

United States Department of Labor

Wage and Hour Division

Questions and Answers from the General Information Overtime Webinars

Q. We are a seasonal property open 8 months - is the \$47,476 based on that or 12 months?

A. The new salary is \$913 per week. During the eight-month period that employees work at your property, you will need to guarantee that at least \$913 per week is paid for an exempt employee. Please see FOH 22g10 concerning rules for annual salary earned in a shorter period, which can be found at the following link:

https://www.dol.gov/whd/FOH/FOH_Ch22.pdf.

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. With regard to the non-discretionary bonus and catch up payment provisions, does "quarterly" mean calendar quarter? Fiscal quarter? Or is it up to the employer's discretion?

A. No, it does not mean the calendar quarter. It is the employer's discretion when the quarter will begin.

Q. How does this ruling affect agricultural workers?

A. The Department's rulemaking addressed the regulations governing the "white collar" exemptions under Section 13(a)(1) of the FLSA - exemptions for executive, administrative, and professional employees, as well as outside sales employees and employees with certain computer-related job duties. Thus, unless an agricultural worker currently qualifies for one of these "white collar" exemptions, they will not be directly affected by the Department's Final Rule. The FLSA's exemptions governing agricultural workers have not been changed by this Final Rule.

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. Can an employer say that an Xmas bonus is part of your salary in effort to meet the new standard?

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. An unannounced holiday bonus would qualify as a **discretionary** bonus, because the bonus is entirely at the discretion of the employer, and therefore could not satisfy any portion of the \$913 standard salary level.

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. Has there been any change to the exemption for commissioned employees working at a retail establishment? Our understanding is that these employees are exempt so long as at least 50% of their gross earnings are from commissions. Has that changed?

A. No, Section 7(i) of the FLSA remains unchanged by the issuance of the new Overtime Final Rule related to commissioned employees. See [Fact Sheet #20: Employees Paid Commissions By Retail Establishments Who Are Exempt Under 7\(i\) from Overtime Under the FLSA](#)

Q. OT rules for non-profit organizations: A client has asked "Can overtime compensation can be paid with time off (comp-time) calculated at time and a half?"

A. No. 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. We currently pay employees every 2 weeks. Will our pay periods need to switch to every week?

A. No. Employers may still pay their employees on a biweekly basis. An employer's overtime pay obligation is determined on a week-by-week basis, but they may pay their employees on a biweekly basis.

Q. Straight Commission Employees: How do we handle outside sales staff who are paid straight commissions?

A. Consistent with the current regulations, neither the old or new salary requirements will apply to the outside sales employee exemption. For additional information, please see [Fact Sheet #17F: Exemption for Outside Sales Employees Under the Fair Labor Standards Act \(FLSA\)](#)

Q. How will this new rule affect California? California has always been consistent or more favorable to the employee than FLSA. This new rule suggests FLSA is now more favorable to the employee. Or am I missing something? Thanks

A. The Fair Labor Standards (FLSA) provides minimum wage and hour standards, and does not prevent a State from establishing more protective standards. If a State establishes a more protective standard than the provisions of the FLSA the higher standard applies in that State. To the extent the new minimum salary amount of \$913 per week under the

Overtime final rule is higher than the State requirement, the employer in that State must comply with the higher standard and pay not less than \$913 per week for an exempt white collar employee.

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. Quarterly bonus: if an employee is paid between \$822 and \$913 per week, can the bonus be paid less frequently than quarterly?

A. No. To count toward the standard salary level, nondiscretionary bonuses must be paid quarterly or more frequently.

Q. We employ individuals who teach ESL classes, we identify them as teachers, we are not an educational institution or school. Their primary duty is teaching. Do they qualify as exempt?

A. No. To qualify for the professional exemption as a teacher, the employee must be employed in an "educational establishment," as that term is defined at 29 CFR 541.204(b).

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. Did I understand you correctly to say that teachers do not have to earn the minimum exempt salary? In other words: there is no problem if the salary for teachers in a given geographic area is below the \$913/week even if they're considered exempt employees.

A. Yes. Certain professional employees - including doctors, lawyers, and teachers - are not subject to the salary basis and salary level requirements that generally apply to other white-collar employees. To qualify for the professional exemption as a teacher, the employee must be employed in an "educational establishment" and have a primary duty of teaching.

