

DOL's Final Overtime Rules: Will They Really Break Your School District Budget?

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Goals of Today's Presentation

- ❖ The Language of the New Overtime Pay Rule:
What's Old and What's New
- ❖ Concerns with DOL's Proposed Rule
- ❖ The New Final Rule in Action
- ❖ Areas of Legal Liability
- ❖ DOL Resources

DOL's Final Rulemaking

On May 23, 2016, the U.S. Department of Labor (DOL) published its final rule on the new overtime pay regulations on May 23, 2016.

Final Rule: <https://www.gpo.gov/fdsys/pkg/FR-2016-05-23/pdf/2016-11754.pdf>

The goal of the final rule is to increase the number of employees who will be paid overtime for work beyond the 40 hrs./wk schedule.

DOL's Final Rulemaking

Recall:

- ❖ Proposed rule was issued in Summer 2015
- ❖ DOL received almost 300,000 written public comments
- ❖ Comments came from all sectors of industry

The Language of the
New Overtime Rule:
What's Old and What's New

What Hasn't Changed

- ❖ Federal minimum wage under the Fair Labor Standards Act (FLSA): \$7.25/hr.
- ❖ 40 hours/wk. at regular rate
- ❖ Overtime rate is 1½ times the hourly rate of pay for all hours worked over 40 in the same workweek
- ❖ Teachers, lawyers, and doctors remain ineligible for overtime, irrespective of their salary levels

29 U.S.C. §§ 206, 207, 213(a)(1); 29 C.F.R. § 541.600.

What Hasn't Changed

- ❖ Categories and Qualifications for "White Collar" Exemptions (i.e., not eligible for overtime):
 - Executive (29 C.F.R. § 541.100)
 - Administrative (29 C.F.R. §§ 541.200, -.204)
 - Professional (29 C.F.R. § 541.300)
 - Certain Computer (29 C.F.R. § 541.400)
 - Highly Compensated ("HCE") (29 C.F.R. § 541.601)

What Hasn't Changed

- ❖ Requirements for the "Duties" test under each exemption
- ❖ Requirements for the "Salary Basis" test under each exemption (i.e., salary can be paid either weekly, bi-weekly, bi-monthly, or monthly)
- ❖ To be eligible for a "White Collar" exemption, an employee must meet the Duties, Salary Basis, AND Salary Level tests.

What HAS Changed

- ❖ Minimum salary threshold for a non-HCE employee (i.e., executive, administrative, professional, and certain computer employees): \$47,476/yr. (or \$913/wk.) for a full-time worker
- ❖ Minimum salary threshold for an HCE: \$134,004/yr.
- ❖ Automatic updates to salary threshold levels will take place every three years

29 C.F.R. §§ 541.600, -.601, -.607

What Happens When?

- ❖ Final Rule's Effective Date: December 1, 2016
- ❖ First Automatic Salary Update: January 1, 2020; every 3 years thereafter, falling on January 1st
- ❖ Amount of Annual Minimum Salary Threshold Increase: Determined in 2nd quarter of the year preceding the update.
- ❖ Notification of Automatic Increase: To be published at least 150 days before January 1st.

What Happens When?

What **MUST** happen by December 1, 2016?

- ❖ An employer must adjust the annual salary for any employee for whom it wants to continue to assert a "White Collar" exemption, and thus not be eligible for overtime pay.
- ❖ Occurs mid-fiscal year
- ❖ No phase-in time
- ❖ No locality differential

What Happens When?

- ❖ Automatic Salary Update: First takes place on January 1, 2020.
- ❖ Takes place mid-fiscal year
- ❖ For 2020 update, school districts should plan for salary threshold increase during Spring 2019 budgetary discussions for the 2020-2021 school year, and every third year thereafter.

Basis of Minimum Salary Thresholds

- ❖ Minimum Salary Threshold for non-HCE employees: 40th percentile of weekly wages of full-time salaried workers in the lowest-wage Census Region.
- ❖ Minimum Salary Threshold for HCE employees: 90th percentile of annual salaries of full-time workers nationally.

What Happens When?

Does this mean that by December 1, 2016, a school district has to raise salaries to meet the new minimum salary level requirements for non-HCEs (\$47,476/yr.) and HCEs (\$134,004/yr/)?

NO! The final rule is not setting a "minimum wage".

What Happens When?

However:

If a school district wants to continue to assert that an employee falls under one of the "White Collar" exemptions, and is therefore ineligible for overtime pay, then that employee must meet the minimum salary level (in addition to the duties and salary basis tests) **as of December 1st.**

The New Final Rule in Action

Who will likely be impacted by the higher \$47,476/yr. minimum salary level threshold?

For non-HCE employees, it's most likely the middle-level managers and employees.

Who are they?

The New Final Rule in Action

- ❖ School staff members with "director", "supervisor", "manager", "coordinator", etc., in their titles
- ❖ Other non-educator supervisors
- ❖ Mid-level personnel (not necessarily in management)
- ❖ No school district department is immune:
Cafeteria, Custodial, Transportation, Finance,
Physical Plant, Special Education, Student Services,
Human Resources, etc.
Reminder: No Manual Labor

The New Final Rule in Action

What should school districts be doing now?

- ❖ Identify all current “overtime exempt” positions with salaries falling **BELOW** the new \$47,476/yr. (or \$913/wk.) threshold taking effect on 12/1/2016.
- ❖ For those employees, review their duties to ensure they clearly fall into a “white collar” exemption.
- ❖ Determine which positions the school district wants to increase the salary level to continue to meet the exemption requirements.

