



THE FAIR LABOR STANDARDS ACT: MINIMUM WAGE AND OVERTIME COMPLIANCE

(A) What is the new FLSA regulation?

The Fair Labor Standards Act (FLSA) seeks to provide workplace protection by (1) guaranteeing an hourly minimum wage for every hour worked, and (2) payment of one and a half times that hourly rate, for hours worked beyond the 40 hour workweek. Currently, the federal minimum wage is set at \$7.25 an hour. Nonprofits are exempt from taxes, but they are not exempt from the law, and have always been required to comply with FLSA regulations. Prior to the recent amendment of the FLSA, executive, administrative, and professional employees (referred to as “white collar” employees) paid a salary of \$23,660 per year were exempt from the overtime requirement, effective January 1, 2020. The FLSA raised this salary level to \$35,568 per year (\$684 per week). Under the amended FLSA, salaried white collar employees paid less than \$35,568 per year are entitled to overtime pay, while employees paid \$35,568 or more are exempt from the overtime requirement when they perform the necessary duties (see “The Duties Test” below). Additionally, the FLSA raised the salary necessary for the exemption of highly compensated individuals from \$100,000 per year to \$107,432 per year.

(B) Who is “covered” under the FLSA?

“Covered” employees are entitled to the protections offered by the FLSA. There are two ways that an employee may be covered under the FLSA. Either (1) “enterprise coverage,” the enterprise as a whole and all of its employees are covered under the FLSA, or (2) “individual coverage,” the individual employees are covered under the FLSA. If an employee is covered under the FLSA, either by enterprise or individual coverage, that individual is entitled to hourly pay and overtime pay.

Enterprise Coverage

Non-profit organizations are subject to FLSA regulation when their commercial activity results in sales made or business done totaling \$500,000 or more. However, charitable activities, provided free of charge, are not considered commercial activity, and the non-profit organization will not be subject to the FLSA regulation *as an enterprise*. Unrelated business income and commercial activity are two distinct concepts under the FLSA and are not to be confused. Organizations that bring in less than \$500,000 per year are likely subject to FLSA requirements (see below “Individual Coverage”).

Example #1:

A homeless shelter provides temporary food and housing for the community free of charge. Even if the non-profit receives over \$500,000 in donations throughout the year, it is not a “covered” entity under the FLSA because the non-profit engages only in *charitable activities that do not have a business purpose*.

Example #2:

A museum charges \$10 per ticket and brings in \$1,000,000 per year in ticket sales. Because selling tickets is a commercial activity, this organization is covered under enterprise coverage, and all of the museum's employees are entitled to FLSA protection.

Additionally, the FLSA applies to some "named" enterprises. Employees at named organizations are entitled to overtime protection, regardless of annual sales or their non-profit status. These named entities include: (1) hospitals, (2) schools and preschools, (3) government agencies, and (4) businesses providing medical or nursing care for residents.

Individual Coverage

The FLSA applies to individual employees that are engaged in interstate commerce or in the production of goods for interstate commerce. Interstate commerce is a broad concept that includes things such as phone calls across state lines, receiving or sending mail or emails across state lines, or even something as simple as a "donate here" button on a website. *There is an exceedingly high probability that all employees are engaged in interstate commerce.*

Example #1:

A food market receives canned food donations from various states. Because food is a "good" moving across state lines, employees who unload, stock, or account for the food donations received are individually covered under the FLSA.

Example #2:

A secretary at an organization works exclusively from the office and does not participate in any of the programs offered by the organization. However, s/he regularly receives phone calls from people residing in various states. Because the secretary receives phone calls from across state lines, s/he is engaged in interstate commerce and individually covered under the FLSA.

(C) The FLSA and Volunteers

Volunteers are not considered employees under the FLSA, and are therefore not "covered" by the FLSA. Thus, if a volunteer is doing the work, the non-profit does not need to worry about hourly wages or overtime.