Q. Non-Enforcement for Medicaid-funded services for individuals with intellectual and developmental disabilities in residential homes and facilities with 15 or fewer beds: Does the limited non-enforcement for Medicaid-funded services for individuals with intellectual and developmental disabilities in residential homes and facilities with 15 or fewer beds apply to companies that have multiple facilities all of which have fewer than 15 beds?

Thank you.

The limited Non-Enforcement Policy for Medicaid-funded services for individuals with intellectual and developmental disabilities in residential homes and facilities with 15 or fewer beds - applies per establishment - not enterprise wide.

Q. In a public accounting firm, will the accountants who earn less than \$47,476 be eligible for overtime? For example, a new college graduate passes the CPA exam and is a professional but the earnings are less than \$47,476.

A. Once the Overtime final rule becomes effective December 1, 2016, white collar employees, such as CPAs, who are paid less than the minimum salary amount of \$913 per week will not meet the professional employee exemption from overtime pay. Thus, such employees must be paid overtime for hours worked over 40 in a workweek.

Q. Do you plan to provide written guidance with further details regarding the application of the 10% "credit"?

A. Yes, we plan to issue additional guidance before the Final Rule becomes effective on December 1, 2016.

Q. Just wanted to verify that any person employed as an outside sales person does not need to have their salary increased?

A. Correct. Outside sales employees are not subject to the salary basis or salary level requirements, so they are not affected by this Final Rule.

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.

Q. Does this affect teacher pay as well? Or do they fall under a separate law?

A. [The following guidance addresses your question https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf](https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf)

Q. School Personnel: We are a school district. We have a cafeteria supervisor who we have in the past considered salary. The position is 204 days per year. Would this position meet the exemption if it is paid more than an entry level teacher? If not, would the salary amount exemption be for the weeks worked or does it have to be for 52 weeks?

A. A cafeteria supervisor must be paid the standard salary level and meet the duties test delineated in 541.100 in order to be classified as exempt. The new salary level of \$913 per week will be effective 12/1/16 and will apply to most employees. Please see FOH 22g10 concerning rules for annual salary earned in a shorter period, which can be found at the following link: https://www.dol.gov/whd/FOH/FOH_Ch22.pdf.

There is a limited exception for academic administrative employees who are paid at least either the new salary level or a weekly salary equal to the entrance salary level for teachers in the same educational establishment. Exempt academic administrative employees must have the primary duty of performing administrative functions directly related to academic instruction or training. Employees, such as a cafeteria supervisor, who work in education but whose work does not relate to the educational field are not performing academic administrative work, and must be paid the standard salary level of \$913 per week and meet the required duties test to be exempt.

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. Is there an exception that for inside sales employees that mirrors the outside sales exemption?

A. For information about the outside sales exemption under the FLSA, please see Fact Sheet 17f: https://www.dol.gov/whd/overtime/fs17f_outsidesales.pdf For information on inside sales employees, please see: <https://www.dol.gov/whd/regs/compliance/whdfs20.pdf>.

Q. How does the Final Rule affect Higher Education employees who are not instructors, but are entry level positions?

A. Many entry level positions may be currently overtime eligible and will not be affected by the Final Rule. Under the New Rule, currently exempt employees must be paid a salary of at least \$913 per week to retain their exemption. However, the salary level does not apply to bona fide Teachers, and Academic Administrative Employees may be subject to an alternative salary level. For additional information, please review our Higher Education Guidance Document: <https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>

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 hour 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. Where can I find more information regarding making catch-up payments for non-discretionary bonuses?

A. 29 CFR Part 541.602(a)(3) as well as 81 Federal Register 32427 provides more information regarding the catch-up payments for non-discretionary bonuses.

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 requirement 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.

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

Q. You said nothing is changed in terms of paying employees on a Fee Basis. Do employees paid on a Fee Basis have to meet the criteria of one of the exemptions: executive, administrative, or executive? And, when the final rule is in place, will the fee basis pay have to equal \$913 per week, rather than the current \$455 per week threshold? Thank you.

A. For an employer to claim an exemption under the white collar exemption regulations (effective Dec. 1, 2016), the employee must meet the duties test under the executive, administrative, or professional exemption, and be paid not less than the minimum salary amount of \$913 per week. Employees who meet the duties test under the administrative or professional exemption may also be paid on a fee basis of not less than \$913 per week when the final rule becomes effective.