The New Final Rule in Action

- ❖ Review/revise existing (and future) vacancies.
- ❖ Clear up any existing “misclassification” disputes.
- ❖ Review existing collective bargaining agreements (i.e., future salary increases, salary steps, etc.)
- ❖ Identify “HCE” school personnel who have salaries that fall BELOW the new \$134,004/yr. threshold taking effect on 12/1/2016.

Existing Duties Tests for the “White Collar” Exemptions

- ❖ Executive Employee (29 C.F.R. §§ 541.100-.102)
- ❖ Administrative Employee (29 C.F.R. §§ 541.200-.202)
 - Personnel Examples (29 C.F.R. § 541.203)
 - Education Personnel Examples (29 C.F.R. § 541.204)
- ❖ Professional Employee (29 C.F.R. § 541.300)
 - “Learned Professionals” (29 C.F.R. § 541.301)
 - “Creative Professionals” (29 C.F.R. § 541.302)
 - Teachers (29 C.F.R. § 541.303)
- ❖ Certain Computer Employees (29 C.F.R. §§ 541.400, -.402)
- ❖ Highly Compensated Employee (29 C.F.R. § 541.601)

The New Final Rule in Action

For the HCE employees, the final rule will have least amount of impact on school districts, as there are few employees who fall into this category:

- ❖ Superintendents
- ❖ Assistant/Associate Superintendents
- ❖ Building (and likely Assistant) Principals
- ❖ Department Heads
- ❖ Department Directors

The New Final Rule in Action

For those non-HCEs who fall into the “pay gap” (i.e., between \$23,660/yr. and \$47,476/yr.), what happens?

What are the options a school district can consider?

The New Final Rule in Action

The Easy (or not-so-easy) Answer:

#1 Raise Salaries

#2 Don't Raise Salaries

The New Final Rule in Action

#1: Raise Salaries

Financial Impact: With respect to the December 1st deadline, the challenge is to find funds in an existing “spent” budget to fund these mid-year salary increases.

Another challenge: Certain affected staff members have likely already signed employment contracts for the 2016-17 SY.

The New Final Rule in Action

#2: Keep Salaries the Same

What does that mean?

Employees, who were previously exempt from overtime pay eligibility, are now eligible.

The New Final Rule in Action

For those employees who are kept at their current salary levels, and fall **BELOW** the minimum salary threshold, a school district can:

- ❖ Keep that employee on a salary basis, and calculate an hourly rate for overtime pay
- ❖ Convert that employee to an hourly employee entirely
- ❖ Restructure the job duties of the previously-exempt employee to restrict any non-exempt duties.

The New Final Rule in Action

- ❖ Hire additional hourly staff to cover the non-exempt work that the previously-exempt employees covered.
- ❖ Strictly monitor and restrict workable hours of non-exempt employees (whether salaried or hourly) to reduce the amount of overtime paid to them.
- ❖ Districts will have to calculate (speculate) overtime costs for the affected employees.

The New Final Rule In Action

- ❖ Ask traditionally-exempt employees to do more.
- ❖ Deal with an immediate budget shortfall for the upcoming fiscal year.

Employee Concerns Related to the Minimum Salary Threshold

- ❖ Perception of slowed career growth
- ❖ Potential perceived loss of credibility as former salaried managers, who are now hourly, must still supervise their hourly subordinates
- ❖ Perception of having less authority
- ❖ Lower employee morale; might feel like a demotion
- ❖ Loss of certain “cache” that comes with being salaried

Employee Concerns (con't)

- ❖ Once kept in the loop (like email strings over the weekend), now not in the loop because they can no longer check emails and such during off hours, because that might result in an employee working overtime
- ❖ Former salaried employees now having to keep track of their hours

Areas of Potential Legal Liability

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Employers can (and have) face significant penalties for misclassifying an employee's position as exempt:

- ❖ Pay back overtime for two years (three years, if a willful violation is found)
- ❖ Pay liquidated damages (which is the equivalent of double actual damages)
- ❖ Pay plaintiff's attorney's fees

Areas of Potential Legal Liability (con't)

- ❖ Face the possibility of a DOL audit, not just of the plaintiff's position, but possibly the employer's entire workforce
- ❖ Employer's failure to correct any identified misclassification for all affected employees could increase the employer's liability

DOL Resources

Along with the final rule, DOL published a host of additional resources for employers:

- ❖ Overtime for White Collar Workers: Overview and Summary of Final Rule:

<https://www.dol.gov/sites/default/files/overtime-overview.pdf>

- ❖ Final Overtime Rule: Qs and As:

<https://www.dol.gov/whd/overtime/final2016/faq.htm>

DOL Resources (con't)

- ❖ Fact Sheet: Final Rule to Update the Regulations Defining and Delimiting the Exemption for Executive, Administrative, and Professional Employees:

<https://www.dol.gov/whd/overtime/final2016/overtime-factsheet.pdf>

- ❖ General Guidance for Private Employers:

<https://www.dol.gov/whd/overtime/final2016/general-guidance.pdf>

DOL Resources (con't)

- ❖ General Guidance for Non-Profits:

<https://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf>

- ❖ Fact Sheet for State and Local Governments:

<https://www.dol.gov/sites/default/files/overtime-government.pdf>

Any Questions?



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Thank you!