A volunteer is a person who:

- (a) Provides their time freely for public service, religious, or humanitarian objectives,
- (b) Does not receive compensation other than expenses, reasonable benefits, or nominal fees, *and*
- (c) Does not displace or perform work that is ordinarily performed by regular employees

A person who is already employed by a non-profit may not volunteer to perform *the same services for which they are paid to provide*. However, an employee may volunteer at the organization s/he works with for activities that are *different* from those duties that they are paid to provide.

(D) The FLSA and Contractors

Independent contractors are not considered employees under the FLSA, and are therefore not "covered" by the FLSA. If an independent contractor is doing work for a non-profit, they are not entitled to overtime under the FLSA. Under Oklahoma law, an independent contractor is a person who is paid to perform a certain service or produce a certain product, but is free from the control of the employer regarding the method in which the product is produced. If a non-profit's employee works in the office or has set workhours, they are not an independent contractor.

(E) Who is exempt from the FLSA overtime requirement?

Individuals who perform specific duties may be exempt from the FLSA's overtime requirement. If an individual meets the requirements necessary for exemption, they are not entitled to overtime pay. These exemptions are often called the "EAP" or "White Collar" Exemptions

A white collar worker is exempt where they pass 3 tests: (1) the salary basis test, (2) the salary level test and (3) the job duties test.

The Salary Basis Test:

An employee meets the salary basis test when they receive a predetermined amount of compensation each pay period, and when that compensation cannot be reduced due to fluctuation in time or quality of work. However, an employee does not have to be paid for weeks when no work is done.

Example:

A manager at a food pantry, who is paid \$50,000 per year on a salary basis (\$961.54 per week) only works 2 hours one week, is still entitled to the full \$961.54 for that week.

The Salary Level Test:

In general, an employee must be paid at least \$35,568 per year (\$684 per week) to satisfy the salary level test.

Salary Level Test and Bonuses or Incentives

An employer may pay up to 10% of the required \$35,568 in nondiscretionary bonuses or incentives. These bonus or incentive payments must have been *previously* promised to the employee, and must be paid on at least a quarterly basis. The employer may not use discretionary bonuses to satisfy the \$35,568 requirement. Discretionary bonuses are not previously agreed upon, and are given to the employee at the employer's complete discretion.

Note, neither the salary basis test, nor the salary level test applies to: (1) outside sales employees, (2) teachers, or (3) employees practicing law or medicine. This means that individuals in these roles may be exempt from the overtime requirement even though they make under \$35,568 per year.

The Duties Test:

In order to qualify as a "white collar" employee, the employee's primary (principal, main, major, or most) duty must be that of an executive, administrative, professional, outside sales, or computer employee. The following indicate the duties required for each "white collar" employee.

(1) Executive Exemption

- The employee must manage the non-profit at which they are employed, or some department within that non-profit; and
- The employee must customarily and regularly direct the work of at least two or more other full-time employees, or their equivalent (i.e. four half-time employees), *and*
- The employee must either (1) have the ability to hire and fire other employees, or (2) the employee's recommendations regarding hiring, firing, advancement, promotion or any change of status must be given particular weight.

(2) Administrative Exemption

- The employee must perform office or non-manual work that is directly related to management or general business operations; *and*
- The employee's primary duty must include the authority to "exercise discretion and independent judgement."

Note*** **academic administrators** who perform administrative functions relating to academic instruction are exempt from the FLSA's minimum wage and overtime requirements *if they are paid at least as much as the entrance salary for teachers in respective educational establishment.*

Examples of academic administrators are: principals, vice-principles, and academic counselors.

(3) Professional Exemption

Professionals include (a) learned professionals, (b) creative professionals, (c) teachers, and (d) employees practicing law or medicine.