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. Final salary number for exempt: How was the decision made to come up with the 47 plus versus the 50 plus number?

A. The Department received a large number of comments expressing concern that the proposal didn't take into account low-wage regions, low-wage industries, and small businesses. In response to these concerns, the Department set the level at the 40th percentile of full-time salaried workers in the lowest wage Census region instead of the 40th percentile nationally, as proposed in the Notice of Proposed Rulemaking. This resulted in the new salary level of \$913/week (\$47,476 annually).

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

Q. Guidance issued from the department indicates that 'academic administrative personnel' employed in HIGHER EDUCATION are subject to a special salary threshold (as least as much as entry level salaries for teachers at that institution). 541.204 seems to indicate this special salary level is available to such personnel working in an 'education establishment' which would include primary and secondary schools. Is this special threshold ONLY now available for higher education?

A. No, the special salary level for academic administrative personnel is still available to administrative employees working in primary and secondary schools, in addition to institutions of higher education. The definition of an "educational establishment" in 541.204 has not changed.

Q. In the company we have a Brand Ambassador Program, that takes care of making sure our sales strategy is correctly implemented in the Point of Sales. They are focused mainly in retail. Should they be considered Outside Sales? Do they qualify or not for the new rule under this premises?

A. Employees who qualify for the outside sales exemption are not subject to the salary basis or salary level requirement. To qualify for the outside sales exemption, an employee must be customarily and regularly engaged away from the employer's place or places of business and meet certain other requirements. For more information, see Fact Sheet # 17 available at https://www.dol.gov/whd/overtime/fs17f_outsidesales.pdf

Q. Does the new minimum salary requirement of \$47,476 apply to the motor carrier exemption? Thank you!

A. The Department's rulemaking addressed the regulations governing the "white collar" exemptions under Section 13(a)(1) of the FLSA - exemptions for executive, administrative, and professional employees, as well as outside sales employees and employees with certain computer-related job duties. Thus, unless a motor carrier employee currently qualifies for one of these "white collar" exemptions, they will not be directly affected by the Department's Final Rule. The FLSA's exemptions governing motor carrier employees have not been changed by the Final Rule. For more information about the motor carrier exemption, please see Fact Sheet #19 at this link: <https://www.dol.gov/whd/regs/compliance/whdfs19.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. We normally work a 4 day 32 hour workweek. How does this affect us as far as overtime goes? Can I pay the salary and only have to pay overtime if the employee reaches over 40 hours?

A. The Department of Labor's final overtime rule updates the salary level required for the executive, administrative, and professional ("white collar") exemption to ensure that the Fair Labor Standards Act's (FLSA) intended overtime protections are fully implemented, and it provides greater clarity for white collar workers and their employers.

Most employees covered by the FLSA must be paid the minimum wage (currently \$7.25 per hour) and at least one and one-half times their regular rate of pay for any hours they work beyond 40 in a workweek. An employer who requires or permits an employee to work overtime is generally required to pay the employee pay for such overtime work. The FLSA does, however, exempt certain kinds of covered employees from the minimum wage and overtime requirements, including bona fide executive, administrative, and professional employees who qualify for the "white collar" exemptions. To qualify for one of the "white collar" exemptions, an employee must be paid on a salary basis, paid above a certain salary level, and meet the respective duties test.

Q. Can housing apply to get to minimum rate? We give free rent to certain employees who live and work in our apartments. Can this cost be included to get to the \$47,476 annual amount?

Ex. Mr. Smith is paid a \$38,000 annual salary. Mr. Smith receives free housing with an annual value of \$10,000. Mr. Smith meets the duties test. Can Mr. Smith remain salaried since his salary and rent value add up to \$48,000 which is above the \$47,476 amount?

A. Thank you for your question. For EAP or White Collar employees to qualify for exemption under section 13(a)(1) of the Act, an employee must earn the minimum salary amount set forth in section 541.600, "exclusive of board, lodging, or other facilities." The phrase "exclusive of board, lodging, or other facilities" means "free and clear" or independent of any claimed credit for non-cash items of value that an employer may provide to an employee. Please see 29 CFR 541.606.

Q. The rules allow employers to use non-discretionary bonuses to meet up to 10% of salary level, if paid on a quarterly or more frequent basis. Can employers establish their own quarterly (13 week) period, or must employers follow a calendar quarter (i.e. Jan - Mar, April - June, etc.). Employers might have a revenue cycle based on a fiscal year, for example, which would set bonuses based on a fiscal year, and "fiscal" quarters.

