question. The Department looks at an employee's gross wage amount before taxes.

**Q. What are the penalties for employers for non-compliance with the new OT rules?**

A. Under the FLSA, employers in violation of the law may be responsible for paying any back wages owed to their employees, as well as additional amounts in liquidated damages, civil money penalties, and/or attorney fees. See 29 U.S.C. 216. See also Fact Sheet #44:  
<https://www.dol.gov/whd/regs/compliance/whdfs44.pdf>.

**Q. How do I know if an employee should be listed as a Highly Compensated Employee? Also, if I have a salaried employee out on non-paid FMLA, for their own serious medical condition, am I right in not paying that employee until he/she returns?**

A. An employer may exempt a Highly Compensated employee if the employee earns the required salary threshold (\$134,004 as of December 1, 2016) and customarily and regularly performs a primary duty listed in any of the EAP exemptions. With respect to the salary basis test, in 29 CFR 541.602(b)(7), an employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the FMLA. Rather, when an exempt employee takes unpaid leave under the FMLA, an employer may pay a proportionate part of the full salary for time actually worked. For questions about the FMLA, contact 202-693-0066.

**Q. Does an employee who meets the Professional Exemption, is salaried and works 30 hrs per week full-time still have the same salary threshold as a 40 hrs per week full-time employee?**

A. Thank you for your question. Yes. The regulations do not define exempt employees by the number of hours they work. Please see 29 CFR 541.300 for the criteria which includes, being paid on a salary basis, being paid a certain salary level, and performing certain job duties.

**Q. I reviewed the handout on the website. Please confirm that I am interpreting one option correctly: If an exempt administrative office manager performs only 40 hours of work each week and is currently compensated at \$40,000/annually, the rationale is that employer does not have to increase the annual salary to \$47,476. Please explain why this office manager's salary would not require a change to new salary. What if there employee does end up working overtime? At this point, is the employer required to pay overtime?**

A. For affected employees (i.e., employees who currently qualify for exemption but earn less than the new \$47,476 standard salary level), employers have a variety of options. Employers may raise the affected employee's salary above the new threshold to retain their exempt status, but are not required to do so. For affected employees who rarely or never work overtime, it may make more sense to reclassify the employee from exempt to non-exempt and simply pay for any overtime work hours if they do occur. Non-exempt employees may continue to be paid a salary, so long as they receive overtime pay for any overtime hours worked (i.e., any hours over 40 in a workweek).

**Q. Does the new salary threshold apply equally to PT and FT employees or can we prorate the salary threshold for PT employees based on hours worked per week?**

A. Whether a worker is full-time or part-time, the standard salary level to qualify for exemption will be \$913 per week.

**Q. What happens if an employee (Human Resource manager) meets all of the executive and administration duties and is currently exempt, but doesn't meet either required salary level. Can we make that person hourly (as long as we pay)?**

A. An employee who satisfies the applicable duties test, but not the salary level requirement, cannot be classified as exempt. Nonexempt employees, whether paid hourly or salary are generally entitled to overtime pay. Employers may pay nonexempt employees hourly or on salary.

**Q. Do salaried nonexempt employees have to be paid on a salary basis following the same regulations applying to exempt employees? I.e., can you only deduct for absences of one or more full days? If a nonexempt salaried employee is absent 1 and 1/2 days, can the employer deduct pay for 1 and 1/2 days or only for the one full day of absence?**

A. An employer is permitted to pay a nonexempt employee a salary which is less than the required \$913 per week (see new Overtime final rule) as long as the employee is not paid less than the federal minimum wage of \$7.25 per hour for all hours worked and is paid overtime for all hours worked in excess of 40 per week. For additional information, please review <https://www.dol.gov/whd/regs/compliance/whdfs23.pdf>, Overtime Pay under the FLSA. The salary basis rule under the white collar exemption (29 CFR 541.602) does not apply to salaried nonexempt employees.

**Q. Some of our management staff receive monthly phone and travel stipend without submitting any receipts. Are these considered a part of non-discretionary bonus?**

A. No. Nondiscretionary bonuses are forms of compensation promised in advance to employees, typically to induce them to work more efficiently or to remain with the company. They can be in the form of, for example, individual or group production bonuses, retention bonuses, and bonuses for quality or accuracy of work.