(a) Learned Professionals

- The employee's primary duty must require advanced knowledge. Advanced knowledge is "work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgement."
- Advanced knowledge must be in a field of science or learning, including: law, medicine, theology, accounting, actuarial computation, engineering, architecture, pharmacy, or occupations that have a "recognized professional status," *and*

- Advanced knowledge must be customarily acquired through a prolonged course of specialized instruction.

(b) Creative Professionals

- In order for an employee to be considered a “creative professional,” the employee’s primary duty must require originality, imagination, invention, or talent in a recognized artistic or creative field. Examples Include: music, acting, graphic arts, and writing.

(c) Teachers

- Teachers are exempt when their primary duty is the act of imparting knowledge through teaching, tutoring, instructing, or lecturing in an educational establishment.
- Examples include: teachers of gifted or disabled children, kindergarten or nursery school teachers, or teachers of skilled trades.

(d) Employees practicing law or medicine

- An employee is exempt if they hold a license to practice law or medicine **and actually does practice law or medicine.**

(4) Outside Sales Exemption

- The employee’s primary duty must be making sales to customers or obtaining orders or contracts for services or for the use of facilities, for which the employee will be paid; *and*
- The employee must customarily and regularly do business *away from the employer’s place of business.*

(5) Computer Employee Exemption

- The employee must be employed as a computer system analyst, programmer, software engineer, or any other similarly skilled worker in the field, *and*
- The duties of the employee must include:
 - i. “The application of system analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;” or
 - ii. “The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;” or
 - iii. “The design, documentation, testing, creation, or modification of computer programs related to machine operating systems;” or
 - iv. A combination of the above duties which require the same or similar level of skill.

Highly Compensated Employees and “white collar” exemptions

A highly compensated employee makes \$107,432 per year. In order for a highly compensated employee to be exempt, the employee must “customarily and regularly” perform one or more of the executive, administrative, or professional duties described above.

(F) How can non-profits comply with the Final Rule?

(1) Evaluate whether any employees regularly work over 40 hours per week.

- If employees do not regularly work over 40 hours a week, then they do not require overtime pay.
 - Example: The Manager of a non-profit animal shelter (assuming the manager deals with interstate commerce- *a safe assumption for all employees*) is paid \$32,000 per year, triggering the protection of the FLSA and entitling her to overtime. However, the shelter is only open from 10am to 2pm Monday- Saturday, and the manager is only there during hours of operation. Thus, she is unlikely to work more than 24-25 hours, and would not likely be eligible for overtime hours.

(2) Raise Salaries to maintain an exemption

- If employees meet the duties test (see above), are paid on a salary basis near the required \$35,568 per year, and often work more than 40 hours a week, it may be advantageous to raise the employee's salary
 - Example: A manager at a conservation non-profit makes \$35,000 a year and often works 60 hours a week. Her job duties pass the duties test for the administrative exemption. Here, the employer may choose to raise the manager's salary so that she qualifies for a "white collar" exemption.
 - Do the math
 - $\$35,000/52 \text{ weeks} = \673.08 per week
 - $\$673.08 /40 \text{ hours} = \16.83 per hour
 - Time and a half = \$25.25 per hour for overtime
 - If the manager works 20 hours of overtime per week, she is entitled to \$405.00 in overtime every week (\$21,060 per year). The manager would make \$56,060 per year. In this situation, it would be advantageous for the non-profit to raise her salary to \$35,568 per year in order to maintain her exemption.

(3) Pay overtime above salaries

- If an employer does not wish to raise an employee's salary, they may choose to pay overtime for hours in excess of 40 per week. An employee does not have to be paid hourly in order to be paid overtime. An employer may pay an employee on a salary basis for the first 40 hours, and then overtime for any additional hours.
 - Example: A manager at a women's shelter makes \$27,000 per year on a salary basis for 40 hours per week. She generally does not work over 43 hours per week.
 - Do the math
 - $\$27,000/52 \text{ weeks} = \519.23 per week
 - $\$519.23/40 \text{ hours} = \12.98 per hour
 - Time and a half = \$19.47 per hour for overtime
 - If the manager works 3 hours of overtime per week, she is entitled to \$58.41 in overtime every week (\$3,037.32 per year). The manager would make \$ 30,037.32 per year. In this situation, it would be advantageous to pay the manager overtime, as opposed to raising her salary to \$35,568 per year.