A. Yes. Employers can establish their own quarterly (13 week) period. It does not mean the calendar quarter. It is the employer's discretion when the quarter will begin.

Q. Are longevity payments considered to be a non-discretionary bonus?

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.

Q. Bonus - we get up to 25% of our salary (with a fixed formula); does the new law apply?

A. Beginning on Dec. 1, 2016, employers may use non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level test (\$913 per week, beginning on Dec. 1), provided that such payments are made on a quarterly or more frequent basis. Payments promised to the employee ahead of time and calculated according to a fixed formula would likely qualify as non-discretionary. Employers may continue to pay non-discretionary bonuses and incentive payments beyond those necessary to satisfy the salary requirement, but such payments may only satisfy up to 10 percent of the new standard salary level.

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. Does this include sales people?

A. If you are referring to an "Outside salesperson" as defined in 29 CFR 541.500, then the answer would be no, as outside sales employees are not subject to the salary basis or salary level requirements, and thus are not affected by the Final Rule.

If you are referring to inside sales commissioned employees that work at a retail establishment who are subject to Section 7(i) of the Act, the FLSA remains unchanged by the issuance of the new Overtime Rule. To ensure compliance with the criteria, please see Fact Sheet #20 at <http://www.dol.gov/whd/regs/compliance/whdfs20.pdf>.

Q. We are looking for clarification regarding categorizing someone as non-exempt Salary. We know that their hours have to be tracked and they are eligible for overtime.

However, we are confused about the 'salary' piece in regards to non worked time. If a non-exempt salary person doesn't work a day and has no balance in their time off plan, can we not pay them for the day? If a nonexempt salary person works partial day and takes time off the rest (works 5 hours, takes 3 hours) can we dock the employee the 3 hours?

We know for exempt, we cannot dock partial days and we were not sure if nonexempt salary follow that rule. Trying to clarify what stating 'salary' really does for the employee.

A. An employer is permitted to pay a non-exempt employee a salary which is less than the required \$913 per week (Net Overtime Final Rule) as long as the employee is not paid less than the federal minimum wage rate of \$7.25 for all hours worked and is paid overtime for all hours worked in excess 40 per week. For additional information, please review [fact Sheet 23: Overtime Pay Requirements of the FLSA](#). The salary basis rule (which requires that an employee salary not be reduced because of variations in the quality or quantity of the work performed) does not affect non-exempt employees.

Q. What if they do not work any overtime?

A. Most employees covered by the FLSA must be paid the minimum wage (currently \$7.25 per hour) and at least one and one-half times their regular rate of pay for any hours they work beyond 40 in a workweek. An employer who requires or permits an employee to work overtime is generally required to pay the employee premium pay for such overtime work.

The FLSA does, however, exempt certain kinds of covered employees from the minimum wage and overtime requirements, including bona fide executive, administrative, and professional employees who qualify for the "white collar" exemptions. For additional information, please see this fact sheet:

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

Q. I would like any information you have regarding the exemption status of consumer loan officers and mortgage loan officers. I was told the DOL had published a letter regarding this and that they are not allowed to be OT exempt. Thank you.

A. This Final Rule has not changed any of the duties requirements for exemption, including for consumer loan officers and mortgage loan officers. For more information on the exempt status of those employees, see Administrator Interpretation No. 2010-1, available at https://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_1.pdf.

Q. Do employees have to be paid at least the 913.00 in a week even if an entire day was not worked of that week. So employees actually work only 4 days and not 5? Do the employees have to use vacation days to cover the pay for that date? How about if they don't have any paid vacation or paid time off?

A. To qualify for any of the white collar exemptions, employees generally must meet the salary basis test, the salary level test, and the duties test. Generally, if an exempt employee subject to the salary level test works for any amount of time during their workweek, they must receive at least the full standard salary level (\$913 per week, beginning on Dec. 1, 2016) to retain their exempt status. To be paid on a salary basis, an employee's pay cannot fluctuate according to the quality or **quantity** of their work. However, according to 29 CFR 541.602(b), employers may deduct from an employee's salary for full-day absences under certain circumstances. For example, if an employee is absent from work for one or more full days for personal reasons other than sickness or disability, the employer may make a deduction without changing the exempt status of the employee.

