

# Fair Labor Standards Act (FLSA) 2019 - Questions and Answers

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## **FLSA Guideline Changes**

### **1. What changes were made to the FLSA rules?**

On September 27, 2019, the Federal Department of Labor increased the salary basis test resulting in more employees being covered by the Fair Labor Standards Act (FLSA) and therefore entitled to overtime. **Effective January 1, 2020**, any employee that is currently overtime exempt from the provisions of FLSA under certain classifications, including the **Executive, Administrative, and Professional exemptions** with a salary of less than **\$684 per week (\$35,568 for a full-year worker)** would be covered by the FLSA, and therefore, will be entitled to overtime.

Also the total annual compensation level for highly compensated employees (HCE) is changing from \$100,000 to \$107,432 per year.

**Note:** in limited circumstances, the salary test does not apply to certain professionals (e.g., teachers, doctors, and lawyers) because those professionals are considered exempt under the FLSA based on their duties alone. In addition, there are other specialized rules which apply in higher education settings, as discussed in number 5 below.

### **2. When are the changes effective?**

Changes to the FLSA rules are effective January 1, 2020.

### **3. Will employees who are currently considered exempt from FLSA overtime requirements remain exempt?**

Employees considered exempt from FLSA's overtime requirements must meet both the threshold salary test (using the new increased salary basis test threshold above) and the duties test of a particular position.

### **4. Should the state agencies apply the FLSA criteria the same?**

Yes, state agencies should apply the FLSA criteria in the same manner if claiming an Executive, Administrative and/or Professional exemption.

### **5. Should higher education institutions apply the FLSA criteria in the same manner as state agencies?**

It depends. For classified employees the salary basis test should be followed. For academic employees, consult your assigned AAG about whether the new salary basis test applies. This test would not apply to individuals whose primary duty is teaching, and there are other specialized rules that apply in the higher education settings. See the attached DOL Fact Sheet.

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## Salary Test and Duties Test

6. **Will employees have to meet both the threshold salary test AND the duties test to be considered overtime exempt?**

In most circumstances, yes. Employees have to meet both the threshold salary test and the duties test to be considered overtime exempt. It is not enough to meet one test but not the other unless the claimed exemption is one for a professional whose duties alone make them exempt regardless of the salary paid or if other specific rules apply, such as in higher education (see #5 above).

7. **If an agency has already determined that a position meets the exemption criteria and there have been no substantive changes to the position since it was last reviewed, is there any reason why the agency would need to review it again before changing the employee to overtime exempt once they reach the salary threshold?**

For non-represented positions WAC 357-28-245 requires general government employers to get OFM approval when changing a position's overtime eligibility designation from overtime eligible to overtime exempt. For represented positions, refer to the appropriate collective bargaining agreement to ensure required notifications occur when making changes to an employee's overtime status.

## Part-Time and Cyclical Employees

8. **What is the salary requirement for part-time salaried workers?**

Whether an employee is full-time or part-time, it does not change the application of the FLSA salary basis test. The relevant inquiry is what the standard salary level to qualify for exemption. The salary threshold to qualify for exemption is \$684 per week.

9. **Will seasonal employees be held to the \$35,568 annual threshold or the \$684 per week threshold?**

The new salary threshold is \$684 per week meaning that if the position calls for the employee to work 40 weeks out of the year, the ability to exempt the position from FLSA would depend on whether or not the employee's weekly salary exceeds \$684 per week.

10. **For an hourly part-time employee - what happens if they don't work the same number of hours each week and some weeks they are below the salary threshold and some weeks they are above it?**

If the person's pay is tied to the amount of time (i.e., the quantity) that they work, they are hourly employees and overtime eligible because they are not being paid on a salary basis pursuant to FLSA rules. Specifically, 29 C.F.R. § 541.602(a) states:

An employee will be considered to be paid on a "salary basis" within the meaning of these regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which **amount is not subject to reduction because of variations in the quality or quantity of the work performed**. Subject to the exceptions provided in paragraph (b) of this section, an **exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked**. Exempt employees need not be paid for any workweek in

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which they perform no work. An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

*Id.* (emphasis added).

## **11. How do we perform a salary test for staff who work in cyclic-year positions?**

It is clear from information on the DOL site that it does not matter if the employee is working full-time or part-time. The standard salary level for exemption is \$684 per week (or \$35,568 annually). As such, absent the limited exceptions for higher education, if a part-time employee's weekly pay doesn't reach \$684 per week, they are eligible for overtime.

## **Split Level Ranges**

### **12. What are the split level pay ranges?**

Split level pay ranges are salary ranges in which the new FLSA salary threshold falls somewhere in the current salary range. The split level salary ranges are 30-38 on the General Service salary schedules that are effective as of July 1, 2019 (Non-Rep and Rep employees under WFSE & Coalition CBAs) Refer to other salary schedules for the cutoff at \$35,568.

### **13. What happens to employees in positions assigned to split level pay ranges when their salary exceeds the new FLSA salary threshold?**

Employees could switch from overtime eligible to overtime exempt once their salary exceeds the new FLSA salary threshold, provided employee's duties also meet the exemption criteria.

## **Miscellaneous**

### **14. Who should you contact regarding agency or higher education institution specific questions?**

Agencies or higher education institutions should contact their assigned Labor and Personnel or Education Division AAG.

### **15. What if an employee takes LWOP and that brings them below the FLSA salary threshold?**

This is a very fact specific question that should be asked of your assigned Labor and Personnel or Education Division AAG. Although the FLSA does not mandate that employers provide employees paid leave of any kind, the law has an exception for public agency employees in these circumstances stating the exemption will not be lost. The FLSA rules states in part that "an employee of a public agency who otherwise meets the

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salary basis requirements . . . shall not be disqualified from the exemption . . . on the basis that such employee is paid according to a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because: (1) Permission for its use has not been sought or has been sought and denied; (2) Accrued leave has been exhausted; or (3) The employee chooses to use leave without pay." 29 C.F.R. § 541.710(a).

### **Contacts**

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