**Q. Do we have to keep someone exempt that DOES meet all the duties of exc. and admin. or can we make them hourly without repercussions?**

A. Under the FLSA, the employer may decide whether to claim an exemption for an employee who meets the salary and duties tests under the white collar exemption regulations. Thus, the employer may decide to pay an employee who meets the duties test an hourly rate and treat the employee as nonexempt and pay overtime for hours worked over 40 in a workweek.

**Q. Would an HR Generalist/Manager who is a department of one be considered exempt?**

A. Job titles do not determine exempt status. However, a human resource manager may qualify for either the "executive" or "administrative" exemptions if they pass the standard salary level test, are paid on a salary basis, and perform the job duties needed to qualify for exemption. For a description of the Executive and Administrative exemptions, see Fact Sheet # 17B (Executive) and Fact Sheet # 17C (Administrative). Those fact sheets are available at [https://www.dol.gov/whd/overtime/fs17b\\_executive.pdf](https://www.dol.gov/whd/overtime/fs17b_executive.pdf) and [https://www.dol.gov/whd/overtime/fs17c\\_administrative.pdf](https://www.dol.gov/whd/overtime/fs17c_administrative.pdf).

**Q. Can you repeat where I can find the information on the acceptable deductions from salary list?**

A. For more information on permissible deductions under the regulations for exempt white collar salaried employees, please see 29 CFR 541.602-.603.

**Q. Are there exceptions for season salary EE's under the new law? We typically hire college students home for the summer at a fixed weekly rate for 2-3 months at a time.**

A. There are no special rules under the "white collar" exemptions for seasonal employees. However, exempt status is determined on a workweek basis, not on an annual basis. Therefore, to claim a white collar exemption, such employees must be paid the weekly standard salary level (\$913 per week, beginning on Dec. 1, 2016), not its annual equivalent (\$47,476 per year).

**Q. For any employee who makes more than \$913 per week that is hourly will we need to make these employees salaried/exempt?**

A. No. White collar exemptions apply to employees meeting the criteria set forth in 29 CFR 541.100-.400. In order to meet the exemption, an employee must be paid on a salary basis, must be paid a certain salary level, and must perform certain job duties. Being paid on a salary basis and meeting or exceeding the standard salary level, is not determinative of the exemption.

**Q. I currently pay my administrative assistant a bi-weekly salary of \$1730.77 (\$45,000/year). Can I leave her at that salary, or do I need to raise her salary level to the minimum \$913/week?**

A. Assuming your administrative assistant passes the duties test to qualify for exemption, you would need to raise her salary to at least \$913 per week (or \$1,826 on a biweekly basis) to retain her exempt status. However, the decision to retain her as an exempt employee is up to you. Alternatively, you may reclassify your assistant as a non-exempt employee and ensure that she receives a time-and-a-half overtime premium for any hours worked beyond 40 in a workweek. If you reclassify her to non-exempt, she may continue to be paid on a salary basis; the only change would be the obligation to pay her overtime pay for any hours worked over 40 in a workweek. For more information on how to comply with overtime pay requirements for non-exempt employees, see Fact Sheet # 23, available at: <https://www.dol.gov/whd/regs/compliance/whdfs23.pdf>.

**Q. We are a govt entity. Our elected officials are the only true salary employees, however our regular people get paid 35 hours per wk as a set schedule but if they have a day off they have to take a personal day for it. So are our people considered salary under this new law? Thank You.**

A. An employer can substitute or reduce an exempt employee's accrued leave (or run a negative leave balance) for the time an employee is absent from work, even if it is less than a full day and even if the absence is directed by the employer because of lack of work, without affecting the salary basis payment, provided that the employee still receives payment equal to the employee's predetermined salary in any week in which any work is performed even if the employee has no leave remaining.

Also, there are special rules that apply to public agencies. For additional information, please review Fact Sheet #70 - <https://www.dol.gov/whd/regs/compliance/whdfs70.pdf> and *29 C.F.R. Section 541.710*.