Q. In the presentation, you quickly went through a few examples of the application of the 10% credit for nondiscretionary bonuses and gave one example of a "catch-up" payment. Will you make additional written examples, providing more detailed analysis on the

application of the 10% credit and "catch-up" payments, available to the public?

A. 29 CFR Part 541.602(a)(3) as well as 81 Federal Register 32427 provides more information regarding the catch-up payments for non-discretionary bonuses. Yes, we plan to issue additional guidance before the Final Rule becomes effective on December 1, 2016.

Q. Are self-employed individuals who are >2% shareholder employers subject to the minimum salary requirements? Many times we see owners (who consistently work >40 hours/week) with annual salaries less than the threshold. Will they have to increase their salaries, or would they be exempt as owners?

A. Business owners - defined in 29 CFR 541.101 as "any employee who owns at least a bona fide 20 percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management" - are not subject to the salary level requirement. These bona fide business owners would not be affected by the Final Rule's increase to the standard salary level.

Q. I have field technicians who are salaried employees - and are paid more than the \$47k+ salary level - but who do not meet the EAP duties tests. They often travel to remote sites to perform field work, and some perform work at night when required. Under the new rules, are these employees entitled to pay for travel time (which might bump them over the 40 hr/wk threshold); and are they entitled to OT pay for night shift work? For example: if a field tech is scheduled to work nights during one week and works only 40 hours, no OT would be required.

A. If an employee does not meet the duties test under the EAP exemptions, then they are not exempt and must be paid overtime pay after 40 hours in a workweek. The Department's travel time regulations have not changed and should be applied appropriately to hours worked. See 29 CFR 785.

Q. Please elaborate on how the DOL views what positions are classified as ministers/religious workers who would be exempt from the new pay test. Thanks!

A. Persons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in the schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be "employees." Since these persons are not considered employees under the Fair Labor Standards Act (FLSA), they are not entitled to the protections of the FLSA. However, the fact that such a person is a member of a religious order does not preclude an employer-employee relationship with a state or secular institution. FOH 10b03 found at: https://www.dol.gov/whd/FOH/FOH_Ch10.pdf.

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

Q. How does this apply to fee basis salaried individuals, e.g. geologists, land surveyors, who work 18 days on and 6 days off? For example, for the first 18 days the employee will meet the \$913 per week salary utilizing the fee basis method (\$175.84 per day worked). However, for the week in which they are off for 6 days they will only have earned one day's pay under the fee basis method. Has the requirement been met because the \$913 per week was met over the 3 week period?

A. To the extent that an employee meets the duties test requirement for the Administrative or Professional exemption, and is paid on a fee basis, to determine whether a fee payment meets the minimum amount of salary required for exemption under these regulations, the amount paid to the employee will be tested by determining the time worked on

the job and whether the fee payment is at a rate that would amount to at least the required standard salary level (currently \$455 per week, but \$913 effective 12/1/16) if the employee worked 40 hours. See 29 CFR 541.605.

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. You mentioned "employees must be paid full salary for the week if any work was done during the week." Does this mean this:

1. If they are hired and start on Wednesday and paid a salary, that you have to pay them the full weekly salary or can you pro-rate it for Wednesday through Friday?

2. What about if their last day is on a Thursday, do you still have to pay them their full salary for that week even though they didn't work Friday?

A. For an employee who qualifies for the "white collar" exemption, the employee must be paid \$913 per week when the Final Rule becomes effective on December 1, 2016. An employee's workweek is a fixed and regularly recurring period of 168 hours - seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. See 29 CFR 778.105.

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. See 29 CFR 541.602(b)(6).

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. We pay bonuses monthly so as long as we look at this quarterly and do any catch up needed, are we okay with paying the 822.00 week salary and using bonuses as the remainder 10%? the catch up is looking at OT hours if they fall below the minimum right? I think I get HCE must be paid at least 913 week and can earn rest by non-discretionary bonuses? Is an annual bonus considered non-discretionary or discretionary if it is tied with performance? Our annual bonuses are tied to performance.