(4) Reorganize workloads

- When employees regularly work over 40 hours a week, an employer may consider adjusting work schedules in order to avoid excessive overtime hours. Note, **the FLSA does not specify days or schedules**, such as Monday - Friday workweek. An organization may set the workweek in their best interest. However, this work week must not vary from week to week. If the workweek is Tuesday-Monday, it must remain Tuesday-Monday.
 - Example: A manager at an animal shelter arrives at work at 8am. The bulk of animal adoptions usually take place between 6pm-7pm. In order to manage overtime hours, the shelter may consider adjusting the manager's schedule so that he does not begin work until 11:00am.

(5) Adjust Wages

- An employer may adjust an employee's earnings from salary to hourly so that the total amount paid to the employee remains largely the same. However, whether the employer is paying salary or hourly, a system will need to be in place to track hours and determine overtime pay.
 - Example: a manager for a museum makes \$35,000 per year on a salary basis.
 - Do the math
 - $\$35,000/52 \text{ weeks} = \673 per week
 - $\$673/40 \text{ hours} = \16.83 per hour
 - Time and a half = \$25.25 per hour for overtime
 - The museum may choose to pay the manager \$16.83 an hour as opposed to \$35,000 per year on a salary basis. Either way, the manager is entitled to overtime at \$25.25 an hour.

Table of Exempt Employee Requirements

Exemption	Salary Level Test	Salary Basis Test	Duties Test
Executive	\$35,568 per year	At least 90% of \$35,568 must be paid on a "salary basis." The other 10% may be paid with nondiscretionary bonuses or incentive payments.	(1) Managing the non-profit or a subdivision of it; <i>and</i> (2) Direct the work of at least two full-time employees or their equivalent; <i>and</i> (3) Authority to hire or fire or opinion is given particular weight.
Administrative	\$35,568 per year Note* academic administrative personnel may qualify with a salary equal to the entrance salary for teachers of the respective establishment.	At least 90% of \$35,568 must be paid on a "salary basis." The other 10% may be paid with nondiscretionary bonuses or incentive payments.	(1) office work (i.e. not manual labor) related to the management or business of the employer or employer's customers; <i>and</i> (2) discretion and judgment in significant matters.
Professional	\$35,568 per year Note* salary level test does <u>not</u> apply to outside sales employees, doctors, lawyers, or teachers.	At least 90% of \$35,568 must be paid on a "salary basis." The other 10% may be paid with nondiscretionary bonuses or incentive payments.	(1)Learned Professionals: individuals who go to school to acquire specialized academic training and are employed to do so. (2)Creative Professionals: individuals who work in a recognized creative field. (3)Teachers: individuals who impart knowledge via teaching, tutoring, instructing, or lecturing.
Outside Sales	Does not apply	Does not apply	(1) make sales or obtain orders; <i>and</i> (2) Customarily are regularly away from employers place of business.
Computer	\$35,568 per year OR \$27.63 an hour	At least 90% of \$35,568 must be paid on a "salary basis." The other 10% may be paid with nondiscretionary bonuses or incentive payments.	See above duties test for details. In sum, computer professional must be employed in programming or some other like skill which requires advanced knowledge.
Highly Compensated Employees	\$107,432 per year in total compensation	100% of the standard salary level (\$35,568 per year) must be paid on a fee or salary basis. The remainder of the requirement (\$71,864) may be paid in <i>nondiscretionary</i> bonuses or incentive payments.	(1) office or non-manual work; <i>and</i> (2) must "customarily and regularly" perform one or more of the duties of an executive, administrative, or professional employee.