**Q. If taking a flight for a business trip, do we pay for time at the airport and flight?**

A. Travel away from home is clearly work time when it cuts across the employee's workday. The employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during working hours, but also during the corresponding hours on non-working days. Please see 29 CFR 785.39 for additional information.

**Q. What clearly defines a highly compensated employee? more specifically, does the highly compensated person making \$101,000/yr need to now make \$134,004/yr?**

A. An HCE is a Highly Compensated Employee as defined in 29 CFR 541.601. An HCE must currently meet the following criteria: 1) be paid an annual compensation level of at least \$100,000. (\$134,004 effective 12/1/16, under the new rule ); 2) be paid a weekly salary of no less than \$455 per week (\$913 effective 12/1/16, under the new rule) 3) pass a minimal duties test (perform any one or more of the exempt duties of an Executive, Administrative, or Professional (EAP) exempt employee as defined in 29 CFR 541.100 - .300)

To continue to claim the highly compensated exemption for this employee, he or she would need to satisfy the above requirements. Note: An employee who does not qualify for the HCE exemption may still be exempt under the standard EAP exemptions if he or she is paid on a salary basis, meets

the salary level test (\$913 per week - effective 12/1/16), and satisfies applicable duties test as defined in the regulations.

For more information, see Fact Sheet #17H,  
[https://www.dol.gov/whd/overtime/fs17h\\_highly\\_comp.pdf](https://www.dol.gov/whd/overtime/fs17h_highly_comp.pdf)

**Q. If all employees are defined by the duties test based on their job description BUT are paid less than the new salary threshold, do we just need to make sure that they are compensated for hours worked over 40 hours in a given pay week? I want to make sure that I understand this fully and that we are meeting the correct requirements.**

A. To qualify for one of the "white collar" exemptions, an employee must generally be paid on a salary basis, earn at least the standard salary level, and perform certain job duties. If an employee subject to the salary level test does not earn the required salary amount, they do not qualify for exemption and will therefore be entitled to overtime pay, regardless of their job duties. For more information regarding how to comply with the FLSA's overtime pay requirements for non-exempt employees, see Fact Sheet # 23, available at:  
<https://www.dol.gov/whd/regs/compliance/whdfs23.pdf>

**Q. We have a manager that meet the executive criteria and is paid hourly and is also paid overtime. With new rule are we required to put him on salary?**

A. No. Employees generally have to be paid on a salary basis to qualify for one of the white collar exemptions, but employers are not required to claim the exemptions for any employee. Even though they may perform the job duties of an exempt employee, you may treat them like non-exempt employees as long as you comply with the FLSA's minimum wage and overtime pay requirements.

**Q. We have a couple of part-time exempt employees for whom we prorate their salaries to coincide with their agreed upon reduced hours. Their prorated salary is below the new minimum required for salaried employees. If we choose to keep their job classification as exempt, will we have to raise their salary level to the new minimum or can we prorate the new minimum?**

A. To meet an exemption under the white collar exemption regulations, the employee must be paid not less than the salary of \$913 per week (effective Dec. 1, 2016) and meet the duties test. Whether a worker is full-time or part-time, the standard salary level to qualify for exemption will be \$913 per week.

**Q. If we determine based on duties and salary that two of three Information Technology FTEs in the same class are exempt, and a third is included, do we need a new class code in our Salary Schedule to distinguish their status?**

A. Salary level alone does not establish exemption. Exemption from OT is based on 3 criteria: duties first, then salary (computer engineers can be paid hourly instead of salary) and salary basis next.

An agency may pay employees more based on experience or education. Therefore, it is conceivable that out of a group of four managers, three are exempt (based on duties, salary level, salary basis) and the 4<sup>th</sup> manager is non-exempt (met the duties test but not the salary level test because he or she is new to the agency and not paid as much as the other three managers).

**Q. For government employees who aren't attorneys or comparable white collar employees, is there any option for them to get comp time instead of paid overtime?**

A. Please refer to 29 C.F.R. §553.20 and forward.

**Q. Since lawyers are exempt, they are also exempt from the salary minimum of \$913 a week, correct?**

A. Yes.