A. For employees who pass the standard duties test, they may qualify for exemption if they receive at least 90 percent of the standard salary level (approximately \$822 per week) on a salary or fee basis and earn at least 10 percent of the standard salary level (approximately \$91 per week) in non-discretionary bonuses or incentive payments (including commissions), provided that such payments are paid on a quarterly or more frequent basis. For employees who pass only the relaxed HCE duties test, however, they must receive at least \$913 per week on a salary (or fee) basis. As long as an HCE employee earns at least \$913 on a salary or fee basis, employers may use non-discretionary bonuses and incentive payments (including commissions) paid on an annual (or more frequent) basis to satisfy the remainder of the new \$134,004 total annual compensation threshold.

Q. How do the new rules affect foreign nationals in the U.S. in J-1 visa status such as Alien Physicians and Research scholars? Where might we locate this information? I was unable to locate this information in the updates.

A. Employment under the J-1 visa program does not preclude application of the Fair Labor Standards Act. For more information about exemptions for professional employees under the Fair Labor Standards Act please see: https://www.dol.gov/whd/overtime/fs17d_professional.pdf For more information about the J-1 program, please see: <http://j1visa.state.gov/>.

Q. I'm a little confused on the new bonus structure. If an employee earns over the minimum, do discretionary bonuses have to be paid out quarterly or can bonuses be paid out annually.

A. As an initial matter, the ten percent applies only to nondiscretionary bonuses and commissions.

As to your question, it depends on which exemption you are thinking of. For the Highly Compensated Employee exemption, an employer may pay the bonus annually, although such an employee must receive the full standard salary amount of \$913 each workweek. If you are asking about the standard EAP exemptions, up to ten percent of the \$913 salary amount may come from nondiscretionary bonuses or commissions and must be paid at least quarterly.

Q. Follow up: for individuals who are hourly, if discretionary bonus is used for 10% of their salary but they don't earn the full amount, then their payment is leveled quarterly to insure they meet requirements? or do they just get paid the amount per quarter in time and a half for hours worked over 40?

A. Hourly employees are not exempt under the EAP exemption. For hourly workers, nondiscretionary bonuses must be calculated in the regular rate of pay for determining overtime pay.

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 nondiscretionary bonus apply to the quarter it covers or the quarter in which it is paid? Ex. Ms. Jones receives a \$2,000.00 bonus in May 2017 for the 1st Quarter of 2017. Does this \$2,000.00 apply to the 1st Quarter minimum wage requirement or to the 2nd Quarter?

A. Under the Final Rule, if by the last pay period of the quarter the sum of the employee's weekly salary plus nondiscretionary bonus, incentive, and/or commission payments received does not equal 13 times the weekly salary amount required by 29 C.F.R. 541.602(a)(3), the employer may make one final catch-up payment sufficient to achieve the required level no later than the next pay period after the end of the quarter.

It appears in your example that the 1st Quarter ends in March 2017. Accordingly a bonus paid in May 2017 falls outside of the catch-up period and could not be counted to satisfy the salary requirement for worked performed in the 1st Quarter of 2017. However, the bonus paid in May 2017 could be counted towards the 2nd Quarter of 2017 (up to 10 percent of the salary level).

Q. School district: How do we handle employees who co-share a position? We have some Dyslexia Specialists who choose to work less than 40 hrs. per week and will not meet the \$913 threshold next year how would we handle those employees who chose to work less but now will not meet the salary threshold to maintain exempt status. Will they need to be hourly employees going forward or is there another option?

A. Whether a worker is full-time or part-time, the standard salary level to qualify for exemption will be \$913 per week. The FLSA does not dictate whether an employee is paid hourly or on a salary basis. That is at the employer's discretion. However, there are salary exempt and salary non-exempt employees. The webinar today was focused on the 541 or "white collar" exemptions which require an employee to among other things, be paid on a salary basis and to be paid a certain salary level. However, employees that are paid on a salary basis and are not exempt, can be paid as such as long as the amount of salary paid, when divided by the total number of hours worked, meets or exceeds the federal minimum wage. In addition, if that person works more than 40 hours in a workweek, they would need to be paid overtime as well.

Q. Can you address the impact to outside sales employees whose compensation is almost entirely commission based? Do they now require a base salary of \$47k?

A. Outside sales employees are not subject to the salary basis and salary level requirements, so as long as they pass the job duties test they will qualify for exemption regardless of how much they earn. Thus, outside sales employees will not be affected by the Final Rule. See Fact Sheet # 17F for a description of the job duty requirements for outside sales employees, available at: https://www.dol.gov/whd/overtime/fs17f_outsidesales.pdf

Q. For graduate students who are doing pre-degree internships or practicum level training in health professions (doing clinical training under supervision not necessarily research in setting like the college counseling center, university medical center or a community mental health center) and receive a stipend, is the unpaid internship fact sheet (71) applicable or are they considered "learned professionals" as outlined in fact sheet (17D)? Is there another provision that includes student trainees who are not medical residents or interns?

A. We do not have enough information to give you a definite answer, but you may want to review the regulations governing "learned professionals" under 29 CFR 541.301. Please note that learned professionals will be subject to the new standard salary level (\$913 per week) when it takes effect on December 1, 2016. If you have further questions, we encourage you to reach out to your nearest Wage and Hour Division district office, which you can find here: <https://www.dol.gov/whd/america2.htm>.

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. How should we classify mortgage loan officers that often work at other offices handling closings for various clients? They are currently compensated once a month as a commissioned employee, but also receive advances at various times during the month.

A. For information about the exempt status of mortgage loan officers, please refer to WHD Administrator Interpretation No. 2010-1, available at: https://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_1.pdf

Q. How should warehouse workers who move product onto a truck and occasionally drive the truck to various locations be classified? Do they fit under the Fact Sheet #19 Motor Carrier exemption?

A. The Section 13(b)(1) overtime exemption does not apply to employees who are not engaged in "safety affecting activities", such as dispatchers, office personnel, those who unload vehicles, or those who load but are not responsible for the proper loading of the vehicle. Only drivers, drivers' helpers, loaders who are responsible for proper loading, and mechanics working directly on motor vehicles that are to be used in transportation of passengers or property in interstate commerce can be exempt from the overtime provisions of the FLSA under Section 13(b)(1). See <https://www.dol.gov/whd/regs/compliance/whdfs19.pdf>. For further information, please see: https://www.dol.gov/whd/FieldBulletins/FAB2010_2.pdf

Q. In an educational institution, faculty often work for 9 months and are paid over 12 months on an ongoing basis. The benefit to this is that they can keep their benefits and benefit deductions active during the months they do not work. Would an employer be compliant with the new salary threshold if employer otherwise exempt non-teaching positions could also have 9, 10 or 11 month appointments earning at least \$913 per week during the 39, 43, or 48 weeks (respectively) that they work, but paid over 12 months for an annual salary less than \$47,476?

A. To qualify for any of the white collar exemptions, employees generally must meet the salary basis test, the salary level test, and the duties test. Generally, if an exempt employee subject to the salary level test works for any amount of time during their workweek, they must receive at least the full standard salary level (\$913 per week, beginning on Dec. 1, 2016) to retain their exempt status. Please see FOH 22g10 concerning rules for annual salary earned in a shorter period which can be found at the following link https://www.dol.gov/whd/FOH/FOH_Ch22.pdf.

Q. How do we classify and compensate owners of a company who work full-time and take draws? Can they be listed as a salaried, exempt employee (under the executive exemption) as long as they make the base \$47,476? Then whatever draw they make is listed as additional compensation, bonuses, etc.?

A. Thanks for your question. The term "Executive employee" includes any employee who owns at least a bona fide 20% equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in management. Such business owners are not subject to the salary level test. For additional information see the requirements of business owners at 29 CFR 541.101. For additional information on "management" please see 541.102.

Q. Is the fluctuating work week method described in 29 CFR 778.114 affected by the new overtime regulations? In other words, can the fluctuating work week only be used if an employee is paid at the new weekly basis of \$913 a week?

A. The new Overtime final rule (effective Dec. 1, 2016) that revised the white collar exemption regulations at 29 CFR 541 made no changes to the fluctuating workweek method of calculating overtime pay under 29 CFR 778.114. Employees who are paid the new salary level and meet the other requirements for the white collar exemption need not be paid overtime.

Q. Do all employees of a company have to be on the same quarter for purposes of the "true-up" payment, or can each employee be on an individual quarter based on start date?

A. No, employees do not have to be on the same quarter.

"For purposes of computing pay due under the Fair Labor Standards Act, a single workweek may be established for a plant or other establishment as a whole or different workweeks may be established for different employees or groups of employees." 29 CFR 778.105. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act. The same principle applies to the treatment of nondiscretionary bonuses and incentive payments (including commissions), which, beginning on Dec. 1, 2016, may satisfy up to 10 percent of the new standard salary level, provided that such payments are paid on a quarterly or more frequent basis. For each employee, the beginning of the quarterly period is left to the employer's discretion. 29 CFR 541.602(a)(3) as well as 81 Federal Register 32427 provides more information regarding the treatment of catch-up payments for nondiscretionary bonuses.

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. Were rural lower income areas taken into account? This exempt level is well above the average for our area.

A. Last summer, the Department proposed to set the standard salary level threshold at the 40th percentile of weekly salaried earnings based on nationwide salary data (estimated to be \$970 per week, or \$50,440 per year, in 2016). The Final Rule, however, sets the standard salary level based on the 40th percentile of weekly salaried earnings based on salary data from the lowest-income Census Region (currently the South).

The Department modified the proposed salary level to account for the fact that salaries are lower in some regions than others. By adjusting the Final Rule salary level to focus on the lowest-wage Census Region instead of a national level, we have removed the effect of the higher earning regions on the salary level, ensuring the salary level is not driven by earnings in high- or even middle-wage regions of the country.

Q. Is there still an exemption for outside sales persons?

A. Yes. Because outside sales employees are not subject to the salary basis and salary level tests, they are not affected by this Final Rule. For more information about outside sales employees, see Fact Sheet # 17F, available at: https://www.dol.gov/whd/overtime/fs17f_outsidesales.pdf

Q. If we have an employee that is Exempt/Salary and misses a day during a work week, due to illness and has exhausted all paid time off - can we deduct this day from their check?

A. For exempt employees subject to the salary basis test, deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. The employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions for such full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder. 29 CFR 541.602(b)(2). For more information on permissible deductions, see Fact Sheet 17G, available at https://www.dol.gov/whd/overtime/fs17g_salary.pdf.

Also, there are special rules that apply to public agencies. For more information, please refer to our State and Local Government Webinar presented on June 8, 2016.

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 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. Has the agricultural worker exemption been removed?

A. The new Overtime final rule (effective Dec. 1, 2016) that revised the white collar exemptions regulations made no changes to the agricultural worker exemptions under the FLSA. For more information on the agricultural exemptions, please see: <https://www.dol.gov/whd/regs/compliance/whdfs12.pdf>.

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 and 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. Retail Managers: They work many different hours, they are salary and make bonuses. Can we make them hourly and overtime at their current salary so nothing has to change?

A. The FLSA does not require an employee to be paid on an hourly or salary basis. This is at the employer's discretion. If an employee is nonexempt, and is paid on an hourly basis, the FLSA requires payment of time and one-half the employee's regular rate of pay for the hours worked over 40 in a workweek. The new rule does not require employers to raise the salaries of employees. However, in order to meet the new requirements for a "white collar" exemption, an employee would need to meet the new standard salary level as well as all the other criteria that did not change. If an employer chooses to continue to pay their currently executive exempt employees below the \$913 per week after 12/1/16, they will no longer meet the exemption and will need to be paid overtime for all hours worked over 40 in a workweek.

Q. For exempt workers, can employers set limits on paid sick days (e.g. 5 days), after which if that limit is exceeded the days will be unpaid?

A. For exempt employees subject to the salary basis test, deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. The employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions for such full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder. 29 CFR 541.602(b)(2). For more information on permissible deductions, see Fact Sheet 17G, available at https://www.dol.gov/whd/overtime/fs17g_salary.pdf.

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 they are a web / graphics designer for the company, will they have to get paid OT if they are not paid \$27.63 per hour?

A. A computer professional employee who meets the duties test in 29 CFR 541.400 and who is paid on either a salary basis of \$913 per week effective 12/1/16, or an hourly basis of \$27.63 will meet the test for the exemption.

Q. HCE: If an employee's salary is currently \$125K and given a yearly bonus of \$10K does this meet the new requirement?

A. The new Overtime final rule (effective Dec. 1, 2016) sets the highly compensated employee (HCE) total annual compensation level to the 90th percentile of earnings of full-time salaried workers nationally (\$134,000). To be exempt as a highly compensated employee, an employee must also receive at least the new standard salary level amount of \$913 per week on either a salary or fee basis (not counting any nondiscretionary bonus payments) and pass a minimal duties test (i.e., the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of a executive, administrative, or professional employee as specified in the regulations).

